DEDICATION

This work is dedicated to the millions of young girls all over the world, particularly in rural communities in Africa, who continue to suffer different forms of abuse and indignity.

ACKNOWLEDGMENT

I want to thank the Good Lord for giving me the grace to complete this project.

I am indebted to Vivek Maru, whose incisive comments and encouragement right through challenged me in many ways. To my colleagues at Timap for Justice: Nancy, Daniel, Macarthy, Michael, Zainab, Hassan, Christiana, Dominic, Marian, Stella, John, Ibrahim, Joseph, Elizabeth, Songa, Harding, and all our community-based paralegals and support staff who continue to provide invaluable justice services to indigent and rural Sierra Leoneans, I wish to express my gratitude for providing the inspiration for this work.

My special thanks to my supervisor for his useful comments, patience and assistance.

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The views expressed in this work are entirely my own and I assume full responsibility for any mistakes or inaccuracies.

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INTRODUCTION

i) Background

This thesis examines the relationship between international human rights law (generally considered as Western at least in its origins[1]) and African Customary Law through the concrete issues of female circumcision (also known as Female Genital Mutilation[2]) and early marriage. The aim is to develop, through examination of these two issues, the outlines of a broader, dialectic approach to the interaction between international human rights and customary law; one which generates a distinctively African modernity by synthesising international human rights and traditional African values.

The protection of fundamental human rights and freedoms—including the dignity of the person and the prohibition of discrimination—is a central plank of many national constitutions; it is also integral to the international human rights regime. Today, human rights protection plays an important, if only symbolic role, in national policies and also multinational and international discourse[3]. Increasingly, aid and development schemes to

[1] Even with considerations of the arguments of cultural relativism versus universalism, many authors agree that the conception of modern human rights has a Western orientation, to say the least. See, among others J. DONELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 50 (1989); Adamantia Pollis, *A New Universalism*, in POLLIS AND SCHWAB (Eds.), HUMAN RIGHTS NEW PERSPECTIVES, NEW REALITIES 11-13, (2000); Makau Wa Mutua, *The Ideology of Human Rights* 36 Va. J. Int'l L. 589, (1996)

[2] This term has gained international notoriety especially among cultural relativists, traditionalists and women who have undergone the practice. It was used for the first time by the World Health Organisation in 1990 in Addis Ababa (Abdullahi Osman El-Tom *Female circumcision and ethnic identification in Sudan with special reference to the Berti of Darfur* GeoJournal 46: 163–170, (1998)), and since then some writers have seen this description as another example of Western imperialism (Abu Sahlieh, *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision* Medicine and Law, 13:7-8, 613 (1994))

[3] See for example Udogu, E. Ike *National Constitutions and Human Rights Issues in Africa* Journal of Asian and African Studies 2:2 (2004)

poor nations (in the so-called Global South) are linked with countries' human rights records[4]. The assessment of these records often considers ratifications of international human rights instruments and how they are guaranteed internally. Yet, among the many challenges facing the protection of human rights is the widening gulf between what is contained in statute books and actual implementation. Amidst accusations of double standards by the international community, the harshest critique is reserved for the role and position of African Customary Law, especially in the realm of contemporary and international human rights, more so regarding the position of women.

African customary law is a broad concept; it has meant so many things within particular periods and in different places. Additionally, Africa as a continent is as diverse as its peoples, with varying customs and traditions existing even within one country[5]. In the same way, it can happen that where a practice like early marriage or female circumcision is found common in many parts of Africa, differences abound either in the rituals surrounding the practice or the reasoning behind its popularity and continuity. Simply, it is difficult to define an African customary law.

[4]Lebovic, J.H. and Voeten, E. The Cost of Shame: International Organisations, Foreign Aid, and Human Rights Norms Enforcement **(**Paper presented at the annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego, California, USA (2006)). Last retrieved on August 14, 2007 from http://www.allacademic.com/meta/p98156_index.html; Philip Alston and J.H.H. Weiler, An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights (Harvard Jean Monnet Working Paper 1/99 (2000)).

[5] For instance Sierra Leone (which is one of the smallest countries in Africa) has 18 indigenous tribes with each having a discernible customary law, recognized by the Local Courts Act 1963 (section 2), and the Constitution of Sierra Leone, 1991 (section 170 (3)); *See* also LEILA CHIRAYATH, CAROLINE SAGE AND MICHAEL WOOLCOCK, CUSTOMARY LAW AND POLICY REFORM: ENGAGING WITH THE PLURALITY OF JUSTICE SYSTEMS (2005).

It is submitted that even the proposition of a single African Customary Law has its own drawbacks. There is real concern of the present nature of what is generally referred to as African Customary Law. There will be an attempt, therefore, to distinguish between two types of 'customary law': one "codified by colonial administrations and traditional authorities into rigid unchanging written laws [applied through] formal traditional-style courts [and the other] applying unwritten living customary law [through] informal traditional justice forums"[6]. Contrary to the common misconception that customary law is static, primitive and repugnant to principles of equality and human rights[7], what is really labelled as such today, has a whole range of 'foreign' components adopted over the centuries due to the interaction with other peoples like Europeans and Arabs.[8] In the so-called African Customary Law, there are many conducts and procedures that are deep rooted in non-African customs and traditions. One typical example is the influence on the institution of marriage. The modus operandi relating to customary marriages among many African tribes has been hugely affected, including the introduction or removal of certain rituals. Professor H.M. Joko-Smart, in his book notes "[a]s these influences increase, in due course the objectionable aspects of the institution [of marriage are] whittled away and it will move with the times and become

[6] PENAL REFORM INT'L, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA:THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS 4 (2000)

[7] See James Read, *Customary Law under Colonial Rule*, in MORRIS & READ (eds) INDIRECT RULE AND THE SEARCH FOR JUSTICE: ESSAYS IN EAST AFRICAN LEGAL HISTORY 167, 169 (1972). But also see for e.g. V.O.O. NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM ITS LAWS, PRACTICE, AND INSTITUTIONS 7-13, (2001), where the author discusses the various assertions, inter alia, of the non-existence of law and by extension human rights in pre-colonial Africa. He particularly stated that the predominant socio-economic formations before colonial penetration (such as communalism, slave owning societies and feudalism) made it imperative that laws had to, and did exist to govern these societies and relations within them. Citing several anthropological studies in this area, Nmehielle maintains that there is general agreement that Africa before colonialism had a degree of economic and social organization that carried certain characteristics of modern states.

[8] Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalisation of Customary Adjudication Processes* 14 St. Thomas L. Rev. 459, (2002); JUSTICE ALEU AKECHAK JOK, ROBERT A LEITCH, CARRIE VANDEWINT, AND B. HUM, (WORLD VISION INTERNATIONAL AND THE SOUTH SUDAN SECRETARIAT OF LEGAL AND CONSTITUTIONAL AFFAIRS) A STUDY OF CUSTOMARY LAW IN CONTEMPORARY SOUTHERN SUDAN (2004)

acceptable to the social and educated elite of the country."[9] According to this author, at least in the practice of customary marriages, the influence on customary law is such that it becomes submerged into the general law, (which includes Western legal principles)[10] of a given community. This influence can be seen in the import into customary courts of procedural and substantive rules known only to Western legal systems (like the service of process and certain evidentiary rules), prompting some writers to refer to customary law as "semi-formal".[11]

Having said this, it is equally difficult to maintain that beyond the apparent differences, there is no similarity within various African customs that carry the force of law. Many authors have postulated that in fact these differences, occasioned by the interaction with outside forces including Arab and Western colonialism, Christianity, Islam and modernization,[12] did not erase the commonality that could be found in the many customs and traditions of African tribes in certain practices like marriage and circumcision.

ii) Scope

I do not intend to get involved in the arguments relating to the virtues or vices of early marriage and female circumcision, or whether and how they can be described as portraying truly African traditional or customary values. Rather, I hope to show that there are (as well as

[9] H.M. JOKO-SMART, SIERRA LEONE CUSTOMARY FAMILY LAW 24 (1983)
[10] For a discussion of the inclusion or rather mix within 'customary law' of Western-oriented legal principles, see Juma, *supra* note 8, at 8-9
[11] EWA WOJKOWSKA, DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE 9, (2006)
[12] Juma, *supra* note 8, at 3-10; Justice Aleu Akechak Jok et al, *supra* note 8, at 11-15.

expose the) flaws of existing approaches aimed at remedying the apparent human rights abuses associated with both these customary practices and to weigh in with what I consider to be a better approach. This is the parallel bottom-top, top-bottom engagement of customary law, with the former representing internal movements and the latter external influences like statutes, government policies and international human rights law. The ultimate goal of this approach is the finding at each turn of the balance between, and parity of both regimes. This approach will not only assure the importance of the core values of human rights, without necessarily debasing traditional African values, but will also address the issue of transitory as well as lasting protection, whilst providing the prospect of transcending the rhetoric that these two regimes are incompatible.

Keeping this in mind, therefore, the scope of this work will be limited. Both female circumcision and early marriage will be examined mainly from a human rights context, accentuating the issues involved not only with their practice but also with the fight for their abolition. I shall not be seeking a wholesome statement of the entire African continent; it will not be a study or blueprint of early marriage and female circumcision in every country (every ethnic group, every tribe and possibly every culture). This will undoubtedly require more in-depth demographic analyses and resources which are beyond the scope of the present project. Instead, my emphases will be on the human rights aspects of female circumcision and early marriage and whether and how the existing approaches to contain them are not only inadequate but also failing to fully protect young girls and women from abuse, as well as shifting the focus to antagonising local populations. This is why it is postulated that a simple, incontrovertible act—alleviating the suffering or improving the lot of ordinary people—is

transformed into a complex, unending debate bordering on insensitivity, cultural superiority, double standards and neo-colonialism.

This work will attempt to put together some unanswered questions which will help explain the continued resistance to movements pushing to abolish these practices. The reasons or 'justifications' for such resistance will be highlighted without necessarily pitching tents for basically two reasons: first, it may be that there are no clear-cut answers to such questions; and, secondly, whatever answers are put forward may be redundant to the real issue of whether and how these practices should be managed or abolished.

Whilst I will be drawing examples from other African countries relevant to specific issues (notably Sudan, Egypt, Ethiopia and Senegal) either because of some peculiarity or the existence of data and literature, this work will be based primarily on Sierra Leone and the interaction between the customary and formal institutions especially regarding female circumcision and early marriage.

This work will be divided into 4 (Four) Chapters, sandwiched by this Introduction and a Conclusion. The first Chapter will attempt to encapsulate the concept of African customary law and its relationship with both domestic and international law. The chapter will end by briefly considering why, despite the pressures from national laws, international treaties (including international human rights law), and modernization, customary law is still popular in many parts of Africa

In Chapter 2, I shall discuss the issue of early marriage comparing this practice both under customary law on the one hand, and national and international human rights laws on the other. The Chapter will look at the various elements of a valid marriage under both sets of regimes. Special attention will be paid to the issue of consent, with due consideration given to the differences in whose consent is required, as well as the age at which such consent can be validly given. There will be an attempt to look at the reasoning behind having a specific age limit for the transition from a child to an adult ready for marriage, with the aim of discovering whether and how cultural specificities of both legal regimes define the period among men and women. The Chapter will end with an examination of causes and effects of early marriages, and more importantly, the issues around possible human rights violations involved.

Chapter 3 will be an assessment of female circumcision, starting with an understanding of the practice in its various forms. Here, as in early marriage above, I shall not address the issue of whether it is truly an African custom because I think such an argument eclipses the real human rights problems associated with these practices. I will consider some of the reasons that have been forwarded for continuing female circumcision, as well as the effects which I will examine primarily from a human rights point of view. One interesting comparative analysis I intend to undertake will be a consideration of female circumcision from a freedom of religion perspective. Much has been written about the justification or legality of this practice in the major religions.[13] The bulk of this discussion has centred on the compatibility of female circumcision with Christianity, Islam and Judaism.[14] I intend to undertake an

[13] See, among others, THE BOOK OF GENESIS (THE HOLY BIBLE) 17:10-14; Aldeeb Abu-Sahlieh, *supra* note 2, at 4-9
[14] *Id*

examination of female circumcision from the perspective of African Traditional Religion, along similar lines. Noting the particularly awkward stance and indifference shown by international human rights institutions, and overzealous human rights 'activists' and 'defenders' alike where freedom of religion is concerned, this thesis will examine whether the current approaches are justifiable if it is proven that both practices (female circumcision and early marriage) are part of religion. As most writers on the subject have remarked, the opposition to these practices is grounded mostly on the fact that they are not sanctioned by the major religions, which is why infant male circumcision is not generally morally reprehensible, thus begging the question whether both female circumcision and early marriage (together with many so-called "harmful practices") would have been so condemned had they been endorsed by the "Holy Books".[15]

Chapter 4 will look at the different approaches that are being used to stop the alleged human rights abuses in female circumcision and early marriage. This chapter will look at national, international and hybrid (national-international) initiatives. It will, further, assess the impact of the above initiatives, given the energies and resources at their disposal. Here, I will argue for another approach (which may also include components of existing approaches), which will be both human rights and customary law friendly, and which is more likely to be acceptable to proponents of African customary law. I will argue further, that international conferences, human rights instruments, ratifications and declarations will continue to lack any meaning to ordinary people who are affected by these practices, unless certain practical steps are taken. I will attempt to go beyond the myths to show that African customary law (like other legal regimes) is not static; that there is internal reform always taking place and

[15] *Id*

how support to speed up these internal reform processes may be a strong hope for vulnerable girls and women all over the continent, who continue to suffer gross human rights abuses. In particular, I will bemoan the lack of strong statistical data indicating that the decline of the practices of female circumcision and early marriage in many parts of Africa is due to any campaigns for their abolition. The few studies that have been done regarding the decline in female circumcision attributing this condition to several programmes spearheaded by governments and abolitionist organisations are inconclusive. For example, in one such study: *Female Genital Mutilation: Conditions of Decline*[16] examining the decline of female circumcision among the Yoruba of South-west Nigeria, the authors claimed that the decline of female circumcision could be explained entirely by programmes initiated by the Ministry of Health and women's organisations. They named the determinants to include an "increasing medicalization" and a decrease in ceremonies associated with female circumcision.[17] Whilst it cannot be denied that initiatives from governments and Non Governmental Organisations (NGOs) have impacted on traditional practices, to attribute a decline wholly on such programmes will be a step too far. This is because it will become almost impossible to explain declines in female circumcision and early marriage in countries where such campaigns and programmes are non-existent. The question then should be not so much about change or no change but rather whether there is a difference in the rates of change? I submit that the recorded decline in these practices is more likely as a result of several factors which include an internal self examination occasioning reform to fit into changing societal values, and these reforms may or may not be influenced by external factors. Where external factors exist, these may not necessarily be programmes promoted by governments or NGOs, but

[16] John C. Caldwell, I.O. Orubuloye & Pat Caldwell, *Female Genital Mutilation: Conditions of Decline,* Population Research and Policy Review **19:** 233-254, (2000)
[17] *Id*

rather shifts caused by adopted religious inclinations, modernization and practical realities of the socio-economic set up of most communities nowadays.

The conclusion will attempt to tie up my thesis: that there can be an interaction between customary law and international human rights law based on heightened understanding and mutual respect of the basic values of both regimes, which eventually will assure the protection of fundamental human rights, as well as the preservation of African customary law.

iii) Method

Based upon the evolving nature of the subject matter examined, it was difficult to stick to any structured, standard and inflexible research methodology. As a result, I employed three main methods which are literature review, interviews, and observations.

a) Literature Review

I looked at written works from a variety of sources, including African and non African scholars. In the process, I read books, journal articles, legislations, international instruments, and policy papers. I also examined documents and working papers from several organisations dealing with these issues.

b) Interviews

In conducting interviews, I paid close attention to ensuring that different viewpoints were represented. I interviewed (both formally and informally) a wide range of individuals and institutions including, human rights/women's rights activists, traditional authorities, women and young girls who have gone through the practices of female circumcision and early marriage, and policy makers. I also held discussions with NGOs that have been involved in these issues for some time now in Sierra Leone.

c) Observations

As one of the two founders of Timap for Justice, a non-profit, non-governmental organisation that provides basic justice services to indigent Sierra Leoneans, as well as assists them to navigate government structures and institutions, through a network of community-based paralegals,[18] I interacted with 'clients' affected by these issues firsthand. I was also able to observe the power synergy in rural Sierra Leone, where these issues are more real. Throughout this work, therefore, I have drawn examples from cases reported to Timap, including clients' statements, and the process of engaging formal and informal institutions in finding practical solutions to ordinary people's problems.

