Republic of Sierra Leone

Commentary

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I. Origins and historical development of the 1991 Constitution

1.1 Pre-independence dispensation

Established as a British Crown colony in 1808, the Sierra Leone peninsula was ruled by a Governor-in-Council who had both executive and legislative powers. After severe pressure from the settler population, this system finally gave way to the establishment of executive and legislative councils that replaced the Governor's Council in 1863. The 1863 Constitution represented a somewhat representative governance in that members of the African population were appointed to serve in the Legislative Council for the first time. Moving away from an authoritarian system wherein the governor had combined executive and legislative powers was a significant measure, and can be described as the genesis of constitutionalism and a long string of constitutional reforms that would ultimately result in self-rule in 1961.[1]

Years of constitutional development saw an increase in control of executive and legislative power by the local population. In the aftermath of the Second World War there was a push for self-determination by countries under colonial rule. Having fought side by side with their colonisers to guarantee world freedom from Nazi domination, the colonised subjects of the British Empire demanded freedom in turn as the independence movement gathered steam. Importantly, the United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples[2] underscored the transformation of self-determination from a mere principle to a right. The Declaration stated that by virtue of that right, all peoples may freely determine their political status and freely pursue their economic, social, and cultural development.[3] The 1950s saw meaningful constitutional reforms and negotiations between Sierra Leonean political leaders and the British Empire that ultimately resulted in independence in 1961.

Consequently, talks between the Secretary of State for the Colonies and the delegation of Sierra Leone politicians in 1957 resulted in proposals that would reconstitute the Executive Council to include a Sierra Leonean Premier and his ministers under the presidency of the Governor. The Governor appointed as Premier the person who appeared to him to command the majority in the House of Representatives. The Executive Council would also now be composed solely of Sierra Leoneans. The Governor also appointed ministers on the advice of the Premier. The reforms emanating from the 1957 negotiations were implemented in 1958.[4] Consequently, the government was now composed of representatives who were elected by the public.

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[1] See Martin Kilson, *Political Change in a West African State* (Harvard, Harvard University Press, 1966) 98.
[2] UN General Assembly Resolution 1514 (XV), adopted on 14 December 1960.
[3] Declaration on the Granting of Independence to Colonial Countries and Peoples, Article 5. See Rowland JV Cole, 'Revolutions in the Maghreb – Resisting Authoritarianism and Accessing the Right to Self-Determination and Democratic Governance', 45(3) *Comparative and International Law Journal of Southern Africa* (2012) 389, 395; A Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge, Cambridge University Press, 1995) 128.
[4] Bankole Thompson, *The Constitutional History and Law of Sierra Leone (1961-1995)* (Lanham/London/New York, University Press of America Inc, 1997) 6.

A United National Front was formed, composed of various political parties, to negotiate for independence from a united stand point. The United National Front held a Round Table Conference in March 1960 at which an agreement was reached to work in concert for the benefit of the country.[5] The Independence Constitution of 1961 was negotiated at the London Conference, which took place on 4 May 1961. The 1961 Constitution saw the introduction of a Westminster-style parliamentary democracy inherited from Britain, along with an entrenched bill of rights. This was in line with British policy to ensure that human rights, including property rights, were guaranteed in former colonies, and was provided as a condition for independence.[6] The British monarch remained head of state and was represented in Sierra Leone by a Governor General, while the Prime Minister became the head of government. Dr Milton Margai, the leader of the Sierra Leone Peoples' Party (SLPP) which commanded the majority in Parliament, became the head of government. Dr Margai ruled until his death in 1964, when he was succeeded by Albert Margai, his brother.

1.2 Post-independence constitutional development

The first post-independence elections were held in 1967 and won by Siaka Stevens of the All Peoples Congress (APC). A military coup immediately followed the elections, thereby preventing Siaka Stevens from taking power. The military-led National Reformation Council (NRC) was established to govern the country, and the Constitution was suspended. The NRC governed by decree. The NRC was overthrown by junior military officers in 1968, who invited Stevens (who had taken sanctuary in neighbouring Guinea) to return as Prime Minister. Stevens was installed in power and remained there until 1985, when he stood down and handed it over to his hand-picked successor, Joseph Saidu Momoh.

In 1971, the post of Prime Minister was replaced by an executive President in a new Constitution that declared Sierra Leone a republic, removing the British monarch as head of state. Under the new Constitution, the President could dismiss his Cabinet and dissolve Parliament. The Judicial Committee of the Privy Council of England was replaced by a Supreme Court as the country's highest court of judicature. Consequently, appeals no longer had to be heard in Britain before British judges. Thompson observed that the 1971 constitutional arrangement gave rise to the erosion of judicial independence due to political control and interference attributable to executive intervention in the appointment and removal of judges.[7] He argued that while the principles of separation of powers and safeguards of the independence of judges were ensconced in the Constitution, these principles remained conceptual in nature.[8]

In 1978, a new Constitution was introduced which replaced a multi-party system with a one-party state, recognising the APC as the only political party. The executive powers of the President were also increased and the tenure extended from four to seven years. Since only one political party existed, the presidential candidate of the ruling APC was the sole presidential candidate during presidential elections. When a member of Parliament was elected as President, he or she was required to vacate his or her seat in Parliament.[9] The members of the Electoral Commission were appointed by the President, who could also

[5] Thompson (note 4), at 7.
[6] Anthony Wambugu Munene, 'The Bill of Rights and Constitutional Order: A Kenyan Perspective', 2(1) *African Human Rights Law Journal* (2002) 135, 135-136.
[7] Thompson (note 4), at 115.
[8] Ibid, at 116.
[9] 1978 Constitution of Sierra Leone, section 25(2).

remove them. The Electoral Commission was also subject to the control and direction of the President and reported to him annually.[10] This constitutional arrangement resulted in the erosion of legislative and judicial oversight and the expansive use of executive powers.

The third wave of democratisation had a significant impact in Africa, resulting in the challenge to and demise of one-party regimes.[11] Sierra Leone was not an exception. Due to rising local demand for political pluralism, coupled with demands for democratisation and good governance that were attached to western economic aid,[12] President Joseph Saidu Momoh, who had succeeded Stevens in 1985, appointed a 35-member National Constitution Review Commission to recommend constitutional changes that would provide alternatives to the one-party state and reform the political system. This resulted in a new Constitution in 1991 that provided for the reinstatement of multi-party politics.

The 1991 Constitution represented a response to curb the excesses of the one-party authoritarian system and so inculcates separation of powers with provisions for oversight, institutional accountability, and a presidential term limit. It vests the power of judicial review in the Supreme Court. Among other things, the Constitution attempts to create checks and balances so as to limit the powers of the executive and the presidency that had resulted in excesses and the arbitrary use of power, the hallmark of years of one-party rule. The President retains executive powers which can be exercised by him or through his or her Vice President (the principal assistant to the President), ministers, deputy ministers, and other public officers. However, the presidential term was reduced from seven to five years with a two term limit. In an arrangement similar to the US system, the President and his or her running mate would for the first time be directly elected by the people, while concurrent parliamentary elections would be held to vote in the people's representatives. To ensure separation of powers, the Cabinet is separated from Parliament with the result that ministers cannot be members of Parliament. Any member of Parliament who is appointed to Cabinet will lose his or her seat in Parliament. The Constitution recognises the President as part of Parliament.[13] The implications of this are not clear since in practice, the President only attends Parliament to make the state of the nation address. Presidential appointment of ministers, judges, and other public officials are subject to parliamentary scrutiny and approval. As opposed to the 1978 Constitution, the President appoints the Electoral Commission after consultations with the leaders of all registered political parties, and such appointment is subject to parliamentary approval.[14] The Electoral Commission is independent and not answerable to any person or authority.[15] However, the Electoral Commission is required to write an annual report to the President and submit a copy to Parliament.[16] Parliament may amend the Constitution by a two-thirds majority,[17] while entrenched clauses should also be subjected to a referendum.[18] Soon after the promulgation of the 1991 Constitution a military coup occurred in April 1992, and young soldiers from the

[10] Ibid, section 34(11).
[11] See Peter J Schraeder, 'Understanding the 'Third Wave' of Democratization in Africa', 57(4) *The Journal of Politics* (1995) 1160; see also Samuel P Huntington, *The Third Wave: Democratization in the Twentieth Century* (Oklahoma University Press, Norman and London, 1991).
[12] Rowland JV Cole, 'Africa's Approach to International Law: Aspects of the Political and Economic Denominator', 18 *African Yearbook of International Law* (2010) 287, 294.
[13] Constitution of Sierra Leone 1991 ('1991 Constitution'), Section 73(1).
[14] Ibid, section 32(3).
[15] Ibid, section 32(11).
[16] Ibid, section 32(12).
[17] Ibid, section 108(2)(b).
[18] Ibid, section 108(3).

National Provisional Ruling Council (NPRC) suspended parts of the Constitution, ruling mainly by decree. Constitutional order was restored in 1996 after elections were held, ushering in multi-party democracy, and the Sierra Leone Peoples Party (SLPP) took power with Ahmed Tejan Kabba as President. With this development, the Constitution of 1991 became fully operational once more.

1.3 Recent developments on proposed constitutional reforms

A brutal civil war led by the Revolutionary United Front (RUF) erupted in March 1991 which saw the massacre of more than 300,000 people and extensive accounts of rape, sexual exploitation, abductions, physical mutilations, amputation of limbs, recruitment of child soldiers, and other grave beaches of international criminal law. A period of interregnum followed in May 1997 when the Sierra Leone military forces took power and invited the RUF to join them to form the Armed Forces Ruling Council (AFRC). Being unable to rule the country due to civil disobedience, the AFRC was removed from power by a West African intervention force[19] and constitutional rule was restored in February 1998. Following temporary capture of the capital Freetown by the RUF in January 1999, President Ahmed Tejan Kabba made concessions which ultimately resulted in the Lomé Peace Accord, which was signed in July 1999, and a power sharing arrangement was reached between the government of Sierra Leone and the RUF. The Lomé Peace Accord provided for the establishment of a Truth and Reconciliation Commission (TRC). Established in 2002, the TRC recommended, among other things, the establishment of a new constitutional framework to consolidate peace and democratic governance. The constitutional review process commenced in 2013 with the establishment of a Constitutional Review Committee (CRC), whose members were drawn from various sectors of the country. The CRC was mandated to review the 1991 Constitution and the Peter Tucker Constitutional Commission Report that was submitted to the government in 2008 as a working document. The CRC has held national consultations on the 1991 Constitution and the 2008 Peter Tucker Commission Report.

