

“ACCESS TO LAND IN AFRICA”

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Introduction

Land is as significant a natural resource as are oxygen and sunlight in the global ecosystem. In essence, without land, the existence and continuity of the human life would be rendered impossible. To large extent, there is hardly any social or economic discourse that would not feature the use of or dependence on land. Human development in the areas of food security and the other provisions for the welfare of citizens of any state, or nation cannot be attained without adequate land resource. In most countries on the African continent, agriculture remains their breadbasket hence land as a resource straddles both the legal sphere and is at the very heart of their economic development and sustenance. Before the dawn of the millennium, access to land was not generally speaking a legal entitlement in most parts of Africa. While the topic seeks to canvass contributions in a bid to portraying a general picture of the right or access to land in Africa, my especial focus and examples would be tailored on the case of Sierra Leone (of which I am a citizen) interspersed with comparative references to other states in Africa. Given the brevity of time, I am certain that this approach would be most feasible to achieving the objective of this paper which is to shed light on the state of land access in Africa with factual illustrations and instances.

Sierra Leone has a total area of 71,740 km² (27,699 sq mi), divided into a land area of 71,620 km² (27,653 sq mi) and water of 120 km² (46 sq mi)¹. About 75% of the landmass of Sierra Leone is arable land and some 70% of its population depend on some form of agricultural activity (mostly subsistence farming) to eke out a living. Following the end of the civil conflict which disrupted livelihoods especially agricultural activities both commercial and indigenous in Sierra Leone with the attendant consequence of food poverty, the current government of Sierra Leone (likely inspired by its predecessor) has committed itself to food security as a means of eradicating poverty hence the inclusion of food security under one of the pillars in its current agenda for prosperity². Underlying the aspiration of food security is the crucial issue

¹ <http://www.fao.org/ag/agp/agpc/doc/counprof/Sierraleone/Sierraleone.htm>

² <http://www.statehouse.gov.sl/images/pics/afp%20version%207.1doc.pdf>

of land, the tenure/ownership, availability, disposal or alienation and other associated ramifications of the same.

The right or access to land in Sierra Leone

The Constitution of Sierra Leone Act No. 6 of 1991, the grund norm, and gives legitimacy or otherwise to all laws, policies, acts and omissions of government and the governed in Sierra Leone. The bill of rights (called the fundamental human rights) entrenched in the extant constitution of Sierra Leone does not include the right to land, housing or indeed any other socio-economic right as justiciable rights. Sierra Leone's Constitution provides as one of the aspirations of the State of Sierra Leone in Section 7(1)(d) that "[t]he State.....place proper and adequate emphasis on agriculture in all its aspects so as to ensure self-sufficiency in food production". This provision like many other aspirations of state policies in chapter two of the said Constitution merely serve as guidelines for governance and cannot be the basis for any judicial redress (as stipulated in Section 14 of the said Constitution). This means therefore that broadly speaking there is no constitutional (human) right to land or legal access to land or housing beyond the traditional legal rights and limitations of land tenure.

International obligations in regard access to land/land rights

Sierra Leone has signed and ratified a number of international instruments/treaties dealing with the protection of human rights. These include the African Charter on Human and People's Rights (including the Maputo Protocol), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Universal Declaration on Human Rights (the Universal Declaration), the Convention on the Rights of the Child. Most of these instruments/treaties have provisions dealing with the right or access to land and/or right to food:

Article 25 of **The Universal Declaration of Human Rights** provides that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

Article 11 of the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** provides that:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

Article 14 of **The African Charter on Human and Peoples’ Rights** provides as follows:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

Article 15 of **The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa**

“States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;

Given that Sierra Leone is a state party to the foregoing international instruments which declare/recognise access to land (housing) as human right and place on state parties related obligations, some school of thought would argue that Sierra Leone has an obligation not only to give effect to the provisions in those treaties by incorporating them in its corpus of laws (since it operates a dualist system) but to ensure that until it takes legislative steps to incorporate them in its laws, it does not act in a manner repugnant to the spirit and intendment of the treaties.

The land tenure system in Sierra Leone: two systems one people

There are two forms of land holding in Sierra Leone, one applies to land in the ‘Western Area’ that is, the land mass of the capital city, Freetown, and its immediate environment comprising villages and industrial precincts, which are commonly referred to as Greater Freetown. The other category of land tenure applies to the much greater mass of land

in the provinces, which comprise the 12 districts composed of cities, towns, and villages, under the guardianship of over a hundred paramount chiefs assisted by town chiefs and village chiefs. Largely customary law governs land ownership in the provinces.