[18] For more information about Timap for Justice, please visit www.timapforjustice.org.

1.1 What is African Customary Law?

What really is African Customary Law? The answer to this singular question has dominated several literary works both by Africans and non-Africans, anthropologists and historians, etymologists and archaeologists, and many others. A common approach to this question is to generate a certain comparison with other types of legal regimes like "formal"[19] law (comprising Common Law, Administrative and Constitutional Law, Criminal Law, etc) and International (Human Rights) Law[20]. While Customary Law shares certain features with these different types of laws—service of process, right to be heard, right to call witnesses—to compare or equate one or more principles can often be misleading.

In the administration of justice, Customary Law is referred to as "informal". When used in this way, customary law refers to both the substantive and procedural judicial practices that do not form part of the recognized, directly state-administered formal justice system. In this sense, customary law represents an aggregation of traditional practices, customs, and beliefs of a particular community sharing a defined affinity.

[19] The terms 'formal' and 'informal' laws or legal systems are regularly used in several literary works with often little contribution in the area of definition of terms. Gathering from the various uses, 'formal' mostly refers to the state (or state-sponsored) law or system derived from legal traditions and values inherited from the colonial past. This includes English law, Roman-Dutch law, and codified civil law systems. 'Informal' on the other hand refers to all non-state justice systems, including customary law and alternative dispute resolution mechanisms outside the formal justice system.

[20] It is worthy to note that the comparison of customary law with international human rights law has not always been around. In fact, it is quite recent and can be said to begin only after human rights became truly a part (and an important component) of international Law. For a discussion on this, please see LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 209 (1989)

This term "informal" can be misleading also because it fails to capture the real picture of both the structure and administration of customary law in many parts of Africa, especially Sierra Leone. This is because by either inheriting or building upon certain colonial legislations[21] regulating the administration of customary justice, the practice of customary law is now recognized and regulated by the state-controlled apparatus, if partially, in many parts of Africa.[22] As stressed by Ewa Wojkowska, author of the UNDP Report entitled "Doing Justice: How informal justice systems can contribute",[23] classifying customary law as "informal" may raise two problems. First, it will fail to acknowledge the "recogni[tion] and regulat[ion] by the state either by law, regulations or by jurisprudence."[24] As a result, she argues, that a better term may be "semi-formal" based on the type of relationship between customary law and more formal, state-controlled institutions.

The second problem she recalls rests on the implication of the meaning of "informal" as used in describing customary law. By defining customary law as such, the connotation points towards a "simplistic or inferior" system when that is not necessarily so.[25]

African Customary Law in its current form represents a journey that predates colonialism and probably parallels the existence of human settlements on the continent. Its ability to adapt to many political, social, economic and cultural situations over the centuries—including Western and Arabic colonialisms, modernisation, imperialism—has been incredible. This is

[21] Examples of these legislations include the Local Courts Act, 1963 of Sierra Leone; and the Peoples' Local Courts Act, 1977 of Sudan.
[22] PENAL REFORM INT'L, *supra* note 6 at 11
[23] WOJKOWSKA, *supra* 11, at 9
[24] *Id*.
[25] *Id*.

not to say that these 'situations over the century' have not had their impact on the institutions and substance of Customary Law. On the contrary, their impact is visible to this day and it is not uncommon to find in different parts of Africa, a particular customary law influenced more by the laws, practices and traditions of a certain cultural group, with whom it interacted at some time in the past. In some cases, customary law will now be such that it cannot be easily discernible from the "other foreign" cultural practices. It is further observed that even within the same country, the external influence will vary depending on where and how the interaction took place. In those African countries with dual (or more) legal systems,[26] the foreign influence is more visible in the type of legal framework present in different parts of those countries.

The complexity of African Customary Law still abounds. Throughout this work, I shall endeavour to distinguish between two types of law—both making a claim to being Customary Law. On the one hand, there is Customary Law as it is understood generally and administered through local or customary courts (partly or wholly sponsored or supervised by the State). This form of Customary Law, sometimes regulated by Statute[27], and with specific procedures developed during and after colonialism, stands parallel to the formal legal system but with limited jurisdiction. It is the type that is recognised in typically dual legal systems.[28]

[26] These are countries with two or three recognizable legal regimes, mostly including (in the case of dual) both formal and informal tiers as in Sierra Leone, Gambia and other former colonies; and in other countries like Sudan, Egypt, Nigeria a formal (colonial-style system), informal (customary) and Islamic/Sharia law. See among others, Justice John Wuol Makec, Legal Aid and its Problems in Sudan: Proposed Supplementary Mechanisms 5 (paper for Conference on Legal Aid in Criminal Justice in Africa, Lilongwe, Nov. 23, 2004) (unpublished manuscript on file with author)

[27] *See, e.g.*, the Local Courts Act No. 20 of 1963

[28] Vivek Maru, *The Challenges of African Legal Dualism: an Experiment in Sierra Leone* in HUMAN RIGHTS AND JUSTICE SECTOR REFORM IN AFRICA, Open Society Justice Initiative, 18-22 (2005)

On the other hand, there is customary law which is by and large unrecognised by the central (Government/Judicial) authorities, but which is otherwise popular among local populations and, actually practised in very rural communities. The main difference between this type of "customary law" and the one above, apart from State recognition issues, is that the former is devoid of the kind of formalities or strict procedures that mark the practice of the latter. This is not to say that this customary system does not have its own formalities? Poro (male secret society among the Temne and Mende of Sierra Leone) law, for example, has a great deal of rules and rituals associated with it. In other words, customary law in this sense has no detectable connection with the formal system and very much represents the basic, enforceable traditional practices before they were incorporated by the (colonial) government/judicial authorities. Compared with the recognised customary law, it is really rudimentary, and can exist in various forms within communities even within the same country.

1.2 Customary Law in Sierra Leone

Sierra Leone, like many African countries, has a dual legal system comprising a formal stratum which is inspired by (British) colonial legal structures and an "informal" stratum embodying customary legal principles applied through traditional customary courts. And within the framework of several enactments including the Constitution of Sierra Leone (Act No. 6 of 1991)[29] these two systems are expected to coexist. Whatever the said relationship should be is sometimes blurred but there are indeed several provisions accentuating the

[29] S. 170.

subordinate status of customary law in the pecking order of the hierarchy of laws applicable in Sierra Leone.[30]

According to Act No. 6 of 1991, otherwise known as the 1991 Constitution, which is the highest law in Sierra Leone,[31] Customary Law is defined as "the rules of law, which, by custom, are applicable to particular communities in Sierra Leone."[32] This definition of customary law is an expansion of the more restrictive but detailed earlier definition entailed in the Local Courts Act, No. 20 of 1963. Section 2 thereof defines customary law as:

> [] any rule, other than a rule of general law, having the force of law in any chiefdom of the Provinces whereby rights and correlative duties have been acquired or imposed which is applicable in any particular case and conforms with natural justice and equity and not incompatible, either directly or indirectly, with any enactment applying to the Provinces, and includes any amendments of customary law made in accordance with the provisions of any enactment.

This definition raises several issues key among which is the area of jurisdiction of customary law in Sierra Leone. It will appear that this Act coming just two years after Sierra Leone gained Independence from Great Britain, takes into consideration the historical and political divisions of the country.[33]

[30] *Id*; S.2 Local Courts Act 1963. Both of these provisions essentially state that customary law ranks below the constitution, (other) laws passed by the Parliament of Sierra Leone, and the General Law including British Common Law.
[31] S 171 (15)
[32] S 170(3)
[33] Politically, Sierra Leone is divided into the Western Area (where the capital Freetown is located) and three Provinces (Eastern, Northern and Southern). The Western Area used to be the British Colony which was "bought" from local chiefs by British philanthropists for the settlement of freed black slaves beginning in 1787. The name Freetown itself was a symbol of freedom and this area was mainly inhabited by former slaves and "Recaptives" (these were persons whowere intercepted by the British before they could be (re)sold into slavery in the Americas) and their British lords. When it was declared a colony in 1808, British law was applicable and its legal principles adopted. The rest of the country (now known as the Provinces), however, continued to be

The above definition also appears to impose conditions that must be fulfilled before a practice can qualify as customary law.

1.2.1 Criteria for Customary Law

The origin of customary law in Sierra Leone (like in other parts of Africa) is not clear, but it is believed to have been in use among indigenous tribes long before the advent of Europeans, other Westerners and Arabs. According to "A Study of Customary Law in Contemporary Southern Sudan"[34] for example, the authors assert that in unravelling the origins of customary law, there can be fewer explanations better than that given by R.W.M Dias[35], when he wrote:

> 'When a large section of the populace are in the habit of doing a thing over a very long period, it may become necessary for the courts to take notice of it. The reaction of the people themselves may manifest itself in mere unthinking adherence to a practice which they follow simply because it is done; or again it may show itself in a conviction that a practice should continue to be observed, because they approve of it as a model of behaviour. The more people follow a practice the greater pressure against non-conformity. But it is not the development of a practice as such, but the growth of a conviction that it ought to be followed that makes it a model for behaviour.'

According to Dias, custom will have to fulfil certain criteria in order to become customary law. He identifies the following as forming essential ingredients in the development of a

ruled by local customs through local kings and queens later known as paramount chiefs. As a compromise during and after the Protectorate Agreement of 1896 was signed (this brought the Provinces under some sort of British dominion), the Provinces (then Protectorate) retained their customary law under certain new conditions. Today these three Provinces are divided into 12 Districts and these are further divided into 149 Chiefdoms ruled by Paramount Chiefs.

[34] Justice Aleu Akechak Jok, et al, *supra* note 8 at 12

[35] RWM DIAS, JURISPRUDENCE 142 (1964).

traditional rule, usage or custom into a customary law applied through a defined mechanism and enforceable in a particular community:

"

- The custom must be of immemorial antiquity. The onus of its antiquity being on the person who asserts the application of the custom. The proof becomes easier, however if its origin cannot be remembered. The burden of rebutting it lies upon the party against whom the custom is being applied.
- It must have been enjoyed as of right.
- It must be certain and precise.
- It must have been enjoyed continuously.
- It must be reasonable. "[36]

The definition of Section 2 of the Local Courts Act, 1963 above, seems to encapsulate most of these conditions and more. Probably the most famous phraseology in the entire definition is the condition that customary law "… conforms with natural justice and equity and not incompatible, either directly or indirectly, with any enactment…." This wording can be found in many a colonial and post-colonial legislation regulating the nature and jurisdiction of customary law in Africa. Notoriously dubbed the "repugnancy clause", many authors have postulated its controlling effects,[37] adaptability, and most controversially, the basis for the enforceability of international

[36] Justice Aleu Akechak Jok, et al, *supra* note 8 at 12
[37] *See* among others T.W. Bennet, *Conflict of Laws: The Application of Customary Law and the Common Law in Zimbabwe***,** 30(1) INT'L & COMP. L. Q. 59-103 (1981).

human rights instruments.[38] Basically, the repugnancy clause stipulates that customary law will be invalid if it conflicts with the formal law, principles of equity, natural law and good conscience. The legal effect of this clause is self-explanatory: any customary law or traditional practice purporting to have the strength of law will have no binding force if it runs afoul of a string of Western legal principles.

1.2.2 Historical Development of Customary Law in Sierra Leone

As mentioned above, the origin of customary law in Sierra Leone is not ascertainable. However, its development can be pinned to certain periods and divided into phases both in the former Colony and Protectorate, stretching from pre-colonial to post-colonial times.

Before the Proclamation of a Protectorate[39] in Sierra Leone in 1896, most of present day Sierra Leone was governed by traditional chiefs or kings. These applied local laws which, to some extent were repugnant to certain legal principles operating in the British-controlled colony, consisting of present day Freetown. But as happened in other African countries which witnessed colonialism, a sort of compromise arrangement was reached in which the British colonial government maintained dominion and extended control over areas once ruled by chiefs, and in return enhanced the chiefs' powers over their subjects.[40] This situation is probably reminiscent of most of colonial Africa, not

[38] Maru, *supra* note 28 at 18-22

[39] This Proclamation was signed by the local chiefs on the one hand and the British government on the other, bringing the entire territory of present day Sierra Leone under British "protection" from "foreign" invaders; and this actually signaled the beginning of British rule in the whole of the territory of present day Sierra Leone.

[40] For a discussion of the strategy of colonial rule in Africa, *see generally* MAHMOUD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (1996); Bennet, *supra* note 37 at 59-103; and Maru, *supra* note 28 at 18-22. These authors believe that the present state of justice in much of present day Africa bears a significant relationship with past activities. Mamdani, for instance maintains that there is a causal connection between colonialism and the state of customary law in (former colonial) Africa.

least in Sierra Leone. In this country, many territories were shrunk to form unequal chiefdoms, in a bid to reward loyal chiefs and punish recalcitrant ones.[41] Subjects' powers of checking despotism by deposing tyrannical rulers were removed, thus making chiefs rulers for life.[42] Finally, the redirection of the substratum of customary law through concentration of political and judicial authority to decide and apply customary law in the hands of chiefs was given an unwelcome boost. Chiefs therein exercised full judicial authority and also wielded enormous political power.

As a means of formalising this arrangement, the Native Courts Act[43] was passed which in fact, established and recognised a paramount 'chief's court' for the purpose of adjudicating disputes arising out of customary law and administering justice generally.[44]

After Independence on the 27th April, 1961 successive post-colonial governments in Sierra Leone (like in other parts of Africa[45]) were reluctant to change the status quo and, further, used these chiefs to foster undemocratic policies as a means to stay in power.[46] In this regard, there was a general unwillingness to stem the obvious systemic injustice and autocratic rule of these chiefs.

Beginning in 1963, however, a series of reforms were instituted which defined the course of customary law in Sierra Leone. With the passage of the Local Courts Act[47] and the Local Courts

Because, the principle of 'Indirect Rule' (rule by proxy) was employed in most of British Colonial Africa, for example, it was necessary to subject traditional (African) chiefs under colonial rule and, as a compromise, these chiefs' powers over their subjects were enhanced significantly.

[41] *Id*; *see* also ARTHUR ABRAHAM, MENDE GOVERNMENT AND POLITICS UNDER COLONIAL RULE, 303-11 (1978).

[42] *See* Maru, *supra* note 28 at 20-22

[43] Cap 8, Laws of Sierra Leone 1960

[44] S.3

[45] *See* generally Mamdani, *supra* note 40

[46] Abrahams, *supra* note 41

[47] No. 20 of 1963

Procedure Rules[48], together with subsequent amendments, the administration of justice in the Provinces was greatly affected. Native (Chiefs') courts were replaced by Local Courts and more importantly, the judicial authority of chiefs was completely removed and placed in the hands of the new Local Courts chairmen,[49] albeit nominated by paramount chiefs together with their chiefdom councils and approved by the Minister of Local Government.[50]

In the former Colony (which covers approximately modern day Freetown), the growth of customary law has an interesting turn. As noted above, the jurisdiction of Paramount Chiefs did not extend to the former colony which was governed only by British Law.[51] However, due to large-scale migration from the Provinces to the capital Freetown (the former colony) in search of a better life, there was a rapid rise in the population of natives[52] in Freetown. These natives formed settlements in and around Freetown. As a corollary of human interaction, there arose disputes among these natives and, at this point, it should be noted that they could not have been aware of the provisions of British law as applied in their new found home. In particular, many of their practices relating to marriage ceremonies and burial rites were mostly unrecognised (and some unlawful it must be said) under British law. But these did not stop the new migrants (or natives) from forming themselves into tribal units to see to their needs. Their actions did not remain unnoticed by the colonial administration for long, because in 1905 the Tribal Headmen's Act was passed. This Act, among other things, gave authority to the appointed heads of tribes to adjudicate disputes among members of their tribes, to

[48] Public Notice No. 8 of 1964
[49] S 4(1)
[50] *Id*
[51] This point needs explaining: prior to the settlement of former slaves, this territory was owned and governed by local chiefs through local laws. It is unclear how these chiefs disappeared from the scene, but suffice it to say that they were overshadowed and dominated by British laws and custom so that to this day, there are several Sierra Leonean authors and jurists (like Professor H.M. Joko-Smart, *supra* note 9) who think customary law does not apply in the Western Area.
[52] Under Sierra Leone law, the term "Natives" is used to describe persons belonging to indigenous tribes from the Provinces and excludes descendants of former slaves and *"Recaptives"* (i.e. those slaves rescued mostly along the West African Coast by the British Navy (after the official abolition of slavery) and brought to Sierra Leone even before they reached their destination).

arrange issues relating to customary marriages and burial rites, as well as to provide support to new members.[53] In 1932, however, with the passing of subsequent legislation[54] the judicial duties of the Tribal Headmen were removed, although they admittedly still adjudicate disputes. Today, this institution still exists and every tribe in Sierra Leone is represented by a "headman" in Freetown. In fact, the trend does not only subsist in Freetown but can be found in all major towns in Sierra Leone.