The CRC has made a number of recommendations for constitutional change in its draft report. These recommendations include recognition and enforceability of some socio-economic rights, including the rights to education, health, 'shelter', and protection of the environment. Further suggestions include the creation of a second chamber of Parliament for traditional leaders, the exclusion of the President from Parliament to provide for more effective separation of powers, and the constitutional enshrinement of financial autonomy of the judiciary.[20] The recommendations will be submitted to Parliament, probably during the course of 2017, and then to a national referendum.

II. Fundamental Principles of the Constitution

A constitution is a reflection of the ideals of the people who framed it. Though a constitution is intended to be a covenant of permanent value, it often reflects the experiences and context of the period in which it is crafted. The 1991 Constitution of Sierra Leone dedicates a full chapter, Chapter II, to the articulation of the fundamental principles of state policy, the first time such a provision has appeared in a Sierra Leone constitution. This development is in line

[19] Economic Community of West African States' Ceasefire Monitoring Group (ECOMOG).
[20] See Constitutional Review Committee, Draft Abridged Report, February 2016, available at http://citizenshiprightsafrica.org/wp-content/uploads/2016/07/SLCRC_report_Feb2016.pdf (accessed on 31 July 2017).

with several third-generation African constitutions which followed the third wave of democratisation and the restoration of political pluralism in the 1990s. This provided the opportunity to incorporate mainly state obligations to provide socio-economic services for its citizens. In most cases, while articulated as rights, they were declared non-justiciable. Nonetheless, these principles represent an articulation of philosophical and ideological goals and objectives of a national and socio-economic order. As national goals, they provide an agenda that seeks to unify the nation.

Overall, state policy embraces social inclusiveness with a view to reducing socio-economic and political inequality in status and opportunities among individuals. The principles articulate the relationship between the government and the people, and exemplifications of political, economic, social, educational, and foreign policy objectives, the enhancement of national culture, the duties of citizens, and the obligations of mass media. They underscore some key attributes of good governance and represent an expression of so-called second-generation rights and remain non-justiciable.

III. Fundamental human rights protection

The Constitution is embedded with an entrenched bill of rights which recognises and protects a range of fundamental rights, namely:

- the right to life;[21]
- protection from arbitrary arrest or detention;[22]
- freedom of movement;[23]
- protection from slavery and forced labour;[24]
- protection from inhuman treatment;[25]
- protection from deprivation of property;[26]
- protection of privacy of home and other property;[27]
- the right to a fair trial;[28]
- protection of freedom of conscience;[29]
- freedom of expression and the press;[30]
- freedom of assembly and association;[31] and
- protection from discrimination.[32]

The Constitution recognises the entitlement of every person to the above rights and freedoms regardless of their race, place of origin, political opinion, colour, creed, or sex.[33] These rights are civil and political in nature, and are often guaranteed in major international human rights

[21] 1991Constitution, section 16.
[22] Ibid, section 17.
[23] Ibid, section 18.
[24] Ibid, section 19.
[25] Ibid, section 20.
[26] Ibid, section 21.
[27] Ibid, section 22.
[28] Ibid, section 23.
[29] Ibid, section 24.
[30] Ibid, section 25.
[31] Ibid, section 26.
[32] Ibid, section 27.
[33] Ibid, section 15.

instruments. They are libertarian in character as they relate to the sanctity of the individual and his or her rights within the socio-political milieu in which he or she is located.[34] The rights seek to protect and safeguard the individual, whether alone or as a group, against the abuse of power, especially by political authority. However, these rights are subject to three kinds of limitations. The first limitation relates to a horizontal application of human rights. In this regard, constitutionally protected rights are 'subject to respect for the rights and freedom of others'.[35] The second limitation involves rights that are subject to the interests of the public. This appears to be similar to horizontal limitations, though in this case the state is the protector and is primarily responsible for issues of public order, public health, or public safety, whereas horizontal limitations relate to the interests of one private citizen as against another. The third limitation relates to specific exceptions created by and relevant to each constitutional provision creating a right. These limitations are often in the nature of exceptions which are regarded as excusable under the law or are deemed lawful because they arise as a direct execution of a legal process. For instance, the right to personal liberty is restricted by legislation providing for lawful arrest. Such limitations are considered lawful under the Constitution. The question as to whether legislation limiting constitutional rights is in conflict with the Constitution or justifiable, necessary, or reasonable in a democratic society has received cursory articulation by the courts. The second and third categories of limitations identified here are not exclusive to specific provisions of the bill of rights. A single provision often contains a combination of these categories of limitations.

3.1 Horizontal application of limitations

As noted above, the Constitution provides limitations to the enjoyment of human rights, in the interest of the rights of others. These provisions create horizontal obligations of forbearance among citizens: a recognition that in addition to the state, an individual may in the exercise of his or her right violate the right of another individual. This means that non-state entities have obligations in relation to the manner in which they exercise their rights.[36] Two examples of such limitations relate to freedom of religion and freedom of expression. For instance, the Constitution protects freedom of conscience, which is defined to include freedom of thought and of religion, and the freedom to change one's religion or belief. The right is expressed both as an individual and a group right. This encompasses the right to practice or propagate one's religion either individually or in concert with others. Thus one may manifest or practice their religion both in private and in public. Religion may be manifested by worship, teaching, or proselytizing.[37] Freedom of religion includes the right not to be compelled to practice a religion or take part in any religious ceremony to which one does not belong.[38] The right not to be compelled to practice other religions apart from one's religion, or any religion at all, is applicable in schools, offices, and other organizations.

[34] Jacob A Dada, 'Human Rights under the Nigerian Constitution: Issues and Problems, 2(12) *International Journal of Humanities and Social Science* (2012) 33, 38.
[35] 1991 Constitution, section 15.
[36] Danwood Mzikenge Chirwa, 'The Horizontal Application of Constitutional Rights in a Comparative Perspective', *Law, Democracy & Development* (2009) 21, 46, available at http://www.saflii.org/za/journals/LDD/2006/9.pdf (accessed on 3 August 2017).
[37] 1991Constitution, section 24(1).
[38] Ibid, section 24(2).

Freedom of religion has limitations among which are the rights of others to practice their religion. This accentuates the position in section 15 of the Constitution which is the preambular section of the bill of rights. As was noted by Chief Justice Tejan-Jalloh in *Sierra Leone Association of Journalists v The Attorney-General and Minister of Justice and The Minister of Information, Broadcasting and Communications*,[39]

> [t]he existence of the right is one thing. The freedom to exercise that right is an entirely different thing. Thus freedom does not mean the right to do whatever we please in the exercise of our right…. We are free to do whatever we like with our rights provided we do not infringe the equal freedom of others.

In this regard, freedom of religion may be limited by any law which is reasonably required 'for the purpose of protecting the rights and freedoms of other persons including the right to observe and practice any religion without the unsolicited intervention of the members of any other religion.'[40] This means that the right to practice one's religion does not include the right to impose one's religious beliefs on another. This is based on the fact that religion is a matter of personal choice. Religion can be a sensitive matter and has been the source of several conflicts globally. History has accounts of crusades and jihads, which represent the penchant to spread religion by any possible means. Further, in a multi-religious society such as Sierra Leone, this limitation ensures social harmony. The limitation also forestalls the tendency of religious zealots to impose their religious beliefs on others. However, proselytizing is permissible so long as it does not amount to unsolicited intervention with the membership of another religion.[41]

Freedom of expression and freedom of the press are recognized by the Constitution.[42] The Constitution acknowledges a direct correlation between the exercise of freedom of expression and freedom of the press, and preserving the reputation of other persons. Section 25 of the Constitution is headed 'Protection of freedom of expression and the press'. Subsection 1 provides that:

> Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purpose of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, freedom from interference with his correspondence, freedom to own, establish and operate any medium for the dissemination of information, ideas and opinions, and academic freedom in institutions of learning.

Among other limitations, the Constitution provides that any law that makes provision for the protection of reputation, rights, and freedoms and preventing the disclosure of information received in confidence will not be inconsistent with the Constitution.[43] All persons have a vested interest in protecting their interests, and often a fine balance should be struck between freedom of expression and the rights of others who

[39] *Sierra Leone Association of Journalists v The Attorney-General and Minister of Justice and The Minister of Information, Broadcasting and Communications* SC 1/2008 (unreported).
[40] 1991 Constitution, section 24(5)(2).
[41] Rowland JV Cole, 'Botswana', in I *Encyclopedia of Law and Religion* (Gerhard Robbers and W Cole Durham Jr, (eds), Leiden, Brill 2016) 29, 30.
[42] 1991 Constitution, section 25(1).
[43] Ibid, section 25(2)(a)(ii).

are the subject of the exercise of this freedom. In *S v Kamara*,[44] the court held that while freedom is not a limitless right, the baseline is that the Constitution guarantees protection of the right to freedom of expression and freedom of the press. The starting point is the consideration of the right, and any limitation on the right follows thereafter.

It should be noted that the limitations of freedom of the press and protection of reputation are not only of horizontal application. They have also undergone vertical restriction due to the criminalization of libel by the state. Libel is a criminal offence in Sierra Leone by virtue of the Public Order Act,[45] and journalists have often been prosecuted and sometimes imprisoned for the offence of seditious libel, where they have published material unpalatable to the government. Not only does the Public Order Act criminalize defamation; it does not permit truth as a defense, although the accused can prove that the publication was in the public interest. The Act also has several reverse onus clauses which are inconsistent with the presumption of innocence recognized in the Constitution.[46] In 2008 the Supreme Court of Sierra Leone rejected a constitutional challenge to the Public Order Act.[47] The applicant contended that the criminalization of free speech by the Act contravened section 25 of the Constitution and that the restrictions provided by section 25(2)[48] did not justify the offending provisions of the Act as they could not be demonstrably justified in a democratic society. The Court dismissed the application, holding that the applicant had not demonstrated that it was in immediate danger of coming into conflict with the law or that its activities had been interfered with by the law. The Court reached this conclusion in spite of the supporting affidavits of three media practitioners who attested as to how they had been arrested and detained under the Public Order Act by successive governments for publishing stories that were disagreeable to the government. While these events referred to in the affidavits had taken place about three years previously, aspects of them highlighted current threats. For instance, in two of the affidavits the deponents contended that they could still not publish contentious stories without first considering whether or not that will result in their imprisonment. In the third affidavit the deponent stated that he was charged for publishing an article regarding a former head of state in 1993. His appeal against conviction under the Public Order Act was

[44] Criminal Appeal 32/2004, 14 June 2006 (unreported).

[45] Public Order Act No 46, 1965. See *Regina v Lamin and Taqi* 1964-1966 ALR/SL 346 for directions on the determining of what amounts to defamation and sedition.

[46] For a discussion of the constitutionality of reverse onus clauses, see Rowland JV Cole, 'Determining the Constitutionality of Reverse Onus Clauses in Botswana', 16(2) *African Journal of International and Comparative Law* (2008) 236.