Historically, subjects of the British Crown at the time (indigenous residents of Freetown) were allowed freehold interest in land in the Western Area hence individuals (citizens only) can have, grant, dispose of or alienate freehold interest in a piece or parcel of land in Freetown (Western Area). Some scholars have argued that only one form of land holding exists in the provinces, that is, communal ownership. There is another school of thought which has propounded the concept of land holding by the family and individuals. Freetown, the seat of government since 1961 when Sierra Leone became independent, was managed as a colony of Britain during the colonial era.

Chief Justice Rayner wrote in his "Report on Land Tenure in West Africa" in 1898 and the following passage was cited with approval by the Judicial Committee of the Privy Council in AMODU TIJANI Vs. SECRETARY, SOUTHERN NIGERIA [1921] 2 A. C. at 404-405 and by the Circuit Court of Sierra Leone in P. C. BONGAY Vs. MACAULEY [1920-36] ALR (SL) 212 at 221-213:

"The next fact which is important to bear in mind in order to understand native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of family, has charge of the land, and in loose mode of speech he is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has firm hold on the people, and in most case, even in Lagos,

land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as individual owner, but on his death all his family claim an interest, which is always recognised, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land”.

It is worthy of mention that the combined effect of Sections 3 & 4 of The Provinces Land Act Cap. 122 is that freehold interest (communal or otherwise) in land outside the Western Area cannot be held by persons referred to as non-natives in the said Act. Non-natives as defined in Section 3 of the Sierra Leone Citizenship (Amendment) Act No. 13 of 1976 are those citizens of Sierra Leone whose principal place of settlement is in the Western Area.

The result of section 4 of the Provinces Land Act is that whilst natives can own land in every part of Sierra Leone, non-natives can only own land in the Western Area and are precluded from acquiring freehold interest in land in the provinces. This by all means creates a divided country (one country, two people) as regards the land tenure structures in Sierra Leone. This legislative regime in itself fosters an inequitable distribution of land as a resource in Sierra Leone since some citizens can acquire land (freehold) throughout the state of Sierra Leone while some others are geographically restricted in their access to or right to land ownership.

Commercial growth and its impact on land use and degradation

Post-conflict economy of Sierra Leone has seen a surge in mining and other commercial activities in the country especially in the Provinces. Multinational entities and other investment groups have since acquired large mass of land especially in the areas outside Freetown to embark on their mining and other commercial activities. The result is that the large mass enjoyed by the especially peasant farmers is being shrunk by the usual long-term leasehold interest held by these entities and degrading environmental impact. In June of 2016 a consortium of civil society organisations wrote to the President of Sierra Leone soliciting his intervention in a matter in respect of one Malen Chiefdom with a land mass of 34,370.9 ha where a certain company called SOCFIN now lays claim to over 50% of the chiefdom with 18,481ha in their concession and a planted area of some 12,500ha. These civil society

organisations have raised eyebrows over the process and procedure leading to the acquisition of more than half of the landmass of the chiefdom and have warned that indigenous Sierra Leoneans are de facto increasingly becoming tenants and the investors landlords in Sierra Leone.

Also, in the first half of 2016, some six land right activists were convicted of destroying the crops and other plantation of a Chinese company whom they protested had illegally acquired several hundreds of hectares of land without consultation with the indigenes. Also in 2013, African Lion Agriculture (ALA) and Carmanor Ltd ALA leased over two thousand acres of farmland (\$5 per acre as annual rent) in Imperi and Jong chiefdoms, southern Sierra Leone which NAMATI, a local NGO, is helping to seek redress against ALA/Carmanor for non-payment of rent and other environmental hazards/degradation.

In February of 2015 , NAMATI, an NGO (on behalf of some land owning families who had no knowledge of the transaction and had never authorised the sale or disposal of their land) commenced an action against Orient Agricultural Ltd- a Chinese-owned company and others to recover a total of 1,486 acres of land. Judgement was given by the High Court of Sierra Leone on the 17th February 2016. The Court inter alia made the following declarations:

1. *“That the agreement of sale dated the 25th November, 2013 between the defendants is illegal.*
2. *Recovery of possession of land totalling 1486 acres, the subject of the agreement dated 25th November, 2013.*
3. *Damages for trespass to land and destruction of crops and economic trees assessed at Le. 50,000,000 (Fifty Million Leones).*
4. *Special damages calculated at Le. 500,000.00 (Five Hundred Thousand Leones) daily from the 14th December 2014 plus interest.*
5. *An Injunction restraining the Defendants/Respondents jointly and severally whether by themselves, their servants, agents, privies, assigns or howsoever otherwise from dealing, leasing or otherwise disposing of the plaintiffs’ land or any parties thereof and from entering or remaining on the Plaintiffs’ land or any parties thereof and from carrying out or continuing the erection of any structures thereon”.*

With the tidal rise of commercial activities comes the increasing flipside of especially rural folks being dispossessed of their lands and deprived of their livelihoods in the usual land acquisition transactions bereft of procedural propriety and shrouded in secrecy. An environmental organisation, Green Scenery has held that most of the land acquisition by commercial entities lacked transparency and inclusive participation. Hence in recent times there has been mounting pressure on the government of Sierra Leone to place moratorium on the acquisition of large-scale land acquisition pending the reformation of the land tenure system in Sierra Leone.