1.3 Overlap with 'Formal' Law and International Human Rights Law

So much has been written about the relationship, if any, between African Customary Law on the one hand and both "formal" law and international human rights law on the other. For the purposes of this chapter, I shall only note their convergence without laying any special emphases on the differences between these different regimes. In particular, I will only concentrate on possible areas of overlap and collaboration between customary law and both "formal" and human rights laws under the Sierra Leone legal system.

1.3.1 Customary Law and Formal Law

As mentioned earlier in this chapter, comparison of customary law on the one hand, with both formal law and human rights on the other, mostly hinge upon drawing similarities and differences in the substantive and procedural rules of both sets of regimes. As it has already been shown above[55], this type of comparison is sometimes very unhelpful for it promotes a certain theory of customary law as

[53] TEJAN COLE & SESAY, cited by WOJKOWSKA *supra* note 11 at 53.
[54] Cap 78, Laws of Sierra Leone 1960
[55] *See* Wojkowska *supra* note 11 at 9

"inferior", "informal", prone to repugnancy of general principles of justice, equity and by extension human rights.[56]

For the purposes of this work, the term "formal" law refers generally to those judicial practices—both substantive and procedural—that do form part of the recognized, directly state-administered justice system. In many countries in Africa (especially former colonial States), "formal" law is known more for its distinguishing features from customary law, also known by some as "informal" law. These descriptive features include reference to "formal" law as written laws or laws "found in books";[57] and all authority-related legal concepts that do belong to modern state administration.[58] These descriptions of formal law include institutions like the judiciary, the police and prisons.

As mentioned earlier in this chapter, the legal system in Sierra Leone is bifurcated. The formal tier is modelled in British fashion with a superior court of judicature, the police and prison department. It applies, among others, statutory laws (passed by the Sierra Leone legislature), the common law (including British Common Law[59]), together with proven Western legal principles. Save in appeals procedures[60], these formal courts do not deal with customary matters at all. But there is more overlap between these two systems than appeals. According to the Local Courts Act of 1963 customary law

[56] *Id; see* also PENAL REFORM INT'L *supra* note 6 at11.
[57] Markus Weilenmann, *Legal Pluralism: A New Challenge for Development Agencies, in* ACCESS TO JUSTICE IN AFRICA AND BEYOND: MAKING THE RULE OF LAW A REALITY, PENAL REFORM INT'L, 86 (2006).
[58] *Id*
[59] S 74, Courts Act No. 31 of 1965
[60] Under the Sierra Leone legal system, decisions from courts applying customary law (i.e. Local Courts, Group Local Appeals Courts and District Appeals Courts in the correct ascendancy order) can actually be challenged in the mainstream formal courts, albeit within a specialised division of those courts and with the assistance of "assessors"—lay persons knowledgeable in customary law, who advise formal courts judges on matters relating to custom only. *See* also Ss 29-33, Local Courts Act, 1963

courts can actually apply some aspects of general law as long as the offences so determined fall within defined limits.[61]

Where customary law conflicts with any provisions of the formal law, Sierra Leone law provides that formal law prevails.[62] However, this only seems to be the general rule as there are excepted situations where customary law is maintained despite a contrary provision under the formal law. Whilst the 1991 Constitution—the highest law in Sierra Leone— for instance, forbids the promulgation of any law "which is discriminatory either of itself or in its effects",[63] it fails to extend to specific provisions of customary law which pertain to devolution of estates, marriage and other matters of personal law. [64]

1.3.2 Customary Law and International Human Rights Law

Sierra Leone is a dualist state as far as the application of international treaties, agreements or conventions are concerned. This means that unless the Sierra Leone national Parliament ratifies a particular convention, treaty or international agreement, it will not be nationally applicable.[65]

There is no clear statement as to relationship between customary law and international human rights law for example. Unlike the formal law where Sierra Leone law dictates that it supersedes customary

[61] S 13
[62] S 2
[63] S 27(1)
[64] S 27(4)(e)
[65] Proviso to Section 40

law in the hierarchy of importance,[66] there is no such expressed provision when it comes to international human rights law. If anything, there have been plenty suggestions that these two are on a collision course, as many human rights instruments are deemed to be outlawing certain customary practices accepted under customary law.

There have also been propositions (which admittedly remain unfounded) stating that international human rights instruments are superior to customary law.[67] Whilst the national law remains as it is, hope can only be placed on a clearer explanation by the courts or better still, domestication of more international human rights instruments.

1.4 Why is Customary Law still popular?

Customary law may be facing its strongest sustained opposition yet especially by human (individual) rights, civil liberties campaigners. Some of these are predicated on sound moral and legal bases. Even the strongest supporters of customary law concede that some form of change or reform is necessary and ideally, this ought to come from within and at a pace dictated by the people themselves. What may be in disagreement is the manner of, and how that change or reform should be effected.

[66] S 170(1)
[67] Maru, *supra* note 28 at 18-22

The opposition and lack of support of the informal legal system from official state resources (as compared to the formal legal system),[68] should mean the demise of customary law, but this has not been so. To the surprise of many, customary law has continued to thrive and enjoy popularity—albeit with marked adaptations—in many parts of Africa.[69] In fact, there have been several attempts to codify customary law and these, added with other factors like communications and information technology, Western education, religion (notably Christianity and Islam), judiciary, migration (from other cultural backgrounds), and other social and economic conditions, have meant that customary law has lost its purity in many respects. Whilst this may affect many writers' comprehension of certain issues of contemporary importance (like the rights of individuals over the community), the overall ethos of customary law still remains.

This may be attributed to a variety of factors including the unchanging support base of customary law (the majority rural poor), its intertwining relationship with local socio-political and economic activities, its down-to-earth and expeditious approach to justice problems, and its emphasis on reconciliation as a means of strengthening the bonds of society. Most of the above are certainly strong qualities for any legal system and they form the basis of the much trumpeted alternative dispute resolution (ADR) mechanisms. At the same time, however, they can serve as an axis for abuse, which is why I am postulating in this work that there can be arena for convergence, within clear and mutually respectful terms, drawing from and engaging each of the legal systems even in the most hotly contested and controversial contemporary issues of early marriage and female circumcision.

[68] *See* for e.g. Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*. **31** YJIL 427, 429-472 (2006)
[69] For a precise note on this, *see* the judgment of C.J. Crabbe in the celebrated case of Kabaka's Government v. Kitono 1965 E.A. 278 (1965) quoted by Juma, *supra* note 8 at 8.

CHAPTER II: EARLY MARRIAGE UNDER CUSTOMARY AND INTERNATIONAL HUMAN RIGHTS LAWS

What do we mean by 'early' and/or 'forced' marriages? In search of answers to this question, this chapter will invoke a comparative study of both international human rights and customary law provisions relating to the form and content of the traditional type of marriages, with specific attention to marriage of young girls. A wide spectrum of existing literature on this subject will be examined, with the aim of discovering the differences between the two regimes (if any), and investigating whether and how cultural differences dictate the fostering of the so-called 'child marriages'.

2.1 Marriage under International Human Rights Law

Discussions on this subject will be formulated around major international human rights instruments (relevant to most of Africa and particularly Sierra Leone) relating to marriage. These include the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Convention on Marriage); the African Charter on Human and Peoples' Rights (ACHPR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Protocol on Rights of Women in Africa); and the African Charter on the Rights and Welfare of the Child.

Marriage is considered as one of the oldest institutions. It has a strong base in most of the world's major religions and is considered in many cultures as a natural journey in a person's life. Whilst the definition and indeed the fashion of marriage may vary from place to place, very few will deny that it is a moment of immense joy to all partakers, meant to serve as a transition to adulthood and independence. In recent years, there have been several discussions (some of which fall outside the purview of this work.[70]) on the nature and importance of marriage. Some of these discussions border on and, admittedly, sometimes dragged along cultural and religious sensitivities relating to the meaning, perception, reasoning, conditions and fulfilment of marriage.

2.1.1 The Meaning of Marriage

According to the Oxford English Dictionary marriage is defined as "[a] legal relationship between husband and wife."[71] A similar line is taken by the American Heritage Dictionary which defines marriage as "[t]he legal union of a man and woman as husband and wife."[72]

In both these definitions, a common corollary is that there is a union between two people,[73] with the intention of enjoying a particular relationship to the exclusion of all others, and with legal rights and obligations accruing from that union.

[70] This chapter will exclude discussions on the international forum of same sex marriages, including the legal and religious divisions that abound.
[71] A. S. HORNBY, OXFORD ADVANCED LEARNER'S DICTIONARY OF CURRENT ENGLISH 723 (Sally Whmeier ed., 2000)
[72] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 518, (2000)
[73] This definition precludes the existence of polygamy as a type of marriage common and legal in most of Africa and other parts of the world.

2.1.2 The Elements of a valid Marriage

> Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family....[74]

All the major international instruments mentioned earlier contain salient points on the criteria of a valid marriage. In no specific order of importance, it is worth starting with the right to marriage under Article 16 of the UDHR, cited above. A common element which Article 16 begins with is that marriage should involve "[m]en and women of full age". It does not specify what that "full age" ought to be and the relevant provision of the ICCPR does not offer much help either. Article 23(1) thereof uses the phrase "men and women of marriageable age" and, as in the UDHR above, there is no indication of what "marriageable age" is. However, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Convention on Marriage), does cast a new insight into this muddiness by not only acknowledging in its preamble, Article 16 of the UDHR[75] but, more importantly, calling on member states to "eliminat[e] completely child marriages and the betrothal of young girls before the age of puberty".[76] As helpful as this is, it further raises questions on the meanings of key terms like "child", "young girls" and the "age of puberty", all of which are relative. Though they were not defined in this Convention, subsequent international instruments,[77] and national legislations have since shed light on them.

[74] UDHR, Art. 16(1).
[75] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, pmbl. para. 2.
[76] *Id* at para. 4.
[77] *See* for e.g., CRC, Art. 1; African Protocol on the Rights of Women, Art. 6 (b); and African Charter on the Rights and Welfare of the Child, Art. 2

The UN Convention on the Rights of the Child (CRC), the single most, authoritative document relating to rights of children, defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."[78] This definition only offers a guideline or limit of 18 years and makes it possible for state parties to have lower age limits.[79]

Probably, the most precise definition of marriageable age by any international instrument is contained in the African Protocol on the Rights of Women in Africa, which states that "the minimum age of marriage for women shall be 18 years." [80] It is worthy to note, however, that this instrument is yet to be ratified by several African states, including Sierra Leone. Having said this, it is also important to note that two new legislations in Sierra Leone: The Registration of Customary Marriage and Divorce Act, 2007[81] and the Child Rights Act, 2007[82] set the age limit for marriage at 18 years.

Another element of marriage under the human rights instruments is the requirement of registration of the marriage, coupled with the insistence on equal duties and obligations of the spouses during marriage.[83]

[78] CRC, Art. 1
[79] This is in similar lines with the provision of Art. 2 of the Convention on Marriage which states that "…No marriage shall be legally entered into by any person under [the minimum age for marriage set by the state], except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses" it is worth noting that there is an expectation (no matter how remote) that persons younger than the specified age may get married.
[80] Art. 6 b) Please note that this Protocol has not been ratified by many African States.
[81] S. 2 (1) (a)
[82] S. 34 (1)
[83] For e.g. *see* Art. 3 Convention on Marriage

A key element of marriage according to the mentioned international human rights instruments is that the parties to the marriage must give their full and free consent before that marriage can become valid.[84] As I will explain under the next rubric, the issue of consent may be the single most controversial element of marriage under international (and most formal systems) and customary law.

In addition to these elements, there are various rituals, ceremonies and processes associated with the institution of marriage itself, but these vary from society to society. These include the place of marriage, the requirement as to the number of persons to be present, duration of the ceremony, incantations, and obligations before, during and after marriage.

2.1.3 The role of consent

The issue of consent is probably the cornerstone without which the entire definition and institution of marriage becomes untenable. Marriage has been considered to be the voluntary union between persons; where this voluntariness is removed either because one or both parties fail to give their consent, or because one or both cannot legally give consent, that arrangement should not and cannot be validly called a marriage according to the definition already mentioned. If consent, therefore, plays such an integral part in our understanding of marriage, what then comprises consent and whose consent are we talking about? According

[84] For instance, *see* Art. 1, Convention on Marriage

to the Universal Declaration of Human Rights, "Marriage shall be entered into only with the free and full consent of the intending spouses".[85]

In fact, the UN Convention on Marriage goes as far as to state that

> No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law[86].

Along similar lines, the ICCPR affirms further that "[n]o marriage shall be entered into without the free and full consent of the intending spouses"[87]. So too is the CEDAW, which states that women should enjoy "[t]he same right freely to choose a spouse and to enter into marriage only with their free and full consent".[88]

All these international human rights instruments sing the same chorus that free and full consent is a precondition to a valid marriage. Thus, voluntary assent particularly in choosing a partner is very central. By being freely given, consent cannot be induced by force, trick, intimidation or otherwise, and can only be given where it is legally possible to do so. The validity, therefore, of marriages of (or between) persons who cannot legally give consent because they are yet to reach majority age is implausible.

[85] UDHR, Art. 16(2)
[86] Art. 1(1) of the Convention on Marriage
[87] Art. 23(3)
[88] Art. 16(1) (b)

These international instruments state, further, that the consent so required can and should be given exclusively by the spouses themselves. There is no indication that the required full and free consent has to come from a third party.

2.2 The Customary Law Marriage

Just as in discussions on the definition of customary law, customary law marriage is not easy to define. In his book Sierra Leone Customary Family Law, H.M. Joko Smart appreciates this difficulty and opines that preferring a definition will inevitably invite pitfalls as any definition should be able to "embrac[e] the nature and character of all types of customary marriage[s]".[89] This is why he thinks that the expression customary law marriage can be understood better in terms of the several features that distinguish it from other types of marriages. Citing Cotran[90], Joko Smart identifies seven such features, namely

> polygamy; that a marriage constitutes an alliance of the families of the spouses; the formalities attached to the marriage; the institution of the marriage consideration; the procreation of children as one of the principal purposes of the marriage; the inferior status of the female spouse; and the peculiar nature of divorce which may be extrajudicial and which may be easy to obtain without any reason whatsoever.[91]

It is important to state that most of these features have been whittled down over the decades and some have been affected by legislation in many African states. Key areas so affected

[89] JOKO-SMART *supra* note 9 at 21
[90] *The Changing Nature of African Marriage*, in FAMILY LAW IN ASIA AND AFRICA 15-23 (J.N.D. Anderson ed., 1968).
[91] JOKO-SMART *supra* note 9 at 21

include the issues of property ownership and divorce[92]. Other features (including polygamy) are slowly fading away as a result of external influences including modernisation, religion and economic and social realities.[93]

Having said this, it is necessary to note that for the purposes of this work, the term customary law marriage will be used to refer to all such unions between men and women celebrated and recognised as valid under any customary law system.

