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Context And Erection Of Legal System In Ghana

Victor Selorme Gedzi
Kwame Nkrumah University of Science and Technology (KNUST)
Department of Religious Studies. Faculty of Social Sciences. Kumasi. Ghana.

ABSTRACT

The paper has analyzed the erection of the formal legal system in Ghana. The research based its analysis on relevant textual and field materials, including observation. The finding has shown that socio-economic context of the colonial period has frame-worked the legal system Ghana inherited from the British. For example, the British have seen the courts as the appropriate way of dealing with cases associated with trade and resentment of local people at the sharp deals of their merchants. The erection of the legal system helped the British assume a broader and more lasting political control in the trading posts to defend and protect their merchants. Today, Ghana faces new challenges. To overcome them, Ghana needs to erect and enforce new laws that are contextually relevant to meet and direct the ongoing socio-economic processes. It means a restructuring and reforming the entire inherited colonial legal system. The study is important because, among other things, it has highlighted the context of the British colonial era which frame-worked the formal legal system in Ghana which needs contextualization to meet present realities for a more desirable micro and macro socio-economic transformation.

Key Words: Context, Erection, Legal System, Socio-economic, Trade motive, Restructuring.

INTRODUCTION

Context counts in the erection of a system of law. Every society has its own set of laws that governs its people's social, economic, political and other dimensions of life (See also Pospisil 1971: 107). It means socio-economic practices and law symbiotically relate. In other words, a legal system in many ways is context specific if it is to bring about desired socio-economic development. In many African countries, including Ghana, however, the colonial context seems to shape the frameworks for current legal systems, making legal principles and procedures contextually different from prevailing socio-economic situations. This legal problem of juristic kinds seems to confront leaders of many post-colonial African societies, including Ghana, who widely regard their complex legal systems as not only frustrating, but also messy and obstructive to progress (see also Merry 1988:871). Thus, the question confronting the analysis is: what is the context that frame-worked the legal system in Ghana and what can be done to make it context-specific? The research will find answers to this discuss the findings and conclude. The study is important because, among other things, it has highlighted the context of the British colonial era which frame-worked the formal legal system in Ghana which needs contextualization to meet present realities for a more desirable micro and macro socio-economic transformation.

Anthropological study of law shows in many ways how "legal norms and institutions are conditioned" by contexts. This is important because "we see law as in and of society, adapting to its contours, giving direction to change" (Selznick 2003). Erhlich also argues the location of law within social life and maintains that norms are always social norms and as such are the products of social relations. Because of this, legal norms must not be treated as if they belong to a higher order of social norms since they constitute one of the rules of conduct like any other rule. "It follows therefore that all legal operations are social operations; that is, operations that

reproduce social structure" (Gedzi 2009: 30; Ziegert 1998). Erhlich's main argument seems to indicate that law is made of the same material as social life at large. In order to describe, understand and explain law, one must refer to social operations at large (Ziegert 1998: 5-6).

METHODOLOGY

The achieved domain of this study is to analyze how erection of any legal system such as that of Ghana needs to be conditioned and renewed by the specific contexts of a people and at any given time. The approach is anthropological qualitative study of law and society. The research is extensively based on relevant textual materials, and supplemented by interviews and general observation on the legal and socio-economic contexts of Ghana. Observation on current actual legal and socio-economic practices has validated information obtained from the interviews. This strategy of supplementing theory with current actual practices of people (context) seems important because, in my opinion, any legal decision should be viewed in line with what people think is normal or not normal, acceptable or unacceptable in everyday life (see Gedzi 2009: 18; Friedman 1969-1970: 34). For instance, in every society there is a legal consciousness peculiar to the culture of the people (Merry 2006) on issues like how land and other natural resources should be sustainably used; and on what is lawful and what is not. This approach may lead to context renewing or updating 'the law-in-the books' with current development issues in the social and the economic universe, and not the other way around (see also Holleman 1986: 123). This is necessary because there is a danger of the law slipping out of its social and economic contexts with the passage of time.

One way of helping to counteract this danger, and to contribute to a wisely directed evolution of customary law and creation and effective reception of more unified modern law, is constant and vigilant research into the different ways of law observance and its enforcement on all levels (Holleman 1986: 125).

RESULT/DISCUSSION

The section has discussed findings on the context of the legal system in Ghana.

Context and Legal System

In Ghana, the emergence of the formal courts system started out of a desire of the British colonial power to protect its gains and its merchants in the lucrative trade in the then Gold Coast. As in so many other colonies, the British saw the courts as the appropriate way of dealing with cases associated with trade and "with the growing resentment of local people at the sharp deals of merchants" (Yeboa 1998: 311). With this trade motive, the British colonial government decided to assume a broader and more lasting political control in the trading posts. Thus the context which precipitated the erection of the legal system in Ghana was mainly economic – that is, how the British could benefit from trade and whatever they could do to protect their merchants against locals' resentment.