The government's development plan (Agenda for Prosperity) has as one of its pillars (Pillar 2) "Natural Resource Management". Under this pillar, the government has committed itself to "*land management. Strategies include a legal framework for land ownership; developing land-use planning; creating sustainable infrastructure for social improvement and economic growth; training farmers in sustainable land and water practices.*"

A need for land reforms: legislative or other methods of enforcing the right to land or access to land

Judicial attitude to land ownership is becoming more progressive especially in regard land tenure in the provinces where communal ownership has been used to deprive many individuals especially women of any ownership of property. There has been a marked departure from the position where the chiefs as trustees for the communities they govern almost exclusively held land in the provinces. This has largely taken place as a result of the influence of English law. Individual ownership is becoming more and more rampant. In the case of JAH Vs. DEEN & BAYOH [1970-71] ALR (SL) 171 Justice During the trial judge held:

"...it is clear settled native customary law that a member of the tribe to whom land has been allocated has a right to sell or pledge a house owned by him situated on such land..."

In the absence of constitutional stipulations on access or right to land In Sierra Leone, judicial bodies have not ventured a declaration of a right to land. Also pursuant to Section 40(4) of its Constitution, Sierra Leone adopts a dualist approach to international treaties/conventions implying that specific legislations are needed before the provisions of

treaties/conventions could form part of the legislative corpus of the country, therefore there is hardly any slits through which the right or access to land could be judicially upheld and enforced.

The extant Constitution of Sierra Leone is on the cusp of repeal with constitutional amendment underway, it is my view that inclusion of equal legal access or right to land irrespective of origin or place of one's birth of settlement of his tribe or kinsmen at this time of constitutional amendment is most ideal and imperative to ensure equitable distribution of the resources. Since more than half of the population of Sierra Leone practice some form of agriculture, the right and access to land must be included as a core human right in Sierra Leone.

Human right bodies concur on the progressive realization of socio-economic rights therefore non-availability of funds should not excuse the inclusion of for instance the right to land and decent housing. Constitutional scholars applaud the South African Constitution (adopted in 1996) and the recently adopted Kenya Constitution (2010) for daring to include socio-economic rights even in the absence of adequate state resources for their realisation.

In the case of EX PARTE CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: IN CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996 (FIRST CERTIFICATION JUDGEMENT) 1996 (4) SA 744(CC), paras. 77-78 the South African Constitutional Court held that “...*at the minimum, socio-economic rights can be negatively protected from improper invasion*”. It is my opinion that this type of protection will be acceptable to the Government of Sierra Leone. Negative protection of the right to land will merely implore the Government to refrain from any activity that would interfere with the right of land ownership. It does not put the Government under any financial obligation.

Conclusion

Obviously, Sierra Leone does not wrestle with a historic legacy of racial policy of allotment of its landed resource as was the case in South Africa and Zimbabwe. But Sierra Leone has discriminatory laws disempowering a section of its population from acquiring lands in certain areas. With the absence of a constitutional human right guarantee, such discriminatory laws can be challenged on the grounds of protection from non-discrimination (section 27 of the Constitution of Sierra Leone) but

not on the grounds of the right or legal access to land. To my mind, equal access to the land in Sierra Leone and in general on the African continent is a crucial in ensuring equality in terms of use and enjoyment of land as a natural resource and also in enhancing agricultural and other land-dependent commercial activities. I think it's about time that the human right to land as well as the right to equal access to the same was constitutionally guaranteed in Sierra Leone and indeed in all states in Africa so as to foster human development, economic growth and override any conflicting and discriminatory legislation(s).

Indeed the boom in mining and other related commercial activities especially in the provincial areas of Sierra Leone should not result in the deprivation of lands of rural folks who depend on agricultural activities for their survival and those of their family members. While large scale mining and other commercial investments are welcoming for an ailing economy such as Sierra Leone's they must not be undertaken at the expense of fundamental right such as the people's right not to be unfairly deprived or dispossessed of their lands. It is therefore imperative that the new constitution of Sierra Leone draws inspiration from the South African and Kenyan constitutional experiences by inclusion of the fundamental right or access to land in its justiciable bill of rights.