2.2.1 The Elements of Marriage

> "….The marriage transaction [under customary law] is normally a long-drawn-out process, and there is often doubt, both as to the exact point in that process at which the parties become husband and wife, and also as to which (if any) of the accompanying ceremonies and observances are strictly essential to the conclusion of a valid marriage".[94]

Customary marriages may vary depending on the customary law prevalent in a particular society. In fact, even within one customary law, there can be several types of valid customary law marriages, some of which are now registered under reforms undertaken by a good number of African states. The common elements of customary law marriage in Sierra Leone are as follows:

[92] *See* for instance, The Devolution of Estates Act, 2007 of Sierra Leone
[93] In spite of the fact that Art. 6 (c) of the Protocol to the ACHPR on the Rights of Women in Africa encourages monogamy as the preferred form of marriage, there is no indication yet that member states are anywhere close to banning polygamy.
[94] PHILLIPS, MARRIAGE LAWS IN AFRICA, 107, 1971, cited by JOKO-SMART, *supra* note 9 at 31.

Marriage has to be between a man (together with his family) and a woman (together with her family).[95] This is probably the basic tenet of customary marriages which are generally considered as unions not only between the spouses themselves, but also between their respective families, tribes, clans, villages, as the case may be. In recent times, this element has lost some of its vibrancy. The so-called 'individualism' is gradually gripping many traditional societies and marriages are becoming more and more personal.

Another element of customary law marriage relates to pre-marital formalities, including the giving of gifts or providing of service by or on behalf the husband-to-be. This is an important component and it represents the bonding between the two families, tribes, clans, villages, and so on. In some cases, the husband-to-be will have to work for the family of his intended spouse for a given time. Most of these practices have now been modified especially in big cities and among the educated class, but the giving of gifts is still seen as an integral part of customary marriages.

One key aspect of customary law marriage is the payment of bride price or consideration. This has aroused controversy in the literary circles and among those advocating for equal (and women's) rights, many of whom see this practice as portraying women as mere objects bought and sold to the highest bidder. Whilst there is no denying that such a reading of the practice may be conceivable, yet it will be equally erroneous if the meaning or importance of the practice is limited only to such reading. [96] Marriage consideration is said to include

[95] Up to writing this piece, I have not come across any tribes or communities within Sierra Leone, where same sex marriage is celebrated and recognised under customary law.

[96] For instance JOKO SMART *supra* note 9 at 78 asserts that this reading coined by early writers like Fenton who described the practice as "marriage price" and "bride price", was inaccurate because it did not involve the

payments in cash or kind, or services rendered to the bride's family by or on behalf of an intended husband during marriage, which gives legal effect to the marriage. Counting on the quotation at the beginning of this rubric, this will appear to be the whole of the process (possibly from the giving of gifts to procreation).[97]

There is no specific amount of money or value in goods or services required under customary law. In some cases, it is agreed between both families, but more often than not—especially in Sierra Leone—it is up to the husband-to-be to give whatever he can afford. Among certain tribes in Sierra Leone,[98] this marriage consideration will be returned in the event of a divorce (or rather where the man divorces the woman for one reason or the other).

Another important element of marriage under customary law is the issue of consent. As we shall see in the next rubric, the issue of consent is of particular importance to customary marriages, and probably gives the clearest indication of difference with other types of marriages, recognised under the formal legal system. To underline its importance, consent is seen as not only a matter of the spouses themselves (and sometimes not even a matter for the spouses alone), but for both families.

2.2.2 The role of consent and whose consent

sale of the woman to the man. He preferred to use "marriage payments" because it was what other African writers (cited therein) describing a similar practice called it.

[97] Interviews with Pa Mohamed Sesay and Adu Gbani, Local Courts chairmen in Gbonkolenken and Bumpe Ngao Chiefdoms in Northern and Southern Sierra Leone on the 23 and 25 October, 2008 respectively

[98] This practice is common among the Mende and Temne, the largest ethnic groups in Sierra Leone. Although, it has lost most of its spark, there are still areas, especially in very rural communities, where the practice of returning/demanding the marriage consideration at the end of the marriage subsists.

According to a leading writer on this subject,[99] the parties whose consents are legally essential in a customary marriage are the spouses (subject to some exceptions) and their respective families; where the man is already married, the consent of the head wife is "socially, though not legally, essential."[100]

Starting with the consent of the spouses, authors on the subject generally agree that the male spouse must consent to his marriage (even if it is his first); but for the female spouse, it was in those days the absolute prerogative of her father (or eldest male relative) to give her into marriage. Here, although her consent was sought, it would count for nothing where it conflicted with her father's (or eldest male relative's) wishes. [101] Nowadays, the position is slightly different; the female spouse's consent is increasingly becoming relevant. The reasons for this may be many and a few writers have ventured to give explanations for this change in customary marriages. [102]

A parallel issue to this is the nature of the consent given. Granted that the right to consent to one's marriage is given, such consent will not mean much where it is not fully and freely given, or more importantly, 'given' by a person who cannot legally do so. In other words, is anything like 'marriageable age' recognised under customary law?

[99] JOKO SMART, *supra* note 9 at 73-76
[100] *Id*
[101] For a discussion of the views of various authors on the subject, *see* JOKO-SMART, *supra*, at 66-73.
[102] *Id*.; *see* also B. Harrell-Bond, Marriage among the Professional Group in Sierra Leone, an unpublished D.Phil. Thesis, Oxford University, 1971

Like the lack of clarity in international human rights instruments we have already seen, customary law in Sierra Leone (as in many parts of Africa), does not have a specific age for contracting marriages.[103] This is not to say, as is erroneously believed, that the marriage of "children" is sanctioned. In fact, both the amendments to the Christian Marriage and Civil Marriage Acts of 1965[104] prescribe 18 years as the age at which persons governed by or practising customary law in Sierra Leone can contract marriage without parental consent. Although these provisions relate only to Christian and Civil Marriages, they, nevertheless, throw light on the acceptable age for marriage. In fact, they colligate the fact that one can get married below the age of 18 years but only with parental consent.

Before the passing into law of both the Child Rights Act, 2007 and Registration of Customary Marriages and Divorces Act, 2007 there was no expressed (or enforceable[105]) minimum age limit for marriage under customary law in Sierra Leone. For this reason, customary law and practice have often been accused of not protecting the rights of children. Whilst it is true that a minimum limit was (is) absent,[106] it should be noted that age limit for customary law marriage seems to be set not upon the attainment of a particular age but on reaching a particular stage in one's physical, spiritual or sexual development. This is normally reaching puberty signalled (in the case of women) by the growth of breasts, the start of menstrual cycle and undergoing initiation rites.

[103] Several early writers (like Crosby: *Polygamy in Mende Country*, Africa 10:3, 259-260, July (1937)) on this subject gave the ages of 15-21 as marriageable ages

[104] Christian Marriage (Amendment) (No.2) Act, 1965; and Civil Marriage (Amendment) (No.2) Act, 1965

[105] With the introduction of the Child Rights Act, 2007 and the Registration of Customary Marriages and Divorces Act, 2007 there is now an age limit of 18 years as the marriageable age for all kinds of marriages (including marriages under customary law) in Sierra Leone. These Acts further criminalise any marriage below that age.

[106] There is lack of clarity as to the validity of the Registration of Customary Marriage and Divorce Act, 2007.

With both Acts, the situation is expected to be a lot clearer in Sierra Leone. Both Acts have the effect of abolishing, as well as in the case of the CRA, criminalising marriages between persons below the age of 18.[107] But enforcement is always expected to be the challenge. At the moment, these Acts have not become part of any nationwide campaigns and there is very little knowledge of these Acts among rural populations[108]. So for the foreseeable future, marriages under customary law in Sierra Leone, as in many parts of Africa, will continue to be conducted without any major regard to the age limit of 18.

Considering this, therefore, it is worth enquiring whether and how customary law marriages entered into by persons under 18 years are valid under international human rights standards; whether this practice is peculiar to customary law marriages; and whether on account of this alone, all such marriages are to be referred to as "forced" or "early" marriages. Starting with the first enquiry, based on our understanding of the relevant international human rights instruments relating to consent alluded to earlier in this chapter, it will seem that the position is more aspirational than it is binding. Each one of these documents either refuses to pinpoint a specific age limit for marriage,[109] or allows member states to lower or otherwise determine what 'child' means and for that matter the marriageable age.[110] The direct implication is that under certain circumstances unexplained in these international instruments, marriage of persons less than 18 years (or the age limit set by that state) can be permissible under the law. Since such marriages could be valid, it will seem that the issue of consent will move in a parallel manner to the age change. Where this premise correct, it will further undermine the

[107] CRA, S.35.
[108] Recently, Timap for Justice undertook a project with the support of International Rescue Committee (IRC), to monitor the implementation of the so-called 'Gender Acts' (The Registration of Customary Marriage and Divorce Act, 2007; The Devolution of Estates Act, 2007; The Domestic Violence Act, 2007).
[109] UDHR, Art. 16(1); Convention on Marriage, prmbl, para 4; ICCPR, Art. 23(1); CEDAW.
[110] CRC, Art. 1

18-year-old norm seen as the golden age of transition into full adulthood capable of consent. This is because if a state is allowed to lower the age for institutions like the military, one will argue that probably, mental and physical growth are more important than the age itself.

On the second limb of our enquiry, that is, whether such a practice of marrying below the so-called "marriageable age" is peculiar to customary law marriages, the short answer is no. As already mentioned above, even under international human rights instruments, some form of derogation is permissible.

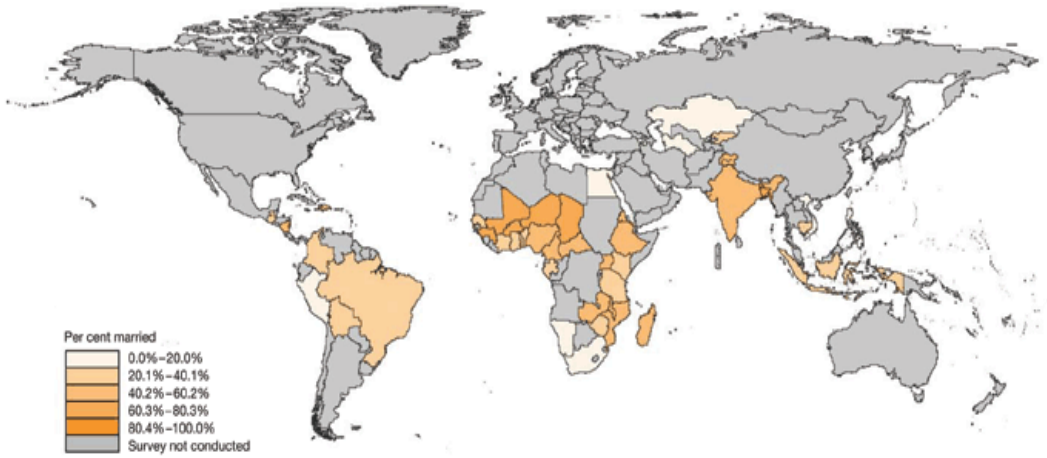
Finally, can all such marriages below the so-called "marriageable age" be called 'forced' or 'early' marriages? The answer to this question is not a simple yes or no. On the one hand, with the absence of a 'universally acceptable minimum age' for marriage, and with opacity on the age of consent, all marriages of young boys but particularly young girls below 18 years for instance, cannot be considered as forced or early marriages, however controversial the issue of legally giving consent appears to be. On the other hand, a country's lowering of the age limit for specific institutions like marriage, labour or military service does not absolve such action from being short of human rights standards, assuming these are clear-cut.

2.3 How common is early marriage

According to the *Innocenti Research Centre* of the UN Children's Fund (UNICEF), a leading institution dedicated to issues of children around the world, child marriage is considered as

unions between persons below 18 years of age.[111] *Innocenti* asserts that marriages of this kind are common in many parts of the world especially in sub-Saharan Africa, South East Asia and Latin America.[112] UNICEF is working tirelessly not only to document incidents of child marriages, but also to work closely with relevant government institutions and other organisations to stem this practice. However, the difficulty of hard and accurate statistical data on the prevalence of child marriages around the world should be noted. A key reason for this is the lack of clarity or uniformity on the meaning of 'marriageable age'. Where some countries have it as 18 years, in others it is either lower or there is no specific provision to that effect.

Diagram 1: *Global and regional trends in child marriage*:[113]



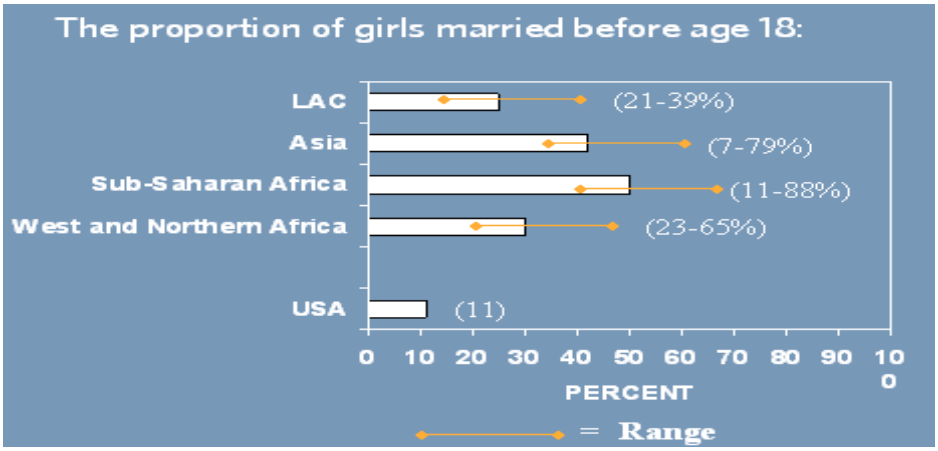
[111] INNOCENTI DIGEST, EARLY MARRIAGE: CHILD SPOUSES, 7: 2-8, (2001); *see* also Child Rights Information Network (CRIN) website www.crin.org/email/crinmail_detail.asp?crinmailID=2280, last seen on the 25 August, 2007; see also End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT) a network of organisations and individuals working together to eliminate the commercial sexual exploitation of children, and with Special Consultative Status with the Economic and Social Council of the United Nations (ECOSOC).

[112] *Id*

[113] All sources for these statistics: www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm

Source: ***UNICEF.*** *2005. Early Marriage: A Harmful Traditional Practice. New York: United Nations.*

Diagram 2: *Child Marriage: substantial variation within countries*[114]



Source: *UNFPA. 2004. Child Marriage: Advocacy Package*

The situation is no different in Sierra Leone, where statistical data on the subject is unavailable, not least because these marriages (which take place under customary law) are not registered at all.[115] The new Registration of Customary Marriage and Divorce Act, 2007 provides for the registration of all marriages celebrated under customary law. In spite of this, there is still confusion as to how the registration of these marriages will be like, when they do take place in the most rural of places, where state institutions are mostly non-existent.[116]

[114] *Id*

[115] Until very recently with the passing of the Registration of Customary Marriage and Divorce Act, 2007 there was no obligation in law to register customary marriages. This law, among other things, state the 'marriageable age' to be 18 years. Its enforcement, which has not kicked off yet (due to the legal uncertainty surrounding the Act's validity) will be a very interesting proposition in a country where customary law affects the lives of at least 70% of its population.

[116] In interviews with Hon. P.C Bai Sebora Kasanga II of Bombali Sebora Chiefdom, he disclosed to me that he had not received any directives as to how the registration exercise would look at. He particularly highlighted the challenges, including creating a flexible system which would take into effect the illiteracy rate of the vast majority of the population.

2.4 Early Marriage: the causes and context

2.4.1 Causes

Notwithstanding the lack of uniformity on the perception of marriageable age, it is fair to state that there is a general agreement that at certain ages, boys and girls are considered 'too young' to marry. For this reason, what is 'early' marriage becomes relative. However, whilst it is difficult to pinpoint a specific age limit, it is safe to say that children before puberty (or the start of menstrual cycle) are generally said to be unfit to enter into 'marriage'; in some societies, where 'marriage' does take place including girls before puberty, there is a condition that no sexual relationship shall take place until the girl reaches a particular age or stage.[117] Despite the difficulty in defining what 'early' is in relation to marriage, there is no denying that sending young children into marriage, mostly to persons old enough to be their parents or even grandparents, is fundamentally problematic.