[47] *Sierra Leone Association of Journalists v The Attorney-General and Minister of Justice and The Minister of Information, Broadcasting and Communications* (note 40).

[48] Section 25(2) provides:

'(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) which is reasonably required -

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the telephony, telegraphy, telecommunications, posts, wireless broadcasting, television, public exhibitions or public entertainment; or

(b) which imposes restrictions on public officers or members of a defence force;

and except in so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.'

still pending in the Court of Appeal, and he was thus tainted with a criminal record. This made him wary of being involved in active media practice and also had a consequent negative impact on his family. These were serious issues that affected the rights of the deponents, which the Court did not consider. The Court further held that while the applicant was an incorporated company with distinct corporate personality, the affidavits in support of the application made allegations in relation to harms suffered by the deponents alone. Consequently, the deponents could not claim rights belonging to the company. The Court did not consider the question of whether the offending sections in the Public Order Act were justifiable in a democratic society. The Court should have anchored its decision on the notion that freedom of expression represents a critical hallmark of a democratic society. To restrict and criminalize the expression of this right opens a leeway for tyranny and absolutism to the extent that to express disagreement openly with the government of the day may result in imprisonment. In the determination of the issues, the Court should have embraced the alienable and imprescriptible nature of fundamental rights as represented by modern constitutional thinking and international human rights norms. The retention of the criminalization of libel essentially means that limitations regarding freedom of expression apply vertically and horizontally.

3.2 Limitations in the interests of the public

An example of limitations of constitutional rights in the public interest can be found in relation to freedom of movement and privacy of home or property. Section 18(1) of the Constitution provides that no person should be deprived of their freedom of movement, which is articulated as the right to move freely throughout Sierra Leone, the right to reside in any part of Sierra Leone, the right to enter or leave Sierra Leone, and immunity from expulsion from Sierra Leone.

Section 18(3) provides that any law which is reasonably required in the interests of defense, public safety, public order, public morality, public health, or the conservation of natural resources, such as mineral, marine, forest, and other resources of Sierra Leone, will not be inconsistent with the Constitution, in so far as the law 'is shown not to be reasonably justifiable in a democratic society'. This provision is very convoluted.[49] One would assume that this means that the test of the validity of the provision is whether it is justifiable in a democratic society. What is clear, however, is that section 18(3) seeks to validate legislation that restricts entry into and control movement in diamond-rich areas and for the purposes of forest conservation.[50] The courts have dealt with limitations of rights in the interests of the public, but have not developed principles which should serve as a yardstick to arrive at a value decision on the matter. The court held in *Akar v Attorney-General*[51] that depriving a person of citizenship who was previously so entitled under the law on the ground of his race was not reasonably justifiable in a democratic society and

[49] Section 18(3) reads: '(3) Nothing contained in or done under authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
(a) which is reasonably required in the interests of defence, public safety, public order, public morality, public health or the conservation of the natural resources, such as mineral, marine, forest and other resources of Sierra Leone, except in so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

[50] See Diamond Industry Protection Act, Cap 199, Law of Sierra Leone. See also *Saccoh v Commissioner of Police* 1957-1960 ALR/SL 203.

[51] ALR-SL 1968-1969 274.

amounted to discrimination under section 23(1) of the Sierra Leone Constitution of 1961. In that case, the state attempted to deprive the appellant of his right to contest elections by amending the Constitution to retroactively exclude persons whose grandfathers were not Africans from being citizens by birth. The amendment, however, provided that such persons could acquire citizenship by registration if they had been residents for a period of 25 years. The appellant's grandfather was of Lebanese origin. However, the appellant had acquired citizenship by birth under the Constitution. The amendment of the Constitution effectively revoked the appellant's citizenship and required persons of his kind to acquire citizenship by registration. The state further sought to justify the discriminatory effect of the amendment by a further amendment (section 23(4)(f)) of the limitation clause to section 23(1) of the Constitution). This amendment provided that section 23(1) would not apply where the person discriminated against would be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to the person discriminated against, was reasonably justifiable in a democratic society. While holding that the amendment was not justifiable in a democratic society, the court did not set out any test or develop any guiding principle upon which a court should reach such a decision. Comparably, the Nigerian case of *Obi v DPP*,[52] to which some Sierra Leonean scholars have made reference, reached a similar conclusion without establishing a guiding principle.[53] In discerning legal principle, guidance can be sought from the proportionality test, which is of German origin and gained notoriety in the Commonwealth by Canadian jurisprudence relating to justifiable limitation of the Canadian Charter on Rights and Freedoms. The justification of limitation of rights in a democratic society should embrace the application of the proportionality test, which means that the limitation must have a pressing and substantial objective and must be proportional.[54] In deciding proportionality, or what has come to be known as the proportionality test, a number of underlying considerations are crucial to justify the limitation. The limitation should be carefully designed to achieve the objective in question and not based on arbitrary, unfair, biased, or irrational considerations. Further, the limitation must be rationally connected to the objective and should impair the right in question as little as possible or be the least intrusive means. Also, there must be proportionality between the effects and the objective of the limitation.[55]

3.3 Limitations relating to specific provisions

3.3.1 *Lawful and excusable limitations*

Limitations of fundamental rights may be justifiable under the law. The Constitution recognizes various types of conduct that are lawful or excusable even where they result in death. These are mostly acts performed by public officials in the exercise of their duty or in lawful execution of court orders. These exceptions include self-defense of the person or property that is faced with unlawful violence; the use of force in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, for the purpose of suppressing a riot, insurrection, or mutiny, in order to prevent the commission of a criminal offence; and

[52] 1961 1 All NLR 186. This case no longer represents the law in Nigeria in so far as it recognises sedition as an offence, having regard to the constitutional provisions protecting freedom of expression in that country.
[53] See for instance Thompson (note 4).
[54] *R v Oakes* [1986] 1 S.C.R. 103.
[55] *R v Big M Drug Mart* [1985] 1 S.C.R. 295.

the killing of an enemy combatant during war.[56] Under such circumstances, death is justifiable where 'force to such extent as is reasonably justifiable in the circumstances' is used.[57] These claw-back clauses unduly negate the declared rights to the extent that they can only be given restricted application. The purpose of constitutionally entrenched rights is to protect the rights of individuals and groups and provide guarantees against the might of state machinery and the use of the executive, legislative, judicial, and policing powers of the state and its limitless resources. The individual, on the other hand, has no such powers and the Constitution forms the framework within which he or she is protected from the might of the state. An entrenched bill of rights makes it hard for the state to engage the individual arbitrarily. On the contrary, the Sierra Leone bill of rights specifically makes inroads into the constitutional provisions which intentionally derail their purpose and enables the state to use executive powers against the individual, with a vaguely measured yardstick. For instance, the state or other persons are empowered to take life in the defense of property or suppressing a mutiny in absolute terms, without any prescription for reasonableness or reasonable force or duty of care.

3.3.2 *Limitations arising from lawful execution of legal processes*

Limitations of rights arising from the lawful execution of legal processes relate to the right to life, the right to personal liberty and security, or the right to privacy of property. Executing the death sentence in terms of a sentence of a court is recognised as a limitation to the right to life.[58] Under the laws of Sierra Leone, the offences of murder, treason, and other related offences, mutiny, and robbery with aggravation are punishable by death.

Another recognized exception relates to the powers of arrest and detention, which limit the right to personal liberty. Consequently, the Constitution underscores a number of exceptions to the right to personal liberty. These include where a prison term is imposed by a court upon trial and conviction; where imprisonment is ordered by the High Court, the Court of Appeal, the Supreme Court, or another court or tribunal or commission of inquiry for contempt of any such court, as the case may be; for the purpose of bringing the person before a court to answer to a charge in execution of the order of a court; upon reasonable suspicion that the person has committed or is about to commit a criminal offence; and in the case of a person who has not attained the age of twenty-one years, for the purpose of his or her education or welfare.[59]

Powers of arrest are usually necessary for the investigation of crime. While the Constitution recognizes such procedural necessity, it also provides safeguards for those arrested under suspicion of having committed or being about to commit a crime. In this regard, persons arrested should be informed of the grounds of arrest within twenty-four hours of the arrest and detention. A person arrested should be informed of his or her right to legal representation upon arrest, and be granted access to such legal representative.[60] A person who is arrested should be brought before a court generally within seventy-two hours, and within ten days in cases of capital offences, offences carrying life imprisonment, and environmental

[56] 1991 Constitution, section 16(a)-(e).
[57] Ibid, section 16(2).
[58] Ibid, section 16(1).
[59] Ibid, section 17(1).
[60] Ibid, section 17(2).

and economic offences, in the absence of which such person must be released.[61] The provision that permits the police to inform a suspect of the grounds of arrest after twenty-four hours of such arrest is fundamentally flawed.[62] It is at variance with the English common law, which Sierra Leone law follows to a large extent, and is also out of sync with the Criminal Procedure Act. This means that the suspect may be interrogated without being given any information as to why he or she is a suspect. This has implications for a fair trial since he or she may not be able to respond adequately to questions during interrogation or disclose defenses or explanations which could be made known as soon as possible should he or she choose to speak. More importantly, the suspect must be made aware of the full facts, including the offences and charges that he or she might face. Further, the period of seventy-two hours seems inordinately long. For a person to become a suspect, he or she must have been under observation or reliable information should have been collected for the police to make a decision to arrest the person. Since search would ordinarily be conducted upon arrest to secure incriminating evidence, what would be required after the arrest of the suspect would be perhaps to secure further witnesses against him or her, or cross-check his or her explanation, including an alibi, from persons named. It is doubtful whether the police would require seventy-two hours, nor should they be heard to claim that such a period is required. Such a lengthy period exposes the suspect to prolonged and unnecessary interrogation which can result in involuntary confessions.

3.4 State of public emergency

Human rights are usually abrogated during periods of public emergency. The President may declare a state of emergency by proclamation, which should be published in the Gazette.[63] A state of public emergency may apply to the entire country or to a specific area. Public emergencies may be declared when Sierra Leone is at war; when Sierra Leone is in imminent danger of being invaded or involved in a state of war; when there is a breakdown of public order and safety in any part of the country or the whole country to such an extent that extraordinary measures are required to restore peace and security; when there is a clear and present danger of actual breakdown of law and order to such an extent that extraordinary measures are required to restore peace and security; when there is imminent danger of, or the actual occurrence of, a natural disaster; or when any other danger clearly poses a threat to the existence of Sierra Leone.[64]

A state of emergency ordinarily lasts for a limited period and requires parliamentary endorsement to extend its duration. This ensures parliamentary oversight over such extraordinary executive powers. A declaration of a state of public emergency is valid for a period of seven days when Parliament is in session and twenty-one days when Parliament is not in session, unless it is approved by a resolution passed by two-thirds of the members of Parliament.[65] The state of emergency then subsists for the life of the resolution, which is ordinarily twelve months, except where Parliament prescribes a shorter period.[66] In such an event, the declaration of a state of emergency is superseded by the resolution of Parliament. The President has extraordinary powers during a state of public emergency.