With the arrival of Sir Charles McCarthy as governor of the Gold Coast in 1822, the British set in motion their programme of establishing law courts in the colony. McCarthy began his programme by establishing petty debt courts, which were restricted only to the workers in the British forts. With time, the jurisdiction of the courts extended to the immediate vicinity of the forts. The British Settlement Act in the early 1840s gave power to the Queen of England to create her own institutions, ordinances, laws and courts to determine matters and to make rules or regulations for the administration of justice in the Gold Coast (now Ghana (Gedzi 2009). Consequently, a judicial assessor's court was created and Governor George Maclean became the judicial assessor. His duty was to sit with and to act as adviser to the court of Amanhene (Yeboa 1998: 313). Technically speaking, this court was neither a British nor an

indigenous court but its very existence depicted a useful liaison between the two courts systems (Gedzi 2009).

It is significant to note that the superimposition of indigenous courts by the British courts started as a gradual but premeditated process (Gedzi 2009). This is revealed in Governor Pine's confidential letter of 31 August 1857 to Labouchere advocating, 'If the country were directly subject to the Crown, and British magistrates were scattered over it, the sooner the native authority (were) destroyed, the better' (Yeboa 1998: 314). Accordingly, in 1853, the first British Supreme Court began in Cape Coast.

On 4 April 1856, the Crown provided an order-in-Council under the Settlements on Coast of Africa and Falklands Act 1843 that made it possible for the British to extend their rule to other areas where the Queen wanted to exercise jurisdiction without cooperation of any native chief or authority. In 1865, on recommendation from the Select Committee, the four British West African colonies consolidated under one supreme government in Sierra Leone. The British government, therefore, abolished the Gold Coast Supreme Court and replaced it with a chief magistrate's court, presided over by a chief magistrate as the highest judicial officer of the British courts (Acquah 2006; Gedzi 2009). At the end of the Sagrenti War of 1875 with the demolition of the Asante threat, the way was cleared for a more meaningful and fruitful involvement in the administration of the country. In 1876, therefore, the Supreme Court Ordinance passed. The Ordinance led to the establishment of a Supreme Court for the Gold Coast Colony (Bennion 1962; Yeboa 1998: 315-16). The Supreme Court comprised: a) a Court of Appeal or Full Court, which could be duly constituted by any two of the judges of the Supreme Court, one of whom must either be the Chief Justice or a person for the time being discharging the functions of the Chief Justice, b) the Divisional Court, which might be constituted by any one of the judges of the Supreme Court, authorised under section 6, for exercising the original jurisdiction, civil or criminal, of the Supreme Court. Now the colony stood divided into three judicial parts namely the Eastern, Central and Western Provinces and a divisional court opened in each provincial capital, according to the provisions in sections 23 and 24 of the ordinance (Gedzi 2009).

Even though the Gold Coast administration joined with that of Sierra Leone in 1866, the courts of the judicial assessor and magistrates operated until 1876. The Supreme Court Ordinance of 1876 removed this anomaly and transferred the powers of these courts to the new Supreme Court. With the power transfer, new magistrate courts opened and with most of their personnel district commissioners, who exercised judicial powers, became regarded as ex officio commissioners of the Supreme Court (Acquah 2006). This situation severed the links indigenous courts had with the British ones. By the beginning of 1877, there appeared a rigid dichotomy between the British and indigenous courts even though chiefs played an advisory role in the British courts whenever the former needed their advice on questions touching on indigenous law. The British court system needed a large measure of co-operation from the natives and their rulers. Moreover, in spite of the fact that the British justice system was becoming popular, there were all sorts of cases or disputes that natives might prefer local rulers and not the white man to handle disputes for them (Yeboa 1998: 316-19). Due to this, it was necessary for the colonial government to recognise indigenous courts. The proper administration of the country demanded they work out some sort of legal and administrative relationship.

The Native Jurisdiction Ordinance passed in 1878 with the purpose of facilitating and regulating judicial powers of chiefs within the protected territories. The ordinance relapsed between 1879 and 1882 due to opposition by the chiefs, but in 1883, it was re-passed. By 1910,

under the ordinance, approximately 39 paramount chiefs formed into local legislative councils and judicial tribunals (Acquah 2006; Gedzi 2009). Having legislative capacity, the chiefs' council enacted by-laws to promote peace, welfare and law and order within their respective areas. There were also sanctions for breach of peace and order. In their tribunals, the chiefs heard and determined cases based on violations of the by-laws. Beyond the by-laws, the tribunals enjoyed an extensive civil jurisdiction including hearing and deciding all personal cases in which the debt, damage or demand did not exceed 25 pounds and others that were fixed under the rules governing the exercise of jurisdiction. Generally, many of these suits related to the ownership and possession of land according to customary law as well as 'suits and matters relating to the succession to the goods of any deceased person where the whole value of the good … does not exceed … fifty pounds' (Yeboa 1998: 319). Nevertheless, the native courts had no jurisdiction in suits relating to land succession of deceased natives. Additionally, personal suits and suits relating to succession of goods of deceased natives were not expressly limited to suits involving customary law.