Many reasons have been given why 'early' marriages persist in many parts of the world. A look at existing literature suggests that the common reasons are poverty, protection of girls, family honour and the provision of stability during unstable social periods.[118]

With poverty, for example, it has been argued that it is no coincidence that the high rate of poverty in many countries of Africa, South and Southeast Asia, Latin America and some

[117] Interviews with Ya. Alimamy N'Soilah on the 18th November, 2007. It is noted that in this type of situation, the girl is considered married for all intents and purposes save for sexual intercourse (and is mostly put under the supervision of the eldest wives).
[118] INNOCENTI DIGEST, *supra* note 109 at 2-8; UNICEF, EARLY MARRIAGE A HARMFUL PRACTICE, A Statistical Exploration, 1 (2005)

parts of the Middle East corresponds with the prevalence of marriages below the age of 18 years.[119] In many homes in rural Africa, the birth of a girl child is considered as an asset, considering the material and other benefits the family will have to make on her. This has proved a sufficient incentive for fostering the practice of early marriage in these areas.

Another interesting factor noted by researchers that has encouraged early marriage is protection from HIV/AIDS.[120] Young girls are sent into early marriage in order to 'protect' their health and men often seek younger wives as a means to avoid getting infected. It should be noted that this theory has remained unproven.

The preservation of family honour is another important reason for the perpetuation of early marriage. In most traditional societies, marrying a virgin is considered a great asset, a sign of her good upbringing, and ultimate praise and glory to her parents. This is because virginity and chastity are seen as synonymous.[121]

Particularly in unstable conditions as war or natural disaster, parents or family members send their young girls to early marriage in the hope that they will be more properly looked after. This is common in situations where the girl's family is large and the parents may have to take

[119] *Id*. This report, among other things, maintains that the desire for financial and social gains forces several families to marry their children at a young age, mostly when they cannot make any informed decisions on many important areas of their 'marriage' life like raising children.
[120] INNOCENTI DIGEST, *supra* note 109 at 2-8; UNICEF, *supra* note 115 at 2
[121] N.Nour, Health Consequences of Child Marriage in Africa. Emerg Infect Dis [serial on the Internet], 2 (2006). Available from http://www.cdc.gov/ncidod/EID/vol12no11/06-0510.htm; UNICEF, *supra* note 115 at 2

care of younger or less able children. In most situations, however, it is just a matter of the parents cashing in on their priced assets, even if these girls are less than 18 years.

2.4.2 Effects

The issue of early marriage would probably not raise such sustained and fierce criticisms if its impact on young girls and the society were not seriously harmful. Ranging from sexual and reproductive health issues to social and economic results, the consequences of early marriage are mostly adversely negative to the wellbeing of young girls in the immediate term and healthy complexion of society in the long run.

One alarming effect of early marriage especially in many parts of Africa is its exposure of these young girls to sexually transmitted diseases, including HIV/AIDS. According to Shelley Clark,[122] girls who are married early are more likely to be infected with HIV/AIDS, than single girls, even though the latter may have multiple partners.[123]

Apart from HIV/AIDS transmission, girls who marry early tend to become pregnant at a dangerously low age. This brings with it several complications before, during and after birth.

[122] Shelly Clark, *Early Marriage and HIV Risks in Sub-Saharan Africa* in STUDIES IN FAMILY PLANNING **35:** 149-160 (2004)
[123] *Id*

It is well documented that children given birth to children are at a significantly higher risk than older women for devastating illness or even death.[124]

2.5 Why is early marriage such a serious human rights issue?

The practice of early marriage (or child marriage) raises very serious human rights issues. Beginning with the lack of (the capacity to make) a legally or informed consent, to the treatment before, during and after marriage, early unions challenge the very concept of the inalienable rights and protection guaranteed under the Child Rights Convention and other human rights instruments. There is no denying that marrying young girls early blights the fulfilment of rights assured under national and international child protection laws. Forcing children into marriage where it is clear they cannot give consent, deprives them not only of freedom and the opportunity for personal development, but also rights to health and wellbeing, education, dignity, and childhood existence. As a serious indictment on the practice, it is hoped that more emphases will be made to address the causes, discourage the incentives and stem the flow of young girls and boys to whom marriage resembles a death sentence.

[124] Nour, *supra* note 118, at 4. In this research, Nour compared girls in Ethiopia, Uganda and Mali, all countries with very high rates of child marriages, with developed countries like the United States, Germany and France, where the practice is almost non-existent. *See* also UNICEF, *supra* note 115 at 2

CHAPTER III: FEMALE CIRCUMCISION OR FEMALE GENITAL MUTILATION

The practice of female circumcision (also known as female genital mutilation or FGM) is probably the single most controversial topic in the relationship between African customary law and international human rights law. Estimated by the World Health Organisation to be practised (or already undergone) by well over 100 million women in Africa, the Middle East, and Asia,[125] female circumcision continues to flourish in many parts of the world despite several efforts to abolish it.

There is no dearth in literature when it comes to female circumcision. From proponents to opponents of the practice, traditionalists to modernists, the several writings can be loosely divided into two categories: On the one hand, there are works that primarily focus on the dark side of the practice (including its tendency to offer little or no value as compared to the harm caused, the seemingly permanent physical, psychological and psychosocial damage incurred, the health and reproductive health risks involved) and more importantly, the call for its abolition, through stern measures that include the use of the criminal law.[126]

On the other hand, we have works that tend to romanticise a certain past, exalt cultural and traditional beliefs, and bemoan an apparent invasion of a considered tranquillity by Western

[125] WHO Statistics available at http://www.who.int/reproductive-health/fgm/prevalence.htm and http://www.who.int/reproductive-health/fgm/index.html

[126] Among these, see Dirie MA, Lindmark G. *The risk of medical complications after female circumcision* East Afr Med J. 62: 479-482, (1992); DeSilva S. *Obstetric sequelae of female circumcision* Eur J Obstet Gynaecol Reprod Biol;32:233-240, (1989). *See* also http://www.who.int/reproductivehealth/publications/articles/lancetfgm.pdf

ideals starting with the colonialism of the continent.[127] In addition to posing as the perfect antithesis of the first class, proponents of this view find fuel for their cause in unhelpful expressions of seeming disrespect for African traditional values, failure to either recognise worth in female circumcision, or acknowledgment that there are indeed similar practices (like infant male circumcision, certain cosmetic surgery including episiotomies, breast implants, and piercing (even of the clitoris)) routinely practised in Western societies that do not receive any rebuke.

There is still a third category which seems to both navigate, as well as cut across the above view points. This group recognises the futility of either exalting or decrying female circumcision not only because of its culturally entrenched position, but also because either action will do little or nothing in the provision of a useful and practical way forward. This third view is epitomised primarily by the realisation that female circumcision does have very serious human rights issues around it for which some action must be taken; that as problematic as it is, other similar (to whatever degree) practices must be identified and likewise proscribed; so that constructive dialogue on female circumcision will be promoted to avoid prejudice or ignorance.[128] In reality, a practice like infant male circumcision, for instance affects far more children in Africa than female circumcision.[129]

Throughout this chapter, the present writer will support the third position.

[127] *See* for example Elizabeth Grande, *Hegemonic Human Rights and African Resistance: Female Circumcision in a Broader Comparative Perspective* Global Jurist Frontiers 4, 2 (2004)
[128] *See* for example Angela Wasunna, *Toward Redirecting the Female Circumcision Debate: Legal, Ethical and Cultural Considerations* MJM 5: 104-110 (2000); Abu-Sahlieh SA., *To mutilate in the name of Jehovah or Allah:legitimization of male and female circumcision, Int. J. Med. Law* **13**: 575–622 (1994)
[129] DENNISTON et al., 1999, cited by Wim Dekkers et al, *Bodily integrity and male and female circumcision* Medicine, Health Care and Philosophy 8: 179-191, 180 (2005), it is stated that each year 13.3 million boys are circumcised as compared to 2 million girls.

3.1 Female Circumcision and its different modes

Female circumcision has been described as "the partial or whole removal of the clitoris of young girls."[130] Because of the nature of the operation—mostly without anaesthetic and performed by untrained medical persons—some authors and human rights activists have preferred the term 'mutilation'.

It is practised in several forms as the literature on the subject suggests. The commonest forms include[131]: Clitoridectomy (also known as *sunna)*, Intermediate (also known as incision), and Infibulation (also known as pharaonic circumcision). Basically, 'clitoridectomy (*sunna*) involves excision of the clitoris (or part of it) and the skin around it. Intermediate (or excision) involves "the removal of the entire clitoris, leaving part of the labia minora intact, or the removal of the clitoris, [together with all or part] of the labia minora." [132] Finally, there is the type called infibulation (or pharaonic circumcision), which "[involves the removal not only of the entire clitoris and labia minora, but also] the outer labia which are first cut and then stitched together, to create a permanent closure with only a small opening for urine and menstrual flow."[133] This is the most severe form of the operation.

[130] Abdullahi El-Tom, *Female circumcision and ethnic identification in Sudan with special reference to the Berti of Darfur*, GeoJournal 46: 163-170, (1998)
[131] Depending on the literature one reads, the different types of female circumcision range from four to seven. See for example Wim Dekkers et al *supra* note 128, at 180
[132] *Id*
[133] *Id*

Complete table of types of female circumcision[134]

Mild Sunna	*Pricking, slitting, or removal of the prepuce of the clitoris causing relatively little if any damage. "Sunna" is an Arabic word meaning "tradition".*
Modified Sunna	*Partial or total excision of the body of the clitoris.*
Clitoridectomy / Excision	*Removal of part or all of the clitoris and part or all of the labia minora. The vaginal opening is often occluded by the extensive scar tissue that results from the procedure.*
Infibulation / Pharaonic circumcision	*Consists of clitoridectomy and the excision of the labia minora and the inner layers of the labia majora. The raw edges are subsequently sewn together with catgut or made to adhere to each other by means of thorns. This causes the remaining skin of the labia majora to form a bridge of scar tissue*

[134] Adopted from The World Health Organization female genital mutilation information pack available at: http://www.who.int/frhwhd/FGM/infopack/English/fgm_infopack.htm. 1999

	over the vaginal opening. A small sliver of wood or straw inserted into the vagina prevents complete occlusion and thereby leaves a passage for urine and menstrual flow.
Introcusion	*Enlargement of the vaginal opening by tearing it downward.*
Intermediate Modified version of pharaonic circumcision	*Consists of removal of the clitoris and part of the labia minora but leaving the labia majora intact. Suturing with catgut then narrows the introitus.*
Recircumcision or refibulation	*Performed on women who have given birth, or who are widowed or divorced to simulate a virginal vagina. The procedure is called "adla" (tightening) and is most frequently performed on women who have had previous pharaonic or intermediate circumcisions. The edges of the scar are pared and sewn*

	together, or the loose tissue is stitched. *Refibulation* *is sometimes referred to as "Adlat El Rujal" meaning men's circumcision as it is designed to create greater sexual pleasure for the man.*

3.2 Causes and effects

There are many suggestions among literary works about the possible reasons for perpetuating the practice of female circumcision. Culture or tradition has been the most cited reason. However, it is fair to say that beneath this cloak there are more telling reasons for the perpetuation of the practice of female circumcision. Probably, the most poignant and at the same time embracive reasons are proffered by Angela Wasunna[135] who divided these into loosely four categories:[136] 1) hygienic and aesthetic reasons, 2) religious, 3) sociological, as well as 4) psychosexual reasons. It should be noted that this categorisation is loose, meaning that two or more reasons could be combined to produce an incentive or cause in any particular case.

[135] Wasunna *supra* note 127, at105

[136] Dekkers, *supra* note 128, at 180 for example also identified four categories: a) medical-therapeutic, b) preventive-hygienic, c) religious and d) cultural reasons

Claim of any aesthetic-hygienic benefits of female circumcision have long been dismissed.[137] Today, what pervades discussions in medical circles on this topic, including at the World Health Organisation (WHO), are for exactly the opposite reasons. There is a consensus that whatever the medical-therapeutic benefits are, they are probably infinitesimal as compared to the harm caused.

With regards to the religious reasons, there have been several discussions as to the place of female circumcision in both Islam and Christianity. While it is clear that both the Bible and Qur'an do not expressly sanction female circumcision, some Muslim scholars have strenuously tried to justify its practice by referring to other sources of Islam, particularly *Sunna*[138]. In spite of this, it is fair to say that there are several Muslim countries in the world where female circumcision is not practised at all. The divisiveness of the issue has aroused keen interest in recent times, with many Muslim theologians weighing in with their understanding of the Holy Book and the teachings of the Prophets.[139]

Another common reason for the continuation of the practice of female circumcision is sociological. Female circumcision is not just any occasion or ritual in most traditional societies. It is the occasion every girl looks forward to because it serves as a passage from childhood to adulthood. Since the ceremony itself keeps many young girls together in one

[137] Diana Tietjens Meyers, *Feminism and Women's Autonomy: The Challenge of Female Genital Cutting* Metaphilosophy 31:5, 472 (2000), noted that among middle-class white Americans in the late nineteenth century and early twentieth century, female circumcision was a medically certified "cure" for 'diseases' such as hysteria, nymphomania, lesbianism, and "excessive" masturbation.

[138] The second source of Islamic laws after the Qur'an, *Sunna* refers to the prophetic tradition abstracted from speeches and the description of the way of life of the Muslim Prophet.

[139] For a brilliant discussion on this topic, please see among others: Abu Sahlieh S.A., *supra* note 127; Abdullahi Osman El-Tom, *supra* note129*;* NEW YORK TIMES, THEOLOGIANS BATTLE FEMALE CIRCUMCISION December 6, 2006. Available at: http://www.nytimes.com/2006/12/06/world/europe/06spiegel.html (last visited August 11, 2007)

place for a given length of time, female circumcision creates a social bond and a network of dependable and trusted friends. In addition to this, there are several rituals associated with the practice itself and most of these are colourful and elaborate, creating a rather irresistible urge. This should not be underrated as both members and non-members acknowledge its compelling effects. For instance, on the one hand, most (non-member) girls I interviewed agree that inasmuch as they were scared of any physical pains they might encounter if they consented to be 'initiated', they felt left out and even awkward in the society, like they were missing something really important. For members on the other hand, even those who are not enthusiastic about the practice (having failed to participate in any subsequent female circumcision ceremonies after theirs), acknowledge that the drumming and singing have an alluring effect like a call to prayers.[140]

The fourth reason often cited is 'psychosexual'. In many societies, people believe that the clitoris is an aggressive organ that must be gotten rid off to avoid calamity on the woman, her husband and their offspring. For example,[141] among certain tribes, there is the belief that there will be danger to the life of a newborn if its mother is uncircumcised. This is not the only reason. In most traditional societies in Africa, including Sierra Leone, where virginity up to marriage is still considered a big deal, parents and other family members will do whatever is necessary to prevent 'shame' upon the family name, occasioned by sex before marriage. One way to insure against promiscuity is to 'reduce' or 'remove' the clitoris.[142]

[140] Interviews with women and girls in Makeni, Magburaka and Freetown, 22nd October—3rd November, 2007
[141] *Id*; *also*, in interviews with Ya Kolloneh (a traditional female secret society leader who herself has performed several circumcisions), she alleged that circumcision did prevent still births and that children of uncircumcised mothers risked early death. *See* also O. KOSO-THOMAS, THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION, 9, (1987)
[142] *Id*; *see* also Wassuna, *supra* note 127 at 105

One more interesting point raised is that female circumcision actually enhances sexual pleasure. It is recorded that among the Kikuyu tribes in Kenya, a particular type of circumcision is practised which is said to be also done in some hospitals in Paris. The clitoris is disengaged and pulled back inside the vagina. Such a practice is said to add to women's sexual pleasure.[143]

Whilst the above points show the reasons for practising female circumcision, it is no denying that some of these are either redundant or have no direct relevance in particular areas where the practice still flourishes. In Sierra Leone, for example, the changes over the years, made possible by reforms brought about by several factors including the 11-year old civil war, religion, modernity, and socio-economic conditions, mean that other reasons have to be considered for the continued popularity of female circumcision, despite growing opposition.

In many communities, female circumcision is a huge economic/financial concern. The circumcision itself is not free; parents, guardians of the initiates pay in cash or kind to the *soweis* or circumcisers, apart from the plenty food, drink, clothes and expensive gifts that accompany it. The *soweis* mostly have no prior medical training or experience, and circumcising is their main employment and key means of income. Abandoning female circumcision without any viable alternative, therefore, does not seem like a probable option to many of these *soweis*.[144]

[143] Abu-Sahlieh, *supra* note 127 at 6.
[144] There are several organisations that have attempted to address this issue by providing either employment or a lump sum as compensation for loss of 'employment' to these *soweis*, to lure them away from performing female circumcision. One example in Sierra Leone is the Amazonian Initiative Movement.