[61] Ibid, section 17(3).
[62] See Criminal Procedure Act 1965, section 15.
[63] 1991 Constitution, section 29(1).
[64] Ibid, section 29(2)(a)-(f).
[65] Ibid, section 29(3).
[66] Ibid, section 29(12).

The President may make regulations and take measures that appear to him or her as necessary for maintaining and securing peace, order, and good government.[67] Such measures may include provisions relating to the detention of persons; restrictions on movement; deportation of non-citizens and exclusion of non-citizens from some parts of the country; taking control or possession on behalf of the government; acquisition of property or land on behalf of the government; authorizing entry into and search of property; suspension, amendment, or modification of the application of any law, except the Constitution; providing for the arrest, trial, and punishment of those found to be in breach of the regulations; and providing for the maintenance of supplies and services that are necessary or essential for life and the well-being of the public.[68]

All regulations made pursuant to a state of emergency are valid only for a period of ninety days, but may be extended by parliamentary resolution prior to their expiration.[69] Such resolutions may remain in force for a period of up to twelve months at any one time and require a two-thirds majority vote.[70] They may be revoked at any time by a simple majority vote. The President may summon Parliament to meet for the purposes of voting on the resolutions, when Parliament is not in session or even where Parliament has been dissolved.[71] Where Parliament has been dissolved, the members of Parliament prior to its dissolution will constitute its membership.[72]

A special tribunal is to be established to review complaints from anyone detained as a result of the regulations made by the President. The tribunal shall be independent and impartial and consist of three persons entitled to practice law in Sierra Leone for at least fifteen years. The chair of the tribunal is nominated by the Chief Justice and the other two members are nominated by the Bar Association. At the conclusion of its proceedings, the tribunal makes recommendations as to whether it is desirable to prolong the detention of the aggrieved party.[73]

3.5 Enforcement of rights

The Constitution provides for the enforcement of fundamental rights. Section 28(1) states that where a provision of the bill of rights has been or is likely to be breached, the affected party may apply to the Supreme Court for a remedy. Where the aggrieved person is in custody, another person may make the application on his or her behalf. The Supreme Court is the highest and final court of appeal. However, it has original jurisdiction in respect of constitutional cases.[74] In the case of *Steele and Others v Attorney-General, Tejan-Sie and Koroma,*[75] Acting Chief Justice Cole (as he then was) determined that on an application for

[67] Ibid, section 29(5).
[68] Ibid, section 29(6).
[69] Ibid, section 29(10).
[70] Ibid, section 29(13).
[71] Ibid, section 29(16).
[72] Ibid, section 29(16).
[73] Ibid, section 29(17).
[74] Ibid, section 124(1)(a); *Alpha Madseray Sheriff II v Attorney-General and Minister of Justice, Minister of Local Government and National Electoral Commission* SC No. 3/2011.
[75] 1967-1968 ALR/SL 1. See also *Sierra Leone Association of Journalists v The Attorney-General and Minister of Justice and The Minister of Information, Broadcasting and Communications* (note 40), where this notion was confirmed.

a declaration on enforcement of a fundamental right, a person invoking the enforcement of provisions laid down in the bill of rights must allege facts and establish that as a result of the acts complained of, an injury to himself, which is not one of a general nature common to all members of the public, have occured, and it is insufficient to allege facts which merely show that he will suffer in common with other people. Similarly in *Benjamin & two others v Dr Christiana Thorpe & three others*,[76] on a question of whether section 48 of the Constitution (which grants the President immunity from suit) prevented a petitioner from petitioning the President on the results of presidential results, it was held that the Court could not grant the relief sought as the person who would be directly affected by such relief was not a party to the proceedings. This articulates a restricted application of the notion of *locus standi* and represents the English common law position.[77] Consequently, the Supreme Court will only entertain applications from persons who can demonstrate that they have sufficient connection to the harm or anticipated harm caused by the breach. This restrictive application of *locus standi* puts a lid on the use of public interest litigation, which is an important tool for social change and development of the law. It is devoid of a stance relating to the enforcement of public rights that is relevant for the enforcement of claims made under the bill of rights, but rather reflects a common law principle relating to the enforcement of private rights. An application of a public nature should only require the applicant to show that the matter is one of national interest concerning all citizens. More particularly, this was a matter concerning the rights of media practitioners for which the organization representing media practitioners would be entitled to protect their rights, and the question had been whether the affidavits of the particular practitioners were of sufficient evidential value to demonstrate the impact on the media of the Public Order Act.

Significantly, the Constitution provides that Parliament should make provisions for indigent citizens to secure legal practitioners to pursue their claims under the bill of rights.[78]

IV. Separation of powers

4.1 The concept of separation of powers

Separation of powers is a model for the governance of a state that was articulated by Charles Louis de Secondat, Baron Montesqueiu. In terms of this model, the institutions of state governance are divided into branches. Each branch has separate and independent powers and areas of responsibility so that the powers of the state are not concentrated in a single institution, thereby reducing the tendency for authoritarian rule. Thus there are three branches of government: a legislature, an executive, and a judiciary, which is known as the '*trias politica*' model.

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[76] SCC No. 4/2012 (unreported). See also *Sierra Leone Association of Journalists v The Attorney-General and Minister of Justice and The Minister of Information, Broadcasting and Communications* (note 40).

[77] For a discussion on the traditional restricted application of *locus standi* and an approach that takes into consideration a wider public law approach, see L Chiduza and PN Makiwane, 'Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An Analysis of the Provisions of the New Zimbabwean Constitution', 19 *PER/PELJ* (2016), available at https://dspace.nwu.ac.za/handle/10394/18075 (accessed on 5 August 2017).

[78] 1991 Constitution, section 28(5).

4.2 The Constitution of Sierra Leone and separation of powers

The Constitution caters to the doctrine of separation of powers. The Constitution establishes and recognises three arms of government: the executive, the legislature, and the judiciary. Each arm of government is governed by a separate chapter in the Constitution dedicated to making provisions for its establishment, jurisdiction, composition, administration, and other ancillary matters. The functions of each arm of government are set out clearly in the chapters and they are to a significant extent exclusive of each other. However, there are instances in the Constitution where the functions of the arms of government are conterminous. Viewed holistically, the Constitution seeks to provide checks and balances on the executive's use of power by giving Parliament significant authority in this respect. In a similar manner, the Constitution also contains provisions for Parliament to be regulated. Parliament is regulated by the Constitution itself. The Constitution also provides for the judiciary. The judiciary is the ultimate arbiter in relation to questions regarding the interpretation of the Constitution, the enforcement of constitutional provisions, and the prevention of violations of its provisions. The judiciary is regulated by the Judicial and Legal Service Commission established by the Constitution.

4.3 The executive arm of government

The Constitution provides for a presidential system of government. The President heads the executive arm of government and he is elected directly by the people through an election conducted for that purpose. The presidential candidate must be nominated by a political party. In other words, there is no provision within the Constitution for an independent candidate for the office of President. When nominated, a candidate is deemed to have been duly elected as President in instances where he or she is the only candidate after the close of nomination. When there are two or more candidates nominated for elections, one of them must poll at least 55 per cent of the valid votes in his or her favour to be declared President of Sierra Leone. In instances where no candidate attains 55 per cent of the valid votes cast, the two nominees with the highest number of votes go forward to a second election which must be held within fourteen days of the announcement of results of the first election. In this instance, the candidate with the highest number of votes cast shall be declared President of Sierra Leone by the Chief Electoral Officer.

The Constitution provides that the President shall be the 'Head of State', 'the supreme executive authority of the Republic and Commander-in-Chief', 'Fountain of Honour and Justice', 'the symbol of national unity and sovereignty', 'the guardian of the Constitution', and 'the guarantor of national independence and territorial integrity'.[79] The Supreme Court recently held, in *Alhaji Samuel Sam-Sumana v The Attorney-General Minister of Justice of Sierra Leone and Victor Bockarie Foh* ('*Sam Sumana* case') that the phrase 'supreme executive authority', when read together with the provisions of section 53(1), gives the President 'executive powers [that are] only limited by the Constitution'.[80]

[79] Ibid, section 40(1)(2) and (3).
[80] *Alhaji Samuel Sam-Sumana v The Attorney-General Minister of Justice of Sierra Leone and Victor Bockarie Foh* SC 4/2015 (unreported).

The Constitution provides that the President shall, in addition to any responsibility given to him under the Constitution or by Parliament, be responsible for

> (a) all constitutional matters concerning legislation; (b) relations with foreign States; (c) the reception of envoys accredited to Sierra Leone and the appointment of principal representatives of Sierra Leone abroad; (d) the execution of treaties, agreements or conventions in the name of Sierra Leone; (e) the exercise of Prerogative of Mercy; (f) the grant of Honours and Awards; (g) the declaration of war; and (h) such other matters as may be referred to by the President by Parliament.[81]

The President's authority in this respect is not without limitations. The Constitution provides that

> any treaty agreement or convention executed by or under the Authority of the President which relates to any matter within the legislative competence of Parliament or which in any way alters the law of Sierra Leone or imposes any charge on, or authorises any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone and any declaration of war made by the President shall be subject to ratification by Parliament either by (a) an enactment of Parliament or by (b) a resolution supported by the votes of not less than one-half of the members of Parliament.[82]

4.4 Removal of the Vice President and separation of powers

In the *Sam-Sumana* case,[83] the Supreme Court validated the decision of the President to remove the Vice President who had been expelled from the ruling party, finding that he did not have the continuous requirement to hold office as Vice President of the Republic of Sierra Leone and that as he had sought asylum in a foreign embassy, he had abandoned his office and thus created a vacancy in the office of the Vice President.

The Supreme Court, adopting what it described as a 'purposive' interpretation of the Constitution, held that sections 54(2)(b) and 41 together with section 54(5) gave authority to the President to relieve the Vice President of his office and duties in circumstances where the sitting Vice President had lost one of the qualifying requirements for holding office.[84] The

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[81] 1991 Constitution, section 40(4)(a)-(h).
[82] Ibid, section 40(4).
[83] *Sam Sumana* case (note 81).
[84] Section 54(2)(b) of the 1991 Constitution provides that:

> 'A person-
> Shall not be qualified to be a candidate for the office of Vice President unless he has the qualifications specified in section 41.'

Section 41 provides:

> 'No person shall be qualified for election as President unless he-
> (a) is a citizen of Sierra Leone;
> (b) is a member of a political party;
> (c) has attained the age of forty years; and
> (d) is otherwise qualified to be elected as a Member of Parliament.'