Furthermore, many of these societies are male-dominated, with even little things like perceptions of beauty modelled along acceptable male standards. In these societies, not only is circumcision seen as a sign of beautification, but the entire ceremony accompanying it is regarded essential to the future (marriage) life of women. To refuse to be 'cut' for instance means sentencing yourself to a life of spinsterhood in many villages. This may not seem a big deal in developed, 'Westernised' societies but a closer look at life without marriage or children in many rural communities in Sierra Leone, reveals that there cannot be a worse ordeal. Many parents and guardians are torn between these two non-options: cut and give your family a chance, or don't cut and bear the consequence.

Until recently, talking about female circumcision in public is rare. The topic itself is still revered today and, although the modus of circumcision has become public knowledge, there is still a great deal of the entire circumcision rite that is shrouded in secrecy. There may be several reasons for that but one thing that is worth noting is that sex education is uncommon. I can recall my years in secondary school (which by the way was an all-boys-school). One of the few female teachers we had was teaching Family Life Education in which she needed to talk about sex. I still remember how uncomfortable she was whenever she mentioned the word 'sex', and how we would giggle each time she strenuously tried to evade it. This was the closest I ever got to learning anything and, for sure, the topic never came up at home, even though both my parents were reasonably educated. This story is similar to many others in Sierra Leone and indeed other parts of Africa. For this reason, most people are unaware of the distress and physical dangers associated with the practice, because there are very few speakers and certainly fewer listeners.

There is also a cultural reason. Many people see the practice as a manifestation of the traditions of the land passed on to the present generation by our ancestors. They will protect it at all cost. They view attempts to abolish it as imperialistic and they are very suspicious of western ideas, brewing this suspicion from colonial days. In fact, in many parts of Africa, (for example in Kenya), white missionaries and colonialists headed the campaign to clamp down on female circumcision and similar practices, and some writers have associated the fight back by African traditionalists as one of the reasons for the birth of several armed groups like the Mau Mau.[145]

The effects of female circumcision are well documented.[146] From the excruciating pain, physical damage, health and reproductive problems to emotional distress, the consequences of female circumcision have very much dominated literary works and conference reports that taking only a snapshot of them will be a bit unfair given the gravity of the situation. Having stated this, it is still necessary to outline some of the major effects this operation has had on the lives of young girls and women.

Regarding the physical as well as health consequences, most writers have divided these into immediate and long term,[147] which may be summarised as follows. Since the circumcision procedure itself is mostly carried out without anaesthetic and with unsterilized instruments,

[145] *See* for e.g. Caldwell, J. C., Orubuloye, I. O. & Caldwell, *Female genital mutilation: Conditions of decline* Population Research and Policy Review **19:**233-254, 239 (2000); P.Strayer, R. W. & Murray, J., *The CMS and male circumcision*, in THE MAKING OF MISSION COMMUNITIES IN EAST AFRICA: ANGLICANS AND AFRICANS IN COLONIAL KENYA, 1875–1935, 136-155, (R. W. Strayer ed., 1887).

[146] Admittedly, all major writings on the subject spend a great deal on the complications of female circumcision. Some of these writings include: Aziz FA., *Gynecologic and obstetric complications of female circumcision*. Int'l J Gyn Obs **17:** 560-563, 1980; Dirie, *supra* note 125; Arbesman M, Kahler L, Buck GM. *Assesment of the impact of female circumcision on the gynecological, genitourinary and obstetrical health problems of women in Somalia: literature review and case series*. Women and Health **20:** 27-42; (1993); De Silva *supra* note 125

[147] For e.g. *see* generally, Wasunna *supra* note 127 at 107

the immediate effects include "h[a]emorrhage, infection, and urinary retention, which if left untreated can be fatal".[148]

Long term complications have also been found especially on girls and women who have undergone infibulation (or the harshest form of the practice). It has been noted by medical experts that chronic pelvic and urinary tract infections can be caused by the build up of urine and menstrual blood as a result of the blocking of the vaginal opening by scar tissue.[149] Other problems like reproductive health issues have been mentioned and even the increase of sexually transmitted diseases (including HIV/Aids) has been credited to the practice of female circumcision.[150]

An equally important aspect of the consequences of the practice on young girls and women is the less talked about emotional distress and psychological dysfunction, including feelings of lack of wholeness. The fact that the operation itself is irreversible has invoked feelings of violability as well as resignation. Admittedly, in many parts of Africa (especially Sierra Leone), unwillingness to publicly talk about sexual issues, makes it difficult to assess the extent of emotional hurt. And one reason for not talking about it publicly may be that those who have already gone through the practice may consider it to be like passing a moral judgement on them.[151]

[148] *Id*
[149] *Id; see* also Dirie *supra* note 125 at 480-82
[150] *Id*
[151] Discussions with Rugiatu Turay, Director of Amazonian Initiative Movement (AIM), one of the leading organisations for the abolition of FGM in Sierra Leone on March 6, 2008. AIM's methods include convincing *Soweis* (Circumcisers) to 'lay down their arms', as well as providing them with alternative employment.

3.3 Female Circumcision: Part of African Traditional Religion?

As mentioned earlier in this chapter, much has been written about the relationship (or lack of it) of female circumcision and the popular religions (Christianity, Islam and Judaism). Very little or nothing can be found on the link (or lack of it) between female circumcision and African traditional religion. Whilst this present author will not be espousing any hypothesis regarding this topic[152], he will, nevertheless, hope to arouse a thought for the proposition that had female circumcision been established as sanctioned by African traditional religion, for instance, would the present opposition from human rights quarters be morally sustainable? Take the *Report of the United Nations Seminar related to Traditional Practices affecting the Health of Women and Children;*[153] it disturbingly contains a reference to the absence of religious sanction for female circumcision (as compared to male circumcision) as the reason for its lack of legitimacy, as well as for the support of its abolition. There was clearly a lack of objective consideration of other religions. Worse, according to Abu-Sahlieh,[154] "[t]his [kind] of reasoning is groundless and extremely dangerous. If female circumcision was in the Bible or the Koran, would it be allowed no matter what?"

African traditional religion has been described to include the beliefs, rituals, ceremonies, practices, and attitudes of indigenous peoples, before the advent of modernity, Christianity, Islam, and other influences, with the caveat that some aspects of these still remain despite the

[152] The present author intends (in a future work) to investigate more thoroughly this question, by looking generally at the relationship between (the freedom of) religion and (other) human rights; whether and how the goal posts really move in the international human rights discourse, and whether and how this impacts the practical comprehension of human rights' arguments on the ground.
[153] Ouagadougou, Burkina Faso, 9, Apr.29-May 3, 1991, E/CN.4/Sub.2/1991/48, Jun.12, 1991.
[154] Abu-Sahlieh, *supra* note 127 at 3

above influences.[155] Whilst it remains difficult to clearly define it in terms of the so called established religions, there is little doubt, however, where it stands in relation to its status as a religion.[156]

Although freedom of religion is well entrenched in international human rights law and guaranteed through international human rights instruments like the UDHR and ICCPR, it, nevertheless, has been seen as the Hercules heel of human rights discourse. Put more directly, the broader human rights law "has a problem with religion."[157] There are numerous cases where human rights activists and practitioners have seemingly shied away because issues of religion are involved. Many of these implicate the enjoyment of other rights like freedoms of association, expression and movement. Where female circumcision is proven to be part of African traditional religion, for example, will the present opposition of the practice represent a shift in international thinking regarding religion? In other words, the question becomes whether the position of many abolitionists and women's rights activists in Africa on issues like FGM and early marriage show that human rights law is finally facing up to religion or is it another case of the growing disconnect between human rights law and practice. To many scholars, human rights law's continued deference to religion and by extension culture, in issues considered no longer acceptable is worrying. Madhavi Sunder, for example, blames this on the way human rights law continues to "define religion in the

[155] J S. MBITI AFRICAN RELIGIONS AND PHILOSOPHY 1-6 (1990)

[156] An agreeable definition of religion has been generally accepted to be almost impossible. Instead, the major international human rights instruments like the UDHR and ICCPR dwell more on the components of freedom of religion including internal freedom (freedom of conscience), external freedom (manifestation), non discrimination, religious autonomy, and limitation provisions. Most of these are captured in several writings including the classic work of ARCOT KRISHNASWAMI: STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60. XIV.2

[157] Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1401 (2003)

twenty-first century as a sovereign, extralegal jurisdiction in which inequality is not only accepted but expected...."[158]

3.4 What are the human rights issues involved?

The practice of female circumcision attracts several human rights issues. Considering the different forms the practice takes in many countries in Africa, human rights concerns like privacy, human dignity, inhuman and degrading treatment, as well as health and reproductive health rights can be invoked.

It should be noted that human rights abuses as mentioned above now form the basis for the call to end the practice of female circumcision. The fact that in most countries, initiates are less than the 18 year-old mark for adulthood makes the argument even more compelling. Where a person of 8-14 years, for example, who cannot legally give consent to being circumcised, is involved, the only other consideration becomes societal or communal pressure. In other words, in most cases, the persons circumcised are too young to legally give their consent, so that the decisions taken on their behalf by parents, guardians or the community, fail to recognise their individualism which is at the heart of human rights itself.

Furthermore, as discussed earlier, the medium to long term negative effects of the practice on women violates certain specific rights, as the practice has the possibility of placing not only their lives in danger but also that of their babies. These include rights of women, rights of

[158] *Id* at 1402

children, right to good health and right to development, all recognised within the human rights regime.

3.5 Responses

The practice of female circumcision is increasingly attracting fierce response by international and national institutions. Whilst most of these efforts have been general in their criticism, they have nevertheless, remained sustained in the past few years.

3.5.1 International Response

The international response has been multifaceted. The opposition to female circumcision from the international community has been overwhelming and the leading role has been assumed by the UN and its specialised agencies. This opposition has been manifested in the long list of international instruments (most of which have already been mentioned earlier), that decry female circumcision. These international instruments include the CEDAW, the CRC, the Protocol to the African Charter on the Rights of Women in Africa, and the African Children Charter. All these contain provisions that outlaw so called "harmful traditional practices", with the preparatory documents referring to female circumcision as one example of such.

In addition to international instruments, the international response has also involved garnering consensus, as well as sharing notes, through organising international conferences and meetings

on the subject. There have been several of these conferences and meetings and they have considered different aspects of the problem, including encouraging national governments to adopt legislations that will outlaw the practice, publishing reports from medical experts on the negative health drawbacks, demystifying the otherwise 'secret' society, funding and engaging local initiatives with the aim of ending the practice. The UNICEF and the WHO have been just two of the organisations that have been actively involved in these processes.

3.5.2 National Response

In Sierra Leone, this response has been, until quite recently, much muted. Although there are a few organisations—like the Amazonian Initiative Movement—whose main object is the abolition of the practice of female circumcision, the official position has been very unclear. For instance, whilst Sierra Leone has ratified most of the above mentioned international instruments that decry female circumcision, the majority of these have not yet been domesticated for national application. In 2007, several bills were introduced in the Sierra Leone Parliament, among which were a few on children and women's rights issues. In particular, these bills (particularly the Child Right Bill), among other things sought to abolish, as well as criminalise female circumcision in Sierra Leone. Whilst these bills eventually became laws after some amendments, all the provisions directly referring to female circumcision were expunged. The official reason given was that the definitions were ambiguous.

This is not a strange decision if one studies the importance of tradition and customary law generally in Sierra Leone. UNICEF estimates that female circumcision has 90% prevalence

in Sierra Leone. It has proved to be a vote winner (loser) during general and presidential elections;[159] no wonder there may be very little political will to go against it.

It may also be that legislation is not the way forward in Sierra Leone. Our national Parliament now comprises 12 Paramount Chiefs (about 10% of all Members of Parliament), and over 2/3rds of Parliament's entire membership come from (and ultimately rely for re-election on) areas where support for the practice is strongest.

In spite of the lack of a specific provision abolishing female circumcision, there are still several provisions outlawing inhuman and degrading treatment against women and girls.[160]

Apart from working towards legislation, there is growing interest in the topic. More organisations are becoming involved and the interest of the public is aroused. These positives must be put into perspective. Probably, unlike any other country, Sierra Leone has a *Sowei* (Circumcisers) Council, legally constituted and recognised by the government.[161] They are a very powerful (or at least presumed to be) interest group who have organised pro-female circumcision demonstrations and also boast of branches all over the country.

3.5.3 Hybrid Response

[159] Female Circumcision Is a Vote Winner, IRINnews.org (U.N. Office for the Coordination of Humanitarian Affairs) (Mar. 17, 2005), *available at* http://www.irinnews.org/print.asp?ReportID=46151.

[160] Section 33 Child Rights Act, 2007; Part II (Sections 4-15) Prevention of Cruelty to Children, Cap 31 Laws of Sierra Leone, 1960

[161] Interviews with Rugiatu Turay, AIM Director, on March 6, 2008

This is a mixture of international and local initiatives that work towards the abolition of the practice of female circumcision, but with local assistance and expertise. This blend is very interesting because it brings with it the international human rights perspective to be mixed not only with the reality on the ground, but also by taking into consideration cultural sensitivities. In practical terms, the hybrid response has involved funding from international institutions, training in human rights, lobbying authorities and engaging in advocacy. This has bred several initiatives, some of which have been very useful in ending the practice in many parts of Africa.[162]

[162] Several examples have been cited in Mali, Senegal, and Burkina Faso. In Sierra Leone, the work of AIM has been greatly enhanced by funding and training. Among others, the organisation has been successful in convincing *Soweis* not only to 'down their tools' but also to lead the campaign of canvassing their colleagues to do the same.

4.1 What is wrong with previous approaches?

As discussed in the preceding chapters, the international and national responses to female circumcision and early marriage cannot be faulted for lack of trying. There is no denying that so much ground has been made and successes registered in the most unlikely of places. Today, both issues are no more part of backyard or muted conversations; they form the frontline of and basis for many international conferences and national legislative debates. Although it is hard to estimate the financial costs of these campaigns, they, nonetheless, dominate many a funding agenda. Today, the number of countries passing legislations to abolish these practices is rising steadily. For this and more, credit must be given to campaigners and formulators of the response mechanisms.

Having stated this, it is also fair to say that given the resources and goodwill especially from the international community, these campaigns should have probably achieved more, especially in countries like Sierra Leone. Reasons abound but I postulate that this is connected with the manner of approach or methodology currently employed. There is something in these approaches that still smacks of suspicion and betrayal among local populations, as well as resentment among some women and girls who have already undergone circumcision or early marriage. Very few campaigners in Sierra Leone have averted their attention to the unique history and place of these traditional practices in hearts and minds of the vast majority of Sierra Leoneans. This attitude has led to a single focus to end the practice immediately, barring any constructive dialogue, and more importantly, losing

any patience for ‘deliberate speed’. Successes in other countries have often been cited as benchmarks for the possibility of success here, but Sierra Leone is quite a different kettle of fish. With no firm statistical data on these subjects, it is necessary to put the prevalence of these practices into perspective. Sierra Leone has about sixteen ethnic tribes. All but the *krios* (descendants of Recaptives, former slaves, and indigenous Africans) practise female circumcision, for example. And this is done during a very glamorous and elaborate ceremony lasting days, weeks or months. Called *bondu*, this all-female ‘secret society’ is said to provide girls with the necessary education and experience to face the challenges of marriage, motherhood, household management, societal responsibility, and skills for survival. In short, this ‘secret’ society comprising a knit set of rituals, ushers in the transition into adulthood, as well as imbibes a sense of cultural identity. In Sierra Leone, this probably explains the massive support surrounding this cultural occasion and by extension the practices of both female circumcision (which takes place during the *bondu*) and early marriage (which takes place after the *bondu*).

It is also important to note that the ceremony and rituals referred to above are not exclusive to women. On the contrary, they are carefully tailored to match parallel male ‘secret’ societies like the *poro* and *gbangbani*, along similar rationales. The current focus on *bondu* instead of the male secret societies, which undoubtedly carry out practices (which if brought to the public domain), will invite serious attention from rights campaigners, undermines the abolitionist campaigns, as well as antagonises potential supporters.