Section 54(5) provides:

> 'Whenever the office of the Vice-President is vacant, or the Vice President dies, resigns, retires or is removed from office, the President shall appoint a person qualified to be elected as a Member of Parliament to the office of Vice President with effect from the date of such vacancy, death, resignation, retirement or removal.'

Court held that the express provisions contained in sections 50 and 51 of the Constitution were inapplicable in the circumstances.

We are of the opinion that the Supreme Court in this instance and under the guise of interpretation gave to the President authority that was not expressly provided for in the Constitution. The judgment of the Supreme Court in the *Sam Sumana* case also detracts from the model of separation of powers adopted by the Constitution as it allows the President to assume authority to dismiss the Vice President without the approval of Parliament. However, in all other instances in the Constitution when the question of removing the President or Vice President arises, the final determination is made by Parliament.[85] We are of the view, therefore, that in light of sections 50 and 51 of the Constitution, a purposive interpretation of the Constitution demands for all intents and purposes that the President and Vice President cannot be removed without the approval of Parliament. Further, if it can be said that sections 50 and 51, which provide grounds for removal, do not extend to section 41(b), then the Court cannot clothe the President with powers that the Constitution does not give him or her. Clearly, section 55(c) of the Constitution, which deals with removal of the Vice President, envisages removal solely on the grounds provided in sections 50 and 51.[86]

4.5 The legislature

4.5.1 *The composition of Parliament*

The Constitution provides for the establishment of Parliament and also for a unicameral structure. Parliament consists of the President, the Speaker, and members of Parliament. The members of Parliament also include the paramount chiefs for each of the twelve districts in Sierra Leone.[87] The institution of chieftaincy is recognised by the Constitution as having been established by customary law and usage. The preservation of the institution is guaranteed by the Constitution. The abolition of the office of paramount chief can only be effected by an Act of Parliament approved at a referendum. There are currently 112 elected members of Parliament and 12 paramount chiefs, totalling 124 members.

4.5.2 *Qualification and disqualification of membership*

The Constitution provides that persons are qualified to be elected as members of Parliament if they are citizens of Sierra Leone (other than by naturalisation), have attained the age of twenty-one years, are registered voters, and are able to speak and read English with a degree of proficiency sufficient to allow them to participate in the deliberations of Parliament.[88] In addition, the Constitution disqualifies persons from being elected as members of Parliament if they are members of any Commission established under the Constitution, if they are serving in the armed forces or as a public officers or as employees of a public corporation established under an Act of Parliament, or have been such members, employees, or officers for a period of twelve months prior to the date on which he or she seeks to be elected to

[85] 1991 Constitution, sections 50 and 51.

[86] Section 55(c) provides:

> 'The office of the Vice-President shall become vacant-
> if the Vice-President is removed from office in accordance with the provisions of section 50 or 51 of this Constitution.'

[87] Two new additional districts were created on 29 July 2017. This will affect the composition of Parliament.

[88] 1991Constitution, section 75.

Parliament. Persons adjudged to be lunatics or of unsound mind; persons who have been convicted and sentenced for an offence of fraud or dishonesty or under the sentence of death imposed by law; paramount chiefs; and persons disqualified from practising their profession in Sierra Leone within a period of five years immediately preceding the elections are also disqualified.[89] The Constitution also disqualifies persons who hold office in the Electoral Commission or who have been convicted by any court of any offence connected with the election of members of Parliament.[90] Disqualification in the latter instance is for a period of five years after the next elections following the one for which he or she was disqualified.[91] The Constitution also disqualifies the President, the Vice President, ministers, and deputy ministers from being elected as members of Parliament.[92] This provision is another manifestation of the doctrine of separation of powers in that it ensures that executive and legislative functions are separated.

4.5.3 *Legislative functions of Parliament*

Parliament's powers to make laws are exercised by bills passed by Parliament and signed by the President. When a bill has been passed by Parliament and signed by the President it becomes law upon publication in the Gazette by the President. This requirement provides the executive with an opportunity to have input in respect of bills being passed by Parliament. However, the Constitution also ensures that the President does not arbitrarily derogate from Parliament's ability to make laws. Although the Constitution provides that the President may refuse to sign a bill, it also states that if the President does so he must return the bill to Parliament within fourteen days of the presentation of the bill for his signature, and he must give reasons for his refusal. In the event of the President's refusal to sign a bill, the bill can be passed into law by a vote of no less than two-thirds of the members of Parliament and the Speaker is responsible for publishing it in the Gazette. The ability of Parliament to pass laws in spite of the President's refusal to sign is yet another example of the Constitution's intention to provide a check on the exercise of the executive's power.

The Constitution states that Parliament may make laws with retroactive effect or may postpone the coming into operation of any law.[93] This provision can be an important tool to regulate the exercise of executive power. Parliament may, using this provision, determine when an executive regulation may take effect. However, the Constitution provides a check against the use of legislative powers against the executive arm of the state. More specifically, the Constitution protects certain holders of constitutional posts from parliamentary overreach, especially with regard to their remuneration. The Constitution provides that the salaries, pensions, gratuities, and allowances of the President, the Vice President, the Attorney General and Minister of Justice, ministers, deputy ministers, the Chief Justices and Justices of the Supreme Court, the Court of Appeal, and the High Court respectively, the Director of Public Prosecutions, the chairman and members of the Electoral Commission, the Chairman and members of the Public Service Commission, and the Auditor General shall not be altered to their disadvantage after appointment.

[89] Ibid, section 76(1)(d).
[90] Ibid, section 76(2)-(3).
[91] Ibid, section 76(2).
[92] Ibid, section 76(1)(h).
[93] Ibid, section 106(5).

Although the Constitution vests in Parliament legislative authority for Sierra Leone, such authority is not exclusive. The Constitution itself provides that the President and persons acting under his authority can make orders, rules, or regulations pursuant to powers conferred upon them by the Constitution or by Parliament.[94] These orders, rules, or regulations made by the President or those acting under his authority must be published in the Gazette not later than twenty-eight days after they have been made.[95] These orders, rules, or regulations must be laid before Parliament and they will come into force at the expiration of twenty-one days after being laid before Parliament (unless Parliament before the expiration of the period of twenty-one days annuls any such orders, rules, or regulations by the votes of not less than two-thirds of the members of Parliament).[96] The constitutional requirement for the orders, rules, and regulations made by the executive to be laid before Parliament serves to check or balance the authority of the President to make laws.

As stated above, the President has powers under section 29 of the Constitution to make regulations for the purposes of maintaining and securing peace, order, and good government during a state of public emergency. As a check on the exercise of executive powers, the Constitution provides that during a state of public emergency, every declaration made by the President shall lapse after seven days including the date of publication. If Parliament is in recess at the time of the President's proclamation, the declaration expires within twenty-one days beginning with the date of publication.

4.5.4 *Constitutional amendments*

The Constitution provides for Parliament to amend the Constitution. The Constitution states that any bill for the amendment of the Constitution must first be published in at least two issues of the Gazette before the first reading of the bill in Parliament. The Constitution also stipulates that there should be at least nine days between the first and second publications of the bill in the Gazette. A bill for the amendment of the Constitution must be approved by not less than two-thirds of the members of Parliament at both the second and third readings of the bill in Parliament. However, a bill for the amendment of an entrenched clause of the Constitution or for the passing of a new Constitution, after it has been passed by Parliament, is also to be subject to approval by a national referendum.[97] A referendum is the process of referring a question to the people for a decision by a general vote. The Constitution provides that every person entitled to vote in the elections of members of Parliament shall be entitled to vote at a referendum. The Constitution also provides that a bill for the amendment of the Constitution or a bill for a new constitution will be deemed to have been approved at a referendum if the vote in favour is not less than two-thirds of all the votes validly cast. Implicit in this provision is the regulation by the Constitution of both the executive arm and Parliament (though by no means exclusive) in the passing and/or altering of entrenched provisions of the Constitution relating to the fundamental rights and freedoms of the individual.

4.6 The Judiciary

[94] Ibid, section 170(1).
[95] Ibid, section 170(6).
[96] Ibid, section170(7).
[97] Ibid, section 108(3) and (4).

The judiciary consists of the Supreme Court of Sierra Leone, the Court of Appeal, and the High Court of Justice, which are together recognised as constituting the Superior Court of Judicature of Sierra Leone. The judiciary also includes the magistrates court and traditional courts.

The courts are hierarchical in structure, the Supreme Court being the highest appellate court. The Supreme Court also has original jurisdiction in matters relating to the interpretation or enforcement of the Constitution or where any question arises as to whether an enactment was made in excess of the power conferred on Parliament or any other authority or person by law or under the Constitution. The Supreme Court is seen to serve as a check on the exercise of both parliamentary and executive authority. The Supreme Court normally treats its own decisions as binding upon itself but may depart from a previous decision when it appears right to do so.[98] Decisions of the Supreme Court are binding on all other courts.

The Court of Appeal is the second highest court in the hierarchy of the judiciary. The Court has no original jurisdiction; it has jurisdiction to hear and determine appeals from any judgment, decree, or order of the High Court of Justice. The decisions of the Court of Appeal are binding upon itself and all other courts inferior to the Court of Appeal.[99]

The High Court has original jurisdiction to hear and determine civil and criminal matters and such other original appellate and other jurisdiction as may be conferred upon it by the Constitution or any other law. The High Court also has jurisdiction to hear and determine any matter relating to industrial and labour disputes and administrative complaints.

4.7 Judicial independence

The independence of the judiciary is an important pillar in the doctrine of separation of powers. An independent judiciary is one that is able to check excesses in the use of power by the various arms of government without fear or favour. The provisions of the Constitution speak to the establishment of an independent judiciary.[100] The Constitution provides for a system of appointing judges who are to be approved by Parliament. Parliament can check the quality of the judges nominated for appointment. In terms of tenure, the Constitution protects judges from being arbitrarily removed or unlawfully punished by unwarranted changes in their salaries and other conditions of service. The Constitution also ensures that the judiciary itself is regulated by an independent body, known as the Judicial and Legal Service Commission (JLSC). The JLSC is a commission comprising of the Chief Justice, the most senior Justice of the Court of Appeal, the Solicitor-General, one practising counsel of not less than ten years standing nominated by the Sierra Leone Bar Association, the Chairman of the Public Service Commission, and two other persons, not being legal practitioners, appointed by the President and subject to the approval of Parliament. The JLSC is responsible for the effective and efficient administration of the judiciary. The JLSC serves to regulate the exercise of judicial power. It participates in the appointment and removal of justices of the courts. The President can only make a judicial appointment in accordance with the advice of the JLSC. The Constitution, by providing for the JLSC, serves to check the executive's authority over the judiciary as well as providing for a regulatory mechanism within the judiciary itself.

[98] Ibid, section 122(2).
[99] Ibid, section 128(3).
[100] Ibid, sections 120(1)-(8), 135,137,138, and 140.

The Constitution states that judicial power shall be vested in the judiciary of which the Chief Justice shall be the head.[101] In the exercise of its judicial functions, the judiciary shall be subject only to the Constitution or any other law and shall not be subject to the control or direction of any person or authority.[102] This constitutional provision ensures the independence of the judiciary. Likewise, the Constitution provides that no office of Judge of the High Court of Justice, Court of Appeal, or Justice of the Supreme Court shall be abolished while there is a substantive holder in office,[103] thus protecting the institution of the courts from tyrannical abolition either by the legislature or the executive arm of government.

Further, the Constitution provides that a Judge of the Superior Court of Judicature shall not be liable to any action or suit for any matter or thing done by him in the performance of his judicial functions.[104] By this provision, the independence of judges is individually secured by ensuring that judges are under no restraint, and are able to craft their judgments in matters before them without fear of peril.

Furthermore, the Constitution provides that the salary, allowances, privileges, rights in respect of leave of absence, gratuity, or pension and other conditions of service of a Judge of the Superior Court of Judicature shall be determined by Parliament and that the money shall be paid out of the consolidated fund. The Constitution also provides that such salary, allowances, privileges, and rights shall not be varied to the disadvantage of the Judge.[105]

Finally, the Constitution provides that a Judge of the Superior Court of Judicature shall hold office during his or her good behaviour. This provision guarantees that the Judge has security in the tenure of his or her office until he or she reaches the retirement age of 65 years. The Constitution also provides that a Judge of the Superior Court of Judicature may only be removed from office for his or her inability to perform the functions of the office. Such inability may arise from infirmity of body or mind of for stated misconduct.

4.8 Removal of the Chief Justice

Where a question is raised in respect of the removal of the Chief Justice, the process should be initiated by a petition to the President.[106] It appears that any person may make such a petition because the Constitution does not provide any limitations in this regard. The President, in consultation with Cabinet, appoints a tribunal consisting of three Justices of the Supreme Court or legal practitioners qualified to be appointed as Justices of the Supreme Court and two other persons who are not members of Parliament or legal practitioners. The President can only remove the Chief Justice from office if the tribunal so recommends and the removal of the Chief Justice is subject to the approval of a two-thirds majority in Parliament.

4.9 Removal of a Judge from office

[101] Ibid, section 120(1).
[102] Ibid, section 120(3).
[103] Ibid, section 120(15).
[104] Ibid, section 120(9).
[105] Ibid, section 138(1) and (3).
[106] Ibid, section 137(8), (9), and (10).

The process for removing a Judge other than the Chief Justice has to be initiated by the JLSC. The JLSC makes a representation to the President that grounds exist for the Judge to be investigated. The President acting in consultation with the JLSC then appoints a tribunal consisting of a chairperson and two other members, all of whom should be persons qualified to hold or who have held office as a Justice of the Supreme Court. The Constitution provides that the Judge can only be removed by the approval of a two-thirds majority in Parliament after the President has acted upon the recommendation of the tribunal and referred the matter to Parliament. It can therefore be seen that all three arms of government must participate for the lawful removal of a Judge from office.

V. Federalism/decentralisation

Sierra Leone is typically a unitary state. It functions with a centralised national executive, a single unicameral legislature, and a national judiciary. For administrative purposes, the country is subdivided into cities, districts, a municipality, and chiefdoms which have councils to regulate aspects of their affairs. One of the institutional reforms that followed the country's decade-long war from 1991 to 2001 was the decentralization of local governance structures and the strengthening of local councils. The over-centralization of political, administrative, and economic power in the capital Freetown was seen as a root cause of rural poverty and the chaotic civil war of the 1990s. Thus democratic decentralization was seen as a measure towards improving development planning and service delivery, thereby reincorporating alienated populations into national bodies and consequently reducing poverty, enhancing local governance, and sustaining peace building.[107]

A new Local Government Act was legislated in 2004[108] and the Decentralisation Policy was developed in 2010 to strengthen local councils, clarify their functions, and provide for funding and periodic elections. Local councils consist of not less than twelve elected councillors and, where the area locality has a chieftaincy system, paramount chiefs who are selected from among themselves to represent their interests in council.[109] There appears to be no division of labour in the areas of competencies governed by councils and other layers of government. However, the Local Government Act provides for generalized functions of local councils. These include promoting the development of the locality and the welfare of its people;[110] development of basic local infrastructure; improvement and management of human settlements and the environment in localities; initiating, developing, and executing development plans; cooperating with relevant agencies to ensure the security of the locality; overseeing local chiefdom councils in relation to matters delegated to them by the councils; and determining and collecting local tax and property tax.[111] Local councils have legislative powers and may enact by-laws, which are subsidiary to Acts of Parliament. Relevant government line ministries are responsible for policy in relation to areas implemented by local councils. The former also provide technical guidance to the latter.[112] It has been contended that the relevant line ministries have been slow to release control over functions scheduled for devolution and the Ministry of Local Government has tended to leave

[107] Richard Fanthorpe, Andrew Lavali and Mohamed Gibril Sesay, 'Decentralization in Sierra Leone: Impact, Constraints and Prospects' (Consultancy report, 2011).
[108] Act No 1, 2004.
[109] Local Government Act, 2004, section 4.
[110] Ibid, section 20(1).
[111] Ibid, section 20(2).
[112] Ibid, section 20(3).

the championing of decentralisation to its project implementation unit while guarding its historical prerogatives in the supervision of chieftaincy affairs.[113]

VI. Constitutional adjudication

The Supreme Court has exclusive jurisdiction in matters of constitutional adjudication. Sierra Leone does not have a separate established constitutional court. Rather, the Constitution vests in the Supreme Court original jurisdiction to the exclusion of all other courts in all matters relating to the enforcement or interpretation of the Constitution.[114] Similarly, the Supreme Court is empowered to determine questions as to whether an enactment was made in excess of the power conferred upon Parliament or any other authority or under the Constitution.[115] When a question relating to the interpretation of any provision within the Constitution is raised in any court of law, the Constitution provides that the matter should be postponed until the issue raised on that constitutional point has been referred to and determined by the Supreme Court.[116]

The Constitution provides that disobedience of the terms or directions of the Supreme Court constitutes a crime.[117] The President (as has been seen in the discourse above) has significant authority bestowed upon him by the Constitution and it is to be expected that in the exercise of such authority, questions may be brought to the Supreme Court as to whether or not he has exceeded his authority. The President however does enjoy immunity from prosecution or civil suit in respect of anything done or omitted to be done by him in his office or private capacity**.** However, in the *Sam-Sumana* case, the Chief Justice opined that an action could be maintained against the President for a declaration in respect of the interpretation of the Constitution. The Chief Justice declined to address the issue as to whether the Supreme Court's order could be enforced against the President.

6.1 Interpretation of the Constitution

The Supreme Court is the only court vested with authority to ascertain the intention of the legislator in respect of the words used in the Constitution. In other words, the Supreme Court has exclusive jurisdiction to determine, when called upon to do so, what Parliament intended to say in relation to the language in the Constitution. The Supreme Court held in the *Sam-Sumana* case that it would adopt a purposive approach when interpreting the Constitution as opposed to restricting itself to the literal approach in cases brought before it. The literal approach to statutory interpretation attaches to words used in the statute their plain, ordinary, and grammatical meaning for the purpose of discerning what the true intention of Parliament was at the time of the enactment. The purposive approach, on the other hand, seeks to interpret the provisions of an enactment in light of its context and purpose when the application of the literal approach leads to an absurdity. In other words, the Supreme Court will not construe provisions of the Constitution in isolation but will look at the Constitution as a whole in order to give effect to the intention of its framers.

[113] Fanthorpe, Lavali and Gibril Sesay (note 108), at 11.
[114] 1991 Constitution, section 124(1).
[115] Ibid, section 124(2).
[116] Ibid.
[117] Ibid, section 127(4).

Thus in the case of *The Sierra Leone Bar Association v The Attorney-General and Minister of Justice and Eke Ahmed Halloway*,[118] the Supreme Court was called upon to give meaning to section 64 of the Constitution and to determine whether the Attorney General and Minister of Justice was 'a minister' within the meaning of section 56(2)-(5) of the Constitution. In this case, the Attorney-General and Minister of Justice had been appointed by the President of Sierra Leone without the approval of Parliament. Previous holders of the office of Attorney-General and Minister of Justice had been subjected to parliamentary approval. The Supreme Court was called upon for the interpretation of sections 56, 57, 59, 60(1) and (2) of the Constitution and more specifically to determine (a) whether appointment to the office of Attorney-General and Minister of Justice required the approval of Parliament and (b) whether the provisions of section 56(2)-(5) inclusive of the Constitution as it applied to ministers were generally applicable to those offices.

Section 56(2) states:

> A person shall not be appointed a Minister or Deputy Minister unless-
>
> (a) He is qualified to be elected as a Member of Parliament; and
> (b) He has not contested and lost as a candidate in the general election immediately preceding his nomination for appointment; and
> (c) *His nomination is approved by parliament*. (emphasis added)

Section 64(1) reads: 'There shall be an Attorney-General and Minister of Justice, who shall be the principal legal adviser to the Government and *a Minister*.' (emphasis added).

Section 64(2) provides: 'The Attorney-General and Minister of Justice shall be appointed by the President from among persons qualified to hold office as a Justice of the Supreme Court and shall have a seat in the Cabinet.'

The argument of the plaintiff was that the Attorney-General and Minister of Justice was a minister like any other minister of state and that he took no other oath but that required under the Constitution to be taken by all ministers.

The defendants conceded that the Attorney-General and Minister of Justice was a minister but contended that the Attorney-General and Minister of Justice was very much more than a minister. The defendants argued that (1) the office of the Attorney-General and Minister of Justice was unique and relied on the fact that the office was established by the Constitution, unlike other ministers whose ministries were created by the President under section 56(1) in his absolute discretion, (2) that the Attorney-General and Minister of Justice, quite unlike other ministers, must have certain professional qualifications, whereas other ministers need not have any specialist qualification; (3) unlike the other ministers of government, the Attorney-General and Minister of Justice was the only person apart from the President and Vice-President who was guaranteed a seat in Cabinet; and (4) that throughout Sierra Leone's constitutional history since independence in 1961, there had always been a separate and distinct constitutional provision dealing with the office and appointment of the Attorney-General and Minister of Justice.

[118] SC 2/2002 (unreported).