As I will further advance in the following subheadings, the choice of campaigners and human rights activists to take the easy route—transplant reformist/abolitionist efforts in other places—without paying attention to the concerns closest to women and girls, is attracting the fiercest resistance and criticism from the constituency they are meant to 'protect'. No one should be naive enough to describe such resistance/criticism as sheer ignorance of both the dangers of continuing the practices of female circumcision and early marriage, and misunderstanding the goodwill of campaigners and women's rights activists. To do so will be to fall into the same trap—as colonisers and imperialists—of presumptuously wearing the cloak of cultural superiority, and erroneously assuming the right to determine for others what is right and wrong.

4.1.1 Erroneous differentiation of male and female circumcision

In the third chapter of this work, I mentioned how the attempt to separate infant male circumcision and female genital cutting, both on religious grounds and scientific/medical discoveries was not only an unsafe rationale, but might have armed cultural relativists and those who oppose the imposition of a ban on female circumcision. As many authors (some of whom I cited in Chapter 3) have commented, the campaign to abolish this practice could have done without such a religious reasoning, coming from a United Nations Conference on the subject.[163] Just the thought of it gives an indication of the mindset and cultural background of some of these policy makers. Obviously, not all world religions were covered; besides, it further poses the eerie concept of validating as good whatever is said to be so in both the Bible and Quran. Nobody wants to go down this route.

[163] *Supra* note 152

The scientific reasoning is also disturbing. As many writers have already stated, basing an argument solely on an ever-changing scientific foundation is as dangerous as it is improper. The history of the practice of female circumcision, including its perpetuation and scientific backing from well respected medical practitioners, researchers, and scientists has had an interesting development from its beginnings in ancient Egypt to its dominance less than a century ago in the West. As the earlier chapters have shown, there have been times when circumcision has been seen as a cure to some diseases, and as a way of enhancing sexual pleasure. Today, it is being opposed for exactly the same reasons based on new studies. It is true that our new technology is cutthroat and impressive, but nobody will dare say it is perfect. New studies have found some benefits (including allegedly reducing the risk of HIV/AIDS) in male circumcision but does this make male circumcision more acceptable and female circumcision unacceptable, based on similar studies that have seen little or no benefit with the latter?[164]

An argument which has not been considered by campaigners in the Sierra Leonean context and probably in other parts of the world is the effect a ban will have on the cultural identity of the community. Female circumcision as I mentioned above, is part of the *bondu*. Removing the cutting and keeping the rituals (as most recent campaigners have opined) sounds realistic but unreasonable and discriminatory in the circumstance. As Ya Kolloneh (a member of Sierra Leone's Sowei Council) puts it, they (meaning campaigners) should also ask the men to change their 'secret' society. This matter runs deep; many people born and bred in

[164] Some have argued that policies should be based on the best available science, so that its evolvement should not vitiate its validity.

traditional societies like rural Sierra Leone will understand where we are going. The truth of the matter is many male secret societies also practice circumcision (although this is fast changing). Female and male societies epitomise the synergy of power and cultural identity. Tampering with one is sure to create an imbalance in favour of the other. These 'secret' societies represent one of the very few instances under Sierra Leone customs and traditions, where female power is exhibited as demonstrated in the following instances: In the majority of communities where both male (*poro, gbangbani)* secret societies and female (*bondo*) secret societies coexist, women societal heads exercise immense power over their male counterparts. No male secret society or function goes ahead without their explicit approval, which overrides even that of the chiefs. If this is not sought, they have the unilateral power to 'cut the road', meaning stand in the way of their counterparts, who will then be required to remain stationary until the women are appeased. There is also the example of having as very powerful heads within the male secret society setup, women called '*mamborehs'* (for the Temne tribe). They are deemed very powerful and are within the decision-making echelon of the male secret society! In addition, *soweis* (and in some instances ordinary members) are protected at certain times from any abuse—physical and verbal—and there are strict penalties levied by the women themselves. It is clear from the above that the current approach then, only to influence the *bondu*, and not the *poro* or *gbangbani* can easily be interpreted as an attempt to further derogate women's authority in society by taking away their powers from them.[165] This may be farther from the truth but the failure to unravel this seemingly simple misunderstanding is an indictment on the movement to better explain who they are and what they stand for, to the same people they are meant to protect from so-called harmful traditional practices.

[165] Interviews with Ya. Kolloneh in Freetown on the 17th March, 2008

4.1.2 The other side of the empowerment argument

The issue of female circumcision in Sierra Leone reveals an irony of sorts. It has been argued that harmful traditional practices (like FGM) retard the economic, social and political development of women, as compared to men in many rural communities. In other words, an abolition of these practices will not only improve women's lot, but further provide the basis for empowerment. If this hypothesis is proven to be correct, then it is indeed ironic that the 'helped' are the very people opposing or resisting being 'helped'. I may have missed where that resistance is described fully, but my sense from what I've read is that it comes primarily from soweis and initiated women, while among younger uninitiated women there is less interest in the practice recently? And it is those younger women, as much as the society leaders, on whose behalf reform campaigns are pursued? For these to include women's groups, politicians, academicians and the like in Sierra Leone, it is either that the message has been lost in a maze of unnecessary rhetoric, or the right tune is yet to be struck.

Empowerment of women is function-specific. It has (or is supposed to have) a clear strategy and intended result punctuated by indicators. For instance, women in a particular village are economically dependent on their husbands to the extent that they must put up with all sorts of physical abuse. Their families cannot return the bride price to their husbands in the event they (the women) decide on divorce. Besides, after getting married at 12-15 years, it is unlikely that these women will be picked up by other men if they leave their current homes. Clearly, help in this situation will have immediate, midterm and long term components. These will include developing schemes geared towards improving the economic situation of these women like microcredit and small associations; conducting (legal or human rights) education

around the issues of domestic violence, rights of women; and ultimately tackling the problem of early marriage. In this example, the focus never shifts; whatever the strategy employed the intended result will always be to remove the impediments that make women dependent on their husbands for everything to the extent that they will have to endure abuse in order to survive.

But why do opponents in Sierra Leone reject this empowerment argument? After interviews with many players including members of the national Sowei Council, members of the *bundu* 'society' (shaymar), abolitionists, my findings reveal that in the main, there is a combination of mistrust and misunderstanding of concepts between the two sides of the female circumcision debate. Practitioners, including those who have gone through or sympathise with the practice view attempts to end the practice with suspicion. Flowing from the reasons advanced in the preceding subheading, many women members of *bondu* see the drive to abolish this all-female 'secret' society and not the all-male ones as the growing trend to take away from them even those small areas of authority left for women. Taking away power or authority from one set of people cannot be synonymous with empowering that same group, except either some commensurate authority is replaced, or some measure taken away from the other group.

4.1.3 Failure to make a distinction of the types of female circumcision

This point has been raised by many scholars as mentioned in the previous Chapter. For the purposes of this work, it is necessary to note that this caption does not play an important role,

if any, in the growing discussions surrounding female circumcision in Sierra Leone. The main reason for this is twofold: on the one hand, only one type of circumcision mode—the *sunna,* is practiced in Sierra Leone and there exists very little knowledge regarding other types of modes. On the other hand, the mode of circumcision itself is in the heart of the 'secrecy' of the *bondu* society and, coupled with the lack of public/private education on sex (including sexual organs), it is considered extremely out of place and culturally objectionable to even call by name, let alone describe the female sexual organs or anything around it. On the basis of this, it is understandable why the campaign in Sierra Leone has not really taken off from this point.

Having said this, this issue still plays an important role in international discourse, even at continental level, where comparisons between countries, multinational campaigns and comparative literary works, bring together different modes of female circumcision to one platform. The view of many has been that probably a better approach would be to distinguish between different types of circumcisions, with the aim of prohibiting only the very severe. Others have said that any attempts to absolve one would whittle down the entire seriousness of the human rights, personal liberties issues involved.

I consider both positions as two unparallel extremes. There is no denying that both exude some truths, which is why I propose a midpoint. The practice of female circumcision, like other practices, carries grave human rights concerns, and these are unacceptable in this time and age. This is why there should be no mincing of words in condemning human rights abuses. At the same time, it becomes imperative once this stance is taken, to condemn in like

tone and manner, all (and not just some) human rights abuses. This is the ideal situation but it is clear that the international human rights regime itself cannot and does not always comply with this high standard. As I have noted earlier, there are several issues that have been somewhat ignored; and the reasons proffered range from political correctness to cultural sensitivities. With this in mind, a gradual approach punctuated by specific timelines should be the key to achieving human rights friendly practices. In this case, there should be a general acknowledgement of the abuses involved in all modes of circumcision. A lighter mode is no more a human rights abuse than a heavier one. But in the overall plan for change within these practices so as to eradicate the abusive parts, a distinction has to be drawn with concrete target points. It makes less sense to address *soweis* in Sierra Leone with no knowledge of infibulations, for instance, about specific effects brought about only by that mode of the practice. In the same way, a distinction, without condoning any particular mode, will maintain a focus and rid the campaign of unhelpful generalisations.

4.1.4 Blanket ban on FGM

Flowing from the preceding subheading, one problem with the present approach by human rights and women's groups' activists is the difficulty to convince (even their kind) that female circumcision must be immediately abolished in all its forms and without any exceptions. This poses some problems in places like Sierra Leone. This practice is like no other. It is engraved in the lifestyle, livelihood and cultural identity of the vast majority of the population. The message of 'zero tolerance' then, ridden on the back of immediacy does not seem to bode well given the abovementioned prevailing circumstances.

In addition, the current approaches in Sierra Leone seem to have a certain sense of contradiction about them. On the one hand, there seems to be a consensus among organisations working towards the general ban of female circumcision that the way forward is to adopt immediate and decisive action, given the gravity of the human rights abuses involved. On the other hand, however, the awe of the formidable support for female circumcision among several segments of Sierra Leonean society seems to push campaigners to a state of resignation wherein the core of the problem is left untouched in favour of influencing fringes of, and small-time practitioners to abandon the practice. In other words, the immediacy rule seems to be more of a theoretical and publicity stunt. In practice, the few organisations, like the Amazonian Initiative Movement of Sierra Leone (AIM-SL), working with grassroots communities to highlight the dangers of female circumcision, actually take on the gradual, non-confrontational approach. Maybe it is time to be real; to put aside the oral bravado which seems to dominate discussions on this topic of late, and to adopt a more down-to-earth approach that will take into consideration the serious cultural and customary issues.

4.1.5 The other side of the 'Consent' and 'Privacy' Arguments

The absence of both consent and privacy has been mentioned as two of the main reasons why female circumcision and early marriage are untenable under human rights law. The word 'privacy' has very much been used in terms of respect for bodily integrity. The argument surrounding this is long and deep; it finds its basis on religious, moral, philosophical grounds, as well as on the principle of non- maleficence. There has been a division between

advocates of the person-oriented and body-oriented approaches to bodily integrity.[166] The former is borne out of the idea that every individual has a right both to decide what should happen to one's body, as well as be safeguarded against abuse of his body by others. In this sense, consent plays a very important role. For example, a circumcision of a young girl (below the age where she can legally give consent) will fall under this category. Body-oriented approach, on the other hand, resonates the mostly held religious view that the human body belongs to the 'Supreme Being' and must, therefore, be preserved. This approach forbids any mutilation, removal of parts to be performed on the body.

This division of bodily integrity is basically to establish its difference with the notion of personal autonomy and control over one's body. For the purposes of this work, however, discussions are limited to female circumcision and early marriage. It has been generally argued that genital cutting represents a classical case of breach of the right to bodily integrity. Conversely, however, some of these arguments have also confused bodily integrity with personal autonomy over the body. On the one hand, there is acceptance that an unrequested tampering with one's genitals without prior, explicit consent is not right; on the other hand, many are uncomfortable with the idea that a requested tampering with consent is right. Between these two, lies the heart of the debate and it is compounded by the disagreement as to whether bodily integrity (and by extension privacy) lies within the public or private sphere.

4.1.6 The argument for choice

[166] *See* generally, Dekkers, *supra* note 128 for a full discussion of the notion of bodily integrity, especially in its relation to male and female circumcision.

The right to choose has been acknowledged in many respects when considering different fundamental rights and freedoms, including enjoyment of freedoms of expression, religion, association and movement. Limitations to these rights and freedoms have been allowed only when they are prescribed by law, or meant to protect public safety health, morals, *ordre public*, or the fundamental rights and freedoms of others.

Both female circumcision and early marriage (as do other traditional practices) have been faulted because they fail to provide girls and young women a free and meaningful choice. Indeed, as I already observed earlier, most of these girls are too young to be able to make any informed choice. Besides this, the alternative to choosing not to be 'circumcised' for instance is a miserable life sentence of isolation and indignation from the family; and following the power asymmetry in these rural areas, such a young girl will be pruned to abuse. In Mamorankay Village, in the Northern Province of Sierra Leone, a 13-year-old girl recounted her story to Timap for Justice[167]:

When I refused to marry Pa[168] Momodu (the chief of the neighbouring village), my parents pulled me out of the village school, refused to give me food and sent me to do all sorts of hard jobs, like ploughing and carrying heavy loads. They said that since I did not want to marry, I would have to do all of these [hard jobs] in place of my 'husband'. One day, (and this was why the matter was reported to Timap), after work I was very hungry. One man in the village offered me food and, as I finished eating, he fell upon me and attempted to rape me, but I fought hard and tore my dress. I reported this to my mother, but she beat me up and insisted that I was the

[167] Timap for Justice is a Sierra Leonean Non Governmental Organisation, which provides basic justice services to indigent Sierra Leoneans as well as assists them navigate government structures through a network of community based paralegals. www.timapforjustice.org/

[168] The prefix 'Pa' is the shorter form of 'Papa' meaning father, but used in Sierra Leone mostly to refer to an old person, although it may also be used to refer to a very important person irrespective of age. The first meaning is used in this case.

one who 'tempted' the man and that my refusal to get married was in order to live a 'free' life.

This poor girl's example epitomises the problem in many rural areas in Sierra Leone. Situations like this are exactly why these practices should not be allowed to continue because they fail to pass the basic human rights test. Having said this, it is also clear that not all situations fall within this bracket.

The notion of choice can as well mean giving the freedom to choose to girls and young women who opt in favour of female circumcision. This may sound offensive and inconceivable to some, but as we all know, offensiveness and inconceivableness are not the instruments to measure policies. Thus, the argument for choice can be a double-edged sword.

4.1.7 Conflicting national legal definitions of child

One longstanding problem faced by child rights campaigners has been the inconsistency in the legal definition of a 'child'. Before the passing of the Child Rights Act, 2007 in Sierra Leone, the definition of a child was very uncertain.[169] Today, apart from the confusion

[169] For instance, S.2 of the Children and Young Persons Act, Cap 44 of the Laws of Sierra Leone, 1960 defines a child as a person below the age of 14 years and a young person as a person of 14 to 17years. The Prevention of Cruelty to Children Act, Cap 31 of the Laws of Sierra Leone, 1960 defines a child as a person under the age of 16 years.

surrounding the legal position of the Child Rights Act,[170] it still fails to consolidate all other definitions of a child contained in earlier legislations. This would not have posed a problem had the Child Rights Act failed to mention all of these earlier provisions. The fact that it referred to some and ignored others means—and I submit—that the Act only affected those legislations/provisions mentioned. This lack of clarity throws the child rights campaign into a maze of uncertainty. It further removes the element of uniformity.

4.1.8 Nature of customary marriages

As I mentioned in the second chapter of this work, customary marriages are different in many respects from other types of marriages, notably Christian and Civil marriages. The form and substance of marriages under customary law have to be studied carefully in order to address their peculiarity and to avoid generalisations occasioned by sheer lack of knowledge. For instance, the common elements of a valid Christian or civil marriage, like consent of the bride and bridegroom, are not given the same importance under customary law. Conversely, there are certain elements of marriage under customary law, like the payment of bride price, or premarital formalities (including the giving of gifts or providing service by the husband-to-be to the bride's family), are absent under the other types of marriages.

It is true that some of the rites relating to marriage under customary law are so engraved in the cultural identity of the community. As I mentioned earlier in Chapter 2, it will be

[170] The Act does not contain any commencement date and carries with it an air of uncertainty as to whether it has or when it will come into operation

erroneous to assume that marriages under customary law do not conform to the basic tenets of human rights. Having said this, it is also true that certain elements of customary marriage, notably the area of consent of the parties, raise serious human rights concerns. As pointed out earlier, this situation is not peculiar to customary marriages; there exist in the other types of marriages similar concessions that may appear inconsistent with human rights standards. For instance, the age of consent to marriage is generally said to be 18 years, but as already discussed, marriage at an earlier age is allowed if the parents or a competent authority consent.[171] So the idea of parental consent to marriage is not entirely new.

In Sierra Leone, there is an attempt to finally legislate on the issue of customary marriages, their compliance with national and international human rights standards, through the promulgation of the Registration of Customary Marriages and Divorces Act, 2007. The Act sets the age of consent to marriage at 18 years, removing any discussions or confusion as to age. However, as it has been shown in many instances where legislation is used to abolish a longstanding practice, the Act itself seems to lack any meaningful mechanisms to monitor and/or enforce this provision. Reading through the various provisions of the Act, it is easy to sense a detachment from the reality on the ground. In other words, this Act represents a movement towards radically reforming customary marriages and divorces from the top to bottom, using the threat of criminal sanctions. It has been hailed by some as a positive step towards the liberation of women and lamented by others as another gimmick. Only time will tell, but it is clear that for such significant shifts in customary law, more than a mere legislation will be required.

[171] *See* for instance Art 2, Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964

4.2 The Alternative Approach

For the reasons outlined above, and in order to find a concrete, practical lubricant in the interaction between international human rights and customary law, relating to the practices of female circumcision and early marriage, I am proposing an alternative approach in managing the relationship between the two legal frameworks. The basis for this approach is bifurcated: on the one hand, there is need to take urgent action to stem the serious human rights abuses occasioned by the practice of both female circumcision and early marriage in many parts of Africa, particularly Sierra Leone. On the other hand, the present line of action, including the use of the criminal law, risks alienating traditional societies, driving the practice underground, disaffecting political will, and ultimately increasing the suffering of many more girls, especially those who live in very rural communities beyond the reach of human rights monitors. It is in short, a compromise that will take on board the realities of the context, without denigrating the inviolability of the dignity of all humans, including young girls and women. The elements of this alternative approach are discussed below:

4.2.1 Understanding these practices

A full appreciation of the form and content of female circumcision and early marriage—including causes and effects—demands a greater understanding of the context. It is true that many research projects have been supported in different parts of the world and many resources continue to be dedicated towards the study of several aspects of female circumcision and early marriage, including their medical and other effects on the

development of young girls and women. Whilst some of this research is detailed and forms the resource base for an in-depth understanding of indigenous peoples, the same cannot be said about the rest.

I believe that ongoing approaches will gain significant impetus if and when they begin to understand the dynamics of these customary practices, the reasons why they continue to be perpetuated despite fierce criticisms, and, above all, identifying 'entry points'. Here, context is everything. It may be important to find out, for instance, why is it that more parents in big cities are reluctant to send their daughters into marriage before they attain 18 years than in rural places. This may seem a simple query with a simple answer: that parents in the big cities are enlightened and are more exposed to modern influences like Western education, religion and so on. But a fact that is often ignored is that their daughters (between 14 and 18 years) may be gainfully engaged in education or some self-enhancement programmes, thus increasing the prospects of a career in law, medicine, engineering, etc. Their counterparts in the village, on the other hand, can only dare to dream; here, even aspirations are limited to the realities on the ground. When half a dozen or so villages share only one primary school that is about 3-4 miles off; when kids as young as 6 years have to carry their benches with them to and from school every day; and when the only secondary school around is situated over 20 miles off; the things most dear to communities like these cannot and will not be stopping early marriage or female circumcision.

In the eyes of these people, the practices of early marriage and circumcision offer an honourable gateway to probably the most important aspect of life—marriage—and with it procreation and a more knit society.

Whilst campaigners have prioritised the abolition of early marriage and female circumcision as the main focus, most parents in rural communities are worried about early sex, resulting in early/teenage pregnancy. There is some connection here but it is lost in the campaign. For instance, activists support the eradication of early marriage but do not oppose early sex. They preach individual freedom and the importance of the community not to have the right to determine what should happen to a child, including undergoing circumcision, but fail to align this argument when it applies to men.

In addition to this, there has been a general observation that traditional communities insist on circumcision to reduce the prevalence of promiscuity and prostitution. Whilst this is true in the majority of cases, it is not the whole story. Both female circumcision and marriage are intrinsically related, and they show how and what ordinary communities are more worried by—early sexual intercourse outside marriage and moral decadence. Female circumcision is not just a check as in the earlier 'effect' sense (that is, the reason it is performed) but it more importantly a check in the 'preventive' sense. In this latter sense, a girl cannot have sexual relations with any man prior to circumcision, which normally comes shortly before marriage. Contravention of this basic rule attracts very serious consequences not only for the offending man but also his family. Recently, in one of our 'human rights education' sessions in the Gondama Village, Southern Sierra Leone, paralegals were explaining the new Child Rights

Act, 2007 which also bans marriages below the age of 18 years. One of the parents in the group who has also reported a case of "Pregnancy Neglect" to Timap for Justice of her 16 year old daughter, stated amid cheers and applause, that the law and human rights organisations have turned their children against them, as well as encouraged the moral bankruptcy in the communities today. Her theory is that the Child Rights Act (like similar recent legislations), which forbids parents from arranging/sanctioning the marriage of their children before they attained 18 years, fails to deal with the most important issue—outlawing sexual relations before marriage—thereby plunging parents into even deeper economic difficulties.

Close reading of this statement reveals two important issues that have often gone unnoticed: on the one hand, there is an emerging difference even in substance between traditional values (of abstinence before marriage, for instance) and liberal, individual and human rights values (of the importance of individual/personal autonomy). On the other hand, the effect on both the family and wider society of such policies and campaigns is devastating. Going back to the woman's example: a ban on marriage before 18 years means that she now has to prepare for a grandchild, an untimely addition to an already large family. The boy responsible for the pregnancy is barely 19 years old himself; for her clearly, a move to strongly discourage sex before marriage is as important (if not more) as to raise the age of marriage. In the old times, she could demand that her child be married to the boy and the responsibility assumed by his parents. Today, she can best rely on the goodwill of the boy's family to provide support to her daughter, which is hard enough considering that family's financial situation. Furthermore, with the threat to ban female circumcision without any proposition to replace one of its most

potent effect—the threat of calamity if sexual intercourse takes place before female initiation—many fear that a free for all promiscuous society is the alternative.

4.2.2 Support of traditional/local institutions

Traditional authorities and their institutions play a key role in shaping, as well as, enforcing customary practices. In Sierra Leone, for instance, it is estimated that customary law (together with its institutions) govern the lives of over seventy percent (70%) of the entire population.[172] This is very significant. These traditional authorities have long established institutions which many people have used and continue to use, not only to resolve their conflicts (in spite of the presence of formal, colonial-type courts), but also for leadership and direction.

It is well documented that support for justice institutions in many countries in Africa including Sierra Leone, for example, has heavily leant towards the formal justice system. Traditional/customary authorities have been portrayed as impediments to development and non-respecters of human rights. But as stated in the earlier chapters, the customary law or system has not collapsed; in fact, it has surpassed expectation. Like I have maintained throughout this work, this customary law system is beset with serious problems and some of these include practices that are questionable under basic principles of equity and even human rights. However, I also maintain that some of these problems are borne out of isolation; the policy of ignoring customary law and/or failing to engage both its leaders and institutions,

[172] *See* for example REPORT ON THE IRCBP 2007 NATIONAL PUBLIC SERVICES SURVEY available at: http://www.ircbp.sl/drwebsite/uploads/nps-2007_report.pdf

has made it drift away from the realities of the present situation. But this by no means undermines its relevance.

Therefore, I believe that a way forward will be to support traditional authorities and their institutions. They affect the lives of many in rural Sierra Leone and they still play such an important role in the decision making process. Strengthening these institutions will help define them, their role in society and, most importantly, their responsibilities towards the broader state and their citizens. In practical terms, support will include recognising the different administrative levels of traditional leadership, defining, together with these institutions, their functions within the national administrative as well as justice framework. Clear financial and administrative contribution has to be made to maintain these institutions and this includes having clear-cut structures with pre-determined staffing. Regular trainings and supervision—the checks and balances—should then form the linchpin of the support mechanism. Within this framework, a smoother connection with the formal justice system will be created. Here, the emphasis will shift from a parallel, alternative justice system, to one that is more closely interwoven and overlapping with the formal justice system. More importantly, the seemingly disjointed levels of traditional administrative and judicial authorities will be pieced together to form a coherent, easily communicable justice system.

4.2.3 Constructive engagement of customary authorities

Following from above, there will already be useful entry points to engage the so-called 'informal' or traditional justice sector on various issues. Years of keeping-off customary

institutions have created a disconnect with the formal, as well as international (human rights) regimes. To pick on the disparities thus created is certainly not the best way to go. There is to be an engagement of customary authorities and institutions like the way it happens in formal and international systems.[173] This is why the engagement has to be constructive thus paving the way for the beginning of a useful discourse on several tenuous issues, including female circumcision and early marriage.

4.2.4 Identification of/alliance with internal reform initiatives

Despite the assertions of many, traditional and customary societies are not static. In fact, they have changed so much over the years. Many of these changes have been the direct response to external factors like modernity, religion and western education. These external influences have been joined by what I will refer to as 'internal adaptations' spurred by the will to survive. These internal adaptations are such that in some instances they make the traditional practice almost unrecognisable.

Taking the examples of both female circumcision and early marriage in Sierra Leone, it is well noted that there have been significant shifts over the years. Some elements of the practice, like the length of time initiates take, and the arduous routines have been toned down to meet modern demands. It is quite common in the big cities of Sierra Leone, for instance, to find the *bondu* ceremony done in homes, which is a far cry from the isolated 'bush' these girls were sent to. Maybe, the most important innovation is the departure from the use of

[173] For accession to the European Union, for instance, a country has to bring its laws in line with European Union Law in a phased, and not immediate, manner.

traditional medicinal herbs to modern medicine and surgical blades. These changes or 'improvements' over the years are certainly no cushions to the human rights concerns I have alluded to earlier but they go towards showing a society that is pruned to change in a particular direction.

There is a driving force behind these changes in attitude and perception. The task for campaigners then should be identifying this force of change, strengthening it and gradually shaping its course, without attempting to take control at all.

4.2.5 Regulation of customary marriages

In 2007, the Sierra Leone Parliament passed the Registration of Customary Marriages and Divorces Act. The main purpose of this legislation is to recognise and validate, for the first time, customary marriages and divorces, like it is for Christian, Mohammedan and Civil Marriages. It is a laudable attempt to regulate the conduct of customary marriages, as well as raise their profile.

In addition to the present legal shroud surrounding the validity of the Act—it contains no commencement date and is said to have been signed by the President at a time when he no longer had authority to—the Act demonstrates lack of knowledge of traditional concepts and totally ignores the use of traditional institutions, under which customary marriage has flourished for many decades, if not centuries. This certificate-heavy model also fails to capture practical difficulties of access to registration centres.

But it is a laudable start. Taking the preceding subheadings into consideration, particularly the support and constructive engagement of traditional authorities, effective regulation and supervision of customary marriages will be possible. The aim is to ensure that fewer underage girls are betrothed. To this, local chiefs including village, town and section chiefs must be involved. Registration of these marriages should be made a local affair with local registries created within chiefdoms. These registries can also be used to register other events like births and deaths. With proper training and supervision, these chiefs or local partners will then verify the ages of the parties (as well as other elements) of a valid customary marriage.

4.2.6 Interim remedial action for female circumcision

Many will say that the above efforts are at best long time goals. In part, this assertion is true; but they also offer the blueprint for a process that will bring about interim remedies between now and the attainment of the ideal society, where human rights protection and customary practices intertwine. In practical terms, the involvement of traditional leaders and institutions, backed with a respectful understanding of traditional and/or customary practices, should form the basis for the creation of safeguards. For instance, there already exists in many rural communities in Sierra Leone the practice whereby secret societal heads seek the permission of the traditional leader (mostly the Paramount or other chief), before any initiations (including female circumcision) take place. This is a precondition which already lays the foundation for the interaction between the traditional authorities and female circumcision enthusiasts.

This relationship should be strengthened to the extent that more formal, directly, state-controlled institutions get to play a part. It could be that a branch of the Registry is given the duty to gather data; and members of the civil society, including community based organisations and NGOs, can be trained to conduct effective monitoring of the process. As a remedial action, this solution in itself is temporary. Therefore, in addition to this, there should be a constructive dialogue around the framework of what I already described earlier in this chapter, on the issue of female circumcision and how Sierra Leone as a nation wants to tackle it.

4.2.7 Creative formulation of a viable alternative

In recent times, many authors on this subject have realised that the perpetuation of female circumcision rests not so much on its customary and/or traditional leanings, as the huge economic incentives attached. The anti-female circumcision campaigner, Rugiatu Turay of Amazonian Initiative Movement—Sierra Leone summed up the situation thus: "it is now a huge business; soweis make more than the average farmer in the village.... So for them to leave this practice will mean giving up on their means of livelihoods."[174]

For this reason, a good number of organisations campaigning for the abolition of the practice of female circumcision (including AIM—SL) have used, among others, the tactic of providing financial and/or material incentives as a way of luring the soweis (or circumcisers)

[174] Discussions with Rugiatu Turay, on 6 March 2008

to “down their tools.” Controversial as it may seem, even AIM—SL, for instance, attributes some of its success to this scheme.[175] It is rather a practical way of engaging those factors that perpetuate the practice.

A similarly important aspect of providing a viable alternative is the discussion surrounding modifying the secret societies that contain female circumcision, like *bundu*. It has been stated that opposition is not directed at the traditional rituals marking the *bundu*; that circumcision apart, the whole ritual-rich ceremony should stand and be supported; in short, get rid of the cutting and leave the colourful rituals. It has even been suggested that a mock initiation rite be used to substitute the cutting aspect.

Both aspects are very important and valid. In them may lie the solution in the long run. However, for now, the result of these attempts is mixed and its success still chequered. It is also possible that the lack of solid empirical records, stating conclusively the effects of some of these viable alternatives to female circumcision, is shrouding the otherwise progressive efforts.

[175] *Id*

CONCLUSION

Throughout this work, my task has been to show that African customary law and international human rights are not incompatible bedfellows; that even in the most controversial of issues—female circumcision and early marriage—there can still exist a constructive interaction. In doing so, this project debunked the idea that customary law can be replaced because it is retrogressive, backward and anti-human rights, by highlighting basic values within customary law which also form the bedrock of human rights like the dignity of the person. In particular, there were several discussions on the tactics of many of the campaigns that promote the protection of human rights, especially women and children's rights, as well as the role of post colonial governments in shaping the relationship between customary law and both formal law and international human rights law.

From the above, one can conclude that the perceived difference between the two sets of legal regimes (customary on the one hand, and formal and international human rights on the other) is cosmetic. Beyond the artificial (and sometimes exaggerated) disparities even in hotly contested issues like female genital mutilation and early marriage, there is still a point of convergence. It is admitted though, that sometimes this meeting point is farther than is generally acceptable; but there is a meeting. Can this point shift? Certainly; and this is what this work has shown.

In many ways, the tenaciousness of the movement to end these practices has been both its strength and its weakness. It needs to carve out a position distinct from what it is opposing. Its failure to do so is turning even superficial differences into monumental disparities. With the success of such a scheme comes serious shortcomings, the key among which is the inability to win over its natural constituency—women and young girls. This has to be addressed if a more sustained effort is to be made in aligning human rights with these customary practices.

Therefore, the campaign against female circumcision and early marriage, as indeed similar customary practices, should not be regarded as a fight against a single-dimensional threat to human rights and freedom of womanhood. It should be split up and addressed in the many complex forms it presents itself. By so doing, we will not risk working against, as well as alienating, liberals and the very people this campaign is modelled to help.

More importantly, this process will put to rest the notion of compatibility of human rights and customary law, and fashion an interaction based on mutual respect and understanding, and underlined by cooperation rather than rivalry; in effect, the creation not of parallel but intertwining legal systems.

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