The Supreme Court held that in light of other provisions in the Constitution, the office of the Attorney General and Minister of Justice was unique and was to be treated separately from other ministers under the Constitution. The Court noted that on a holistic reading of the Constitution there were at least ten other instances where Parliament had deemed it necessary to express in the Constitution that parliamentary approval should be sought for appointment to certain public offices. The Supreme Court adopted the position that

> it must have been a deliberate decision of Parliament that the appointment of the Attorney-General and Minister of Justice as well as the Solicitor-General, his principal assistant shall not be subjected to parliamentary screening or investigation as long as both have otherwise fulfilled the professional qualifications stipulated in sections 64(2) and 65(2) respectively.[119]

The Supreme Court arrived at a conclusion by applying a purposive interpretation to the constitutional provisions in that instance.

The Supreme Court further held that it could not 'under guise of judicial interpretation introduce something into the Constitution that cannot be found there',[120] meaning that it could not read into the express provisions of section 64 a proviso that the Attorney-General and Minister of Justice's appointment required the approval of Parliament.

VII. International Law and Regional Integration

Sierra Leone's laws and legal traditions reflect its close historical ties with Britain, its former coloniser, and where, until recently, most of its lawyers and judges were trained. Thus, Sierra Leone largely inherited the British Westminster political system and to some extent its legal system and traditions.[121] Even though Sierra Leone's 1961 Independence Constitution embodied a bill of rights, which was a deviation from British tradition, this was part of a British agenda which ensured that the constitutions of its former colonies were embedded with entrenched bills of rights. It is not surprising, therefore, that the sources of international law and its relationship with the domestic legal order reflect the Anglo-American dualist tradition. The Constitution does not clarify the position regarding the application of international law. However, in defining the powers of the President, section 40(4) speaks to the application of international conventions in the domestic legal order. Further, when occasion calls to look beyond national jurisprudence, due to its historical ties with Britain and the fact that the common law of Britain is a source of Sierra Leone law, Sierra Leonean judges rarely refer to principles of international law or international legal precedents, but rather to British or regional cases.

7.1 Sources of international law and their application in domestic law

In conceptualising the term 'sources of law', Oppenheim employs the imagery of the source of a running stream. In his words,

[119] Ibid, p 17.
[120] Ibid, p 20.
[121] The country started training its own lawyers in 1985.

> [w]hen we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water… Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence these rules come, we have to follow these streams upwards until we come to their beginning. Where we find that such rules rise into existence, there is the source of them.[122]

Thus if we want to know where laws come from, we have to follow them to their origins.[123] Sierra Leone's interaction with international law derives from a number of considerations. The first is from express consent with regard to the international conventions the country ratifies, signifying intent to be bound by the rules and obligations that they contain. An extension of this argument will imply that by ratifying the Charter of the United Nations and, by implication, the Statute of the International Court of Justice (ICJ Statute) which is an integral part of the former, Sierra Leone subscribes to all the sources of international law as defined therein. These are (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59 of the ICJ Statute, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[124] The second consideration is historical origin or association, and legislative import or adoption. As a former colony of Britain, Sierra Leone's British legal tradition is strong both in the domestic legal system and in its reception of international law. Further, post-independent Sierra Leone adopted principles of English laws, including some English statutes.[125] The third consideration is implicit consent or conduct, signifying the adoption of or acquiescence to customs and rules of international law. The second and third derivatives are crucial to the form of incorporation of customary international law and its content. Two primary sources of international law which are most likely to be at play in the domestic sphere are international conventions wherein Sierra Leone makes an express commitment to be bound by international law, and further transforms such law in her domestic legal system through legislation, and customary international law, by which customs are directly applicable in the domestic order especially in the absence of persistent objection by Sierra Leone. However, Sierra Leone will not be able to make a sustainable objection in respect of peremptory norms of *jus cogens*,[126] from which no derogation is permitted, or obligations *erga omnes*, in respect of which a state owes obligations to the international community as a whole and the enforcement of which all states have an interest.[127]

> In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of

[122] L Oppenheim, Vol I, 3 Ed, *International Law: A Treatise* (Clark, New Jersey, The Lawbook Exchange, Ltd, 2005) 20.
[123] Ibid.
[124] Statute of the International Court of Justice, Article 38.
[125] Courts Act, No 31, 1965, Section 74.
[126] The origins of *jus cogens* can be found in Article 53 of the Vienna Convention on the Law of Treaties of 1969.
[127] See *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, 1970 ICJ Reports 3.

> protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character.[128]

The nature of certain obligations is the concern of all states. There is no universally accepted position on which norms are *jus cogens* or how norms attain the status of *jus cogens*. However, norms which have come to be regarded as *jus cogens* include the prohibition against aggression and piracy, as well as norms that promote the protection of human rights, such as the prohibitions against racial discrimination, slavery, genocide, torture, and denial of self-determination.

7.2 Treaties or conventions

International conventions play a central role in the development and shaping of international law. Their proliferation has made them a very important source of international law.[129] Their ratification is an executive act. Since the legislature plays no role in the conclusion of international conventions, they do not form part of domestic law except by legislative transformation. The conclusion of international conventions and their domestication in Sierra Leone is governed by the Constitution. The Constitution empowers the President with the authority for the execution of treaties, agreements, or conventions in the name of Sierra Leone.[130] This provision is among others that define the powers of the President, rather than seeking to establish the sources of international law. The provision further sets the relationship between conventions ratified by Sierra Leone and the domestic legal order, adopting a dualist model and the requirement for domestication of international conventions. In this regard, the Constitution further provides that

> any Treaty, Agreement or Convention executed by or under the authority of the President which relates to any matter within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorises any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament.[131]

Sierra Leone follows the dualist tradition. This means that while international conventions create international obligations and bind the country on the international plane, they require domestication to create legal obligations in-country. Until such domestication occurs, international conventions are not applicable in the domestic legal framework of Sierra Leone. Domestication occurs by the enactment of legislation by Parliament[132] or a resolution supported by the votes of not less than one-half of the members of Parliament,[133] though the former procedure is always followed in practice.

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[128] Ibid, p 32.
[129] Christian N Okeke, 'The use of International Law in the Domestic Courts of Ghana and Nigeria', 32(2) *Arizona Journal of International & Comparative Law* (2015) 372, 394.
[130] 1991 Constitution, section 40(4)(d).
[131] Ibid, section 40(4)(h).
[132] Ibid, section 40(4)(h)(i). The question of domestication was argued, and vaguely discussed in *Saad Group Limited v The Owners and/or Persons interested in the vessel MV "Praphathepprarat"* (FTCC: 008/13) [2013] SLHC 08 (10 April 2014, unreported), where the court missed the opportunity to articulate on domestication, deciding the matter on the pleadings rather than on the applicable international convention.
[133] 1991 Constitution, section 40(4)(h)(ii).

In the *Sam Sumana* case, Browne Marke JSC made reference to the transformation process with regard to diplomatic immunity and the inviolability of the premises of diplomatic missions. In this case, the applicant, the former Vice President who had been expelled from the ruling party, sought refuge in a foreign embassy for what he averred was fear for his life. The Judge noted in his judgment that '[f]oreign diplomatic missions and their premises in Sierra Leone, are accorded full diplomatic immunity'.[134] The Judge gave recognition to diplomatic immunity on the basis of national legislation, the Diplomatic and Privileges Act of 1961, which domesticated the Vienna Convention on Diplomatic Immunities of 1961,[135] to which Sierra Leone is a party. That the Judge cited both section 3(1) of the Diplomatic and Privileges Act and Article 22 of the Vienna Convention, which provide for immunity and inviolability of premises, demonstrates the application of the principle ensconced in the latter by virtue of the former. The question arises whether the principle of diplomatic immunity will apply in the absence of a convention by virtue of the fact that it has attained the status of customary international law and the fact that Sierra Leone by conduct has complied with the principle. Would Sierra Leone have complied with the principle had it not ratified the Vienna Convention? What is clear is that so far as diplomatic immunity is concerned, reference has only been made to convention obligations, and more particularly the applicability of international law through the domestication process.

As was demonstrated by the *Sam Sumana* case, it is clear that the courts of Sierra Leone will rely not only on the domesticating legislation but also on the relevant international convention which has been domesticated, so as to reinforce their position or clarify gaps in the domestic statute. Similarly, in *Granville Fillie v The Representative World Health Organisation and Joseph Monrovia*[136] the court relied on the Diplomatic and Privileges Act in determining the immunity of the defendants. The court also relied on the Vienna Convention to answer the question as to whether the defendant, by taking out third party insurance as required by the laws of Sierra Leone, had subjected itself to national laws and thus waived its immunity. Adopting the position taken by the court in a Ghanaian case[137] which relied on Article 41 of the Vienna Convention to answer a similar question that arose before that court, the court in the instant case noted that by taking out third party insurance the defendant was merely complying with the Vienna Convention, which requires all diplomatic agents to respect the laws of the receiving state. Consequently, this did not amount to a waiver of immunity. Also, in the *Issa Hassan Sesay* ruling,[138] the court made reference to the Rome Statue of the International Criminal Court,[139] which Sierra Leone has ratified but not domesticated, as well as to a number of treaties which Sierra Leone has not ratified[140] but are similar in nature and with relevant principles, to distinguish the non-application of immunity of heads of states in international tribunals, as opposed to its application in national and foreign courts. In this regard, the court used provisions in treaties establishing

[134] *Sam Sumana* case (note 81), p 30 of the cyclostyled copy of the judgment.
[135] Act No 35, 1961.
[136] CC 1215/2005 2005 F No 51, 14 March 2007 (unreported). See also *Issa Hassan Sesay alias Issa Sesay, Alieu Kondewa, Moinina Fofanah v The President of the Special Court, the Registrar of the Special Court, the Prosecutor of the Special and the Attorney-General and Minister of Justice* SC 1/2003, 14 October 2005 (unreported), where reference was made to the import of the Special Court Agreement, 2002 (Ratification) Act. No 7, 2002.
[137] *Armon v Katz* (1976) 2 GLR 124.
[138] SC 1/2003 (note 137).
[139] Rome Statute of the International Criminal Court, Article 27(2).
[140] Charter of the Nuremburg Tribunal, Article 7; Statute of the Tokyo Tribunal, Article 6; Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Article 7(2); and Statute of the International Criminal Tribunal for Rwanda (ICTR), Article 6(2).

international tribunals that excluded the application of sovereign immunity to explain section 29 of the Special Court Agreement, 2002 (Ratification) Act, which contained a similar provision.

7.3 Customary international law

Customary international law refers to the rules of international law that have emerged from long-standing practice by states (*usus*)[141] and an acceptance of an obligation to be binding (*opinion juris sive necessitates*).[142] Thus these rules emerge from general and consistent practice by states which regard them with a sense of legal obligation. State practice may be discerned from support for a particular rule or may be inferred from acquiescence to a rule, especially in its formative stage.[143] Evidence of state practice may also be found in various materials including international conventions, decisions of national courts, national legislation, policy statements by government officials, opinions by national law officers, and comments on reports and resolutions of organs of the United Nations.[144] A practice must constitute consistent and uniform usage to qualify as custom.[145]

A settled practice by itself is insufficient to establish customary international law. In addition, it should be regarded as an obligation and states should feel bound by the practice.[146] In other words, the practice should be accepted as law.[147]

Sierra Leone's 1991 Constitution makes no provision for the application of customary international law. However, as noted above, international law derives from legislative import and historical legacy. Through its historical connection with Britain and the adoption of British common law by colonial legislation, it can be said that the laws, customs, and principles applicable in Britain, including international law, found their way into the Sierra Leone legal system. Sierra Leone became a crown colony in 1808 and the British colonialists brought their laws with them.[148] The British Parliament legislated Orders in Council and Proclamations for the colony. This resulted in a dual legal system wherein the pre-colonial customary laws and legal systems operated side by side with the received English law, so long as the former was not repugnant to the latter. After Sierra Leone attained independence in 1961 it gained full executive and legislative powers though it remained tied to Britain with the Queen – represented by a Governor General in Sierra Leone – remaining the ceremonial head of state until a republic was declared in 1971. Up until this time, the Privy Council in England remained Sierra Leone's highest court of judicature. Thus, English law continued to influence the Sierra Leone legal system. Consequently, the Courts Act of 1965 provides that subject to the provisions of the Constitution and any other enactment, the common law, the doctrines of equity, and statutes of general application in England on 1 January 1880 'shall be in force in Sierra Leone'.[149] With the entrenchment of English common law in the Sierra Leone legal system since colonisation, and the 1965 legislative adoption, the principles

[141] *Asylum Case (Columbia v Peru)* 1950 ICJ Reports 266.
[142] John Dugard, *International Law: A South African Perspective* (3rd ed, Cape Town, Juta, 2009) 29.
[143] Ibid.
[144] Ibid.
[145] *Asylum Case* (note 142), at 266.
[146] Dugard (note 143), at 33.
[147] See Statute of the International Court of Justice, Article 38(1)(b).
[148] See JND Anderson, 'Colonial Law in Tropical Africa: The Conflict Between English, Islamic and Customary Law', 35(4) *Indiana Law Journal* (1960) 433, 433.
[149] Courts Act, No 31, 1965, section 74. See also 1991 Constitution, section 170.

relating to the direct application of customary international law in domestic law apply in Sierra Leone as in Britain.

In Sierra Leone, as in Britain, customary international law operates on the basis of the Blackstonian, or automatic, incorporation.[150] This principle was articulated in the case of *Trendtex Trading Corporation Ltd v Central Bank of Nigeria*[151] where the court held that sovereign immunity does not apply to commercial contracts, a principle that formed part of English law. The court held that international law is incorporated and domesticated into English law. The courts of Sierra Leone rely heavily on English cases, which are of persuasive authority, and also apply English common law. It can be concluded, therefore, that customary international law forms part of the laws of Sierra Leone.[152]

7.4 The Special Court for Sierra Leone

The establishment of the Special Court for Sierra Leone (SCSL) on 1 July 2002, and its resulting practice and jurisprudence, has contributed significantly to the development and shaping of international humanitarian law and has also sought to establish a legacy for the Sierra Leone legal system.

Sierra Leone was plagued by an eleven-year civil war which ignited in 1991, resulting in very brutal killings and gross violations of human rights. Attempts to bring the war to an end resulted in the signing of the Lomé Peace Accord, referred to previously, which provided amnesty for perpetrators of the conflict, including leaders of the RUF rebel group. However, subsequent to renewed violence, President Ahmed Tejan Kabba officially requested the United Nations to establish a tribunal to try those bearing greatest responsibility for the atrocities. The SCSL was created by treaty between Sierra Leone and the United Nations as an independent hybrid special court in accordance with a Security Council resolution.[153]

The SCSL has made notable contributions to international law through its jurisprudence. This has involved building on or expanding the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the first international courts after Nuremberg. A notable contribution of the SCSL's contribution to international law was its development of the prohibition of attacks against UN peace keepers.[154] In the *RUF Case*,[155] the SCSL affirmed that the prohibition of such attacks was provided for under customary international law as part of a broader prohibition on attacks on civilians. This case was significant in strengthening the protection mechanism of peace keepers. The SCSL gave a comprehensive interpretation of the prohibition of attacks against UN peace keepers to include the deprivation of personal liberty in addition to physical injury or death. The SCSL further

[150] See J Westlake, 'Is International Law Part of the Law of England?', 22 *Law Quarterly Review* (1906) 14, 26;
[151] [1977] 1 ALL ER 881.
[152] An exception is the requirement that customary international law be consistent with statute. See Oppenheim, (note 123), at 26-27; Edwin Borchard, 'Relation Between International Law and Municipal Law', 27(2) *Virginia Law Review* (1940) 137, 145.
[153] UN Security Council Resolution 1315, 14 August 2000.
[154] See Alhagi BM Marong, 'Fleshing out the Contours of the Crime of Attacks Against United Nations Peacekeepers – The Contribution of the Special Court for Sierra Leone', in Charles C Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (Cambridge, Cambridge University Press, 2014) 290.
[155] *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao* Case No SCSL-04-15-T.

provided that the use of robust force in specific circumstances, such as for the protection of civilians, did not convert peace keepers into peace enforcers, thus enhancing the protection mechanism for peace keepers. This principle regarding the prohibition of attacks on peace keepers has received recognition by the International Criminal Court.[156] Other areas in which the jurisprudence of the SCSL has made notable contribution include immunity of sitting heads of states for international crimes before international courts,[157] the implications of amnesties granted under domestic law for the prosecution of international crimes before international courts,[158] the simultaneous co-existence of international criminal courts and other transitional justice mechanisms (truth commissions),[159] gender crimes, including sexual slavery and forced marriage,[160] and criminal responsibility for the recruitment of child soldiers.[161]

One of the milestones that hybrid or mixed tribunals are expected to reach is to establish a legacy for the national judiciary and legal system in particular and for international law as well. In this regard, the SCSL was the first of such tribunals that specifically set out to do just that. Consequently, the SCSL established a Legacy Phase Working Group which developed a White Paper on Legacy, intended to sustainably influence the Sierra Leone justice system. The SCSL's legacy spanned from knowledge creation to the provision of infrastructure and providing support for victim memory. This included the transfer to Sierra Leone of the SCSL's premises, which are being used for legal education by the Sierra Leone Law School. The provision of legal information and the opportunity for research was supported by the transfer of the SCSL's Specialized Library to the judiciary of Sierra Leone. The SCSL also supported the development of the Sierra Leone Legal Information Institute in partnership with the Open Society Foundation, which provides free online access to Sierra Leone's legal materials, including case law and legislation, and has become a valuable resource for legal practitioners and researchers.[162] Further, the SCSL developed a casebook which consists of the jurisprudence and factual findings of its cases, with analysis and resource tools.[163] The establishment of a Peace Museum has provided an opportunity to access these documents[164] and has become an important symbol of memorialisation, which is symbolic for the victims as well as providing valuable lessons for future generations.

The SCSL created permanent records by establishing an archive of copies of its records in Sierra Leone, in addition to an archive in The Hague, the Netherlands. The records

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[156] *Prosecutor v Bahr Idriss Abu Garda*, ICC-02/05-02/09.
[157] *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No SCSL-2—3-01-I, 31 May 2004, at 59.
[158] *Prosecutor v Allieu Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lome Accord, Case No SCSL-2004-14-AR72(E), 25 May 2004, at 128.
[159] *Prosecutor v Samuel Hinga Norman, Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Sam Hinga Norman,* Case No SCSL-2003-08-PT, 29 October 2003, at 101.
[160] *Prosecutor v Sesay, Kallon & Gbao*, Case No SCSL-04-15-T, Judgment (Special Court for Sierra Leone, Trial Chamber I), 2 March 2009.
[161] *Prosecutor v Samuel Hinga Norman*, Decision on Preliminary Motion on Lack of Jurisdiction (Child Recruitment), Case No SCSL-2004-14-AR72(E), 31 May 2004, at 132.
[162] Tenth Annual Report of the President of the Special Court for Sierra Leone, June 2012 to May 2013, at 24, available at http://www.rscsl.org/Documents/AnRpt10.pdf (accessed on 15 July 2017).
[163] Ibid, at 36.
[164] Eleventh and Final Report of the President of the Special Court for Sierra Leone (undated: the foreword, by the President of the Court, is dated December 2013), at p 40, available at http://www.rscsl.org/Documents/AnRpt11.pdf (accessed on 16 July 2017).

are important to victims,[165] civil society, activists, academics, lawyers, journalists, and future generations in Sierra Leone. They form the richest source of information on the conflict in Sierra Leone.[166] The archives are combined with the records of the Truth and Reconciliation Commission and the National Commission for Disarmament, Demobilisation and Reintegration to create a unified research centre on transitional justice following Sierra Leone's civil war. While the SCSL did implement a number of legacy initiatives, the expectation is that a mixed tribunal of the nature of the SCSL will influence transformation of the national judiciary, or at least catalyse transformation.[167] However, it is doubtful whether the legacy initiative has had significant impact on the Sierra Leone justice system. Evidence of the impact of the SCSL's legacy should ordinarily see demonstrable evidence of the strengthening of the rule of law, enhancement of national capacity, or an increased demand for justice. The SCSL employed national judges, prosecutors, and investigators and provided them with training, and it is expected that they will use their skills in the national system. In the absence of an evaluation, there is no demonstrable evidence that this has occurred. It has been suggested, however, that the success of legacy should be a national rather than an international responsibility.[168] This proposition appears to recognize the importance of national buy-in and local ownership of internationally supported reforms. This is crucial if the legacy of international tribunals is to be sustained with the maximum effect. Influencing local legal cultures is a long process and for the Sierra Leone legal system, the impact of the SCSL appears to have been minimal. It must be noted that the SCSL has established the notion that accountability is a consequence for impunity. This should serve as deterrence and will probably contribute to the future stability of Sierra Leone.

VIII. Conclusion

Sierra Leone's chequered constitutional history has taken the country through one-party rule, military interregnums, and multi-party democracy. This has mainly delivered centralized governance and the dominant use of executive powers. Since the adoption of a one-party political system, the courts have increasingly deferred to the executive. With this and the several limitations of rights in the bill of rights, the protection of human rights and human rights litigation have not flourished. The legislature has also increasingly towed the line of the executive, resulting in an erosion of the notion of separation of powers, notwithstanding the fact that the Constitution has strong provisions to guarantee this. The 1991 Constitution is not fundamentally different from the 1971 and 1978 Constitutions in terms of content, and specifically with regard to the bill of rights. Thus, although constitutional changes approach, it is yet to be seen whether ground-breaking changes will be introduced to promote democracy and the protection of human rights in Sierra Leone.

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