Thus, the ordinances of 1873 and 1883 created few statutory customary courts while the vast majority of the non-statutory indigenous courts in the country could not function. The personnel in the statutory customary courts were mainly native chiefs and rulers. These few customary courts constituted a separate system and were subordinated to the British courts system and controlled by the Secretary for Native Affairs and the superior courts of the British system (Gedzi 2009).

Owing to constitutional differences between the Colony and Asante, a different system existed there. However, after the political amalgamation of the various sectors of the country in 1935, the pattern of courts in the colony extended over the whole country including the northern territories. It is important to emphasise here that interference of the judicial power of chiefs by the British began as far back as 1844, and passage of the Native Administration Ordinance (No. 23) in 1927 considerably curtailed it (Gedzi 2009). From this time onwards 'aboriginal judicial tribunals ceased to exist, and every tribunal that should exercise judicial functions as distinct from arbitral functions, had to be one which derived its jurisdiction from enactment' (Acquah 2006: 67).

Passage of the Local Courts Act (No. 23 of 1958) finally ended the judicial powers of the chief under colonial rule, and subsequently by section 66 of the Chieftaincy Act (No. 370 of 1971). The Local Courts Acts (No. 23 of 1958) stripped chiefs of their customary courts. In 1958, the local courts were later absorbed into the British and therefore, the national courts system as district courts grade II replaced the customary courts. Since then, chiefs have lost all statutory powers to adjudicate on civil and criminal matters except disputes that concern the chieftaincy institution in Ghana (Acquah 2006: 68-9).

Thus, it can be seen that the imposed British colonial system of law with its principles and procedures, was forged for the colonial industrial capitalism and was not for an agrarian economy in Ghana. In other words, the laws emanating from the legal system evolved from the British settings that were sociologically different from the Ghanaian way of life. For example, the British criminal law system does not see anything wrong with a divorced man having sexual relationship with a daughter of his former wife's sister. The Ghanaian society interprets this as incest and does not allow it. Secondly, while the English law forbids bigotry, polygamy (polygyny) is allowed in Ghana . This, among other things, may be an indication that although there may be laws that are universally applicable, legal systems to a large extent are context-specific (see also Selznick 2003). Unfortunately, the issue of context-specificity of legal systems was not considered when the colonial framework of law was imposed to subsume indigenous legal frameworks in the colonized societies like Ghana (See also Merry 1988: 869).

For the proponents of empire in the nineteenth century, the imposition of the colonial system of law was a something to celebrate. This is because, for them it substituted "civilized law for the anarchy and fear that they believed gripped the lives of the colonized peoples, freeing them from the scourges of war, witchcraft, and tyranny" (Ranger 1983). In African countries like Ghana, the British and the French superimposed their law onto indigenous law, incorporating customary law as long as it was not "repugnant to natural justice, equity, and good conscience", or "inconsistent with any written law" (Okoth-Ogendo 1979:160; Merry 1988:870). The repugnancy principle was enforced to outlaw the so-called unacceptable African customs. In doing this, the British usually took strategic decisions about the extent and nature of legal controls (Benton 2002) and made conscious efforts to retain elements of existing institutions that might benefit her ambitious exploitation of resources in the colonies. This pragmatism helped limit the call for legal change - a mechanism of sustaining social order for British merchants to carry out their sharp deals. In addition, the British legal system helped to mould a cooperative labour force to serve the new extractive industries and to produce cash crops in the colonies for export (Chanock 1998; Moore 1986a).

Today , Ghana is no more under colonial rule. But there is neo-colonialism in many ways that encourages an African country like Ghana to hold on to and relish her past even if it is obsolete and detrimental to her socio-economic survival. Liberalism, for example, has brought into being the free markets. But while its proponent, the West, advocates the liberal market, it always interferes in the inflow and outflow of the market, holding on to the age long strategic principles and procedures that must benefit them. In addition, Ghana currently faces many challenges in her economy. The economy to a large extent is still agrarian. There is also the illegal mining saga, which does not only remove the vegetation cover and fertile soils for farming, but also destruction of water bodies in geometric proportions. For example, Akwatia and Obuasi, once villages in the eastern and Ashanti regions and regarded as food baskets of Ghana, have been turned into a diamond and gold mining towns with most of their farms destroyed through reckless mining activities; and which is causing shortage of food and hardship on locals. Besides, Ghana has the challenge of sanitation. In 2014, many died through cholera as a result of insanitary conditions in cities and towns. To overcome these challenges, there is need to erect laws that are contextually valid, and enforced to curb the anomalies and direct the socio-economic process. These laws must be periodically reviewed in consonance with social, economic and political changes. This means that the law in this sense is semi-autonomous since it is made valid or invalid by contextual realities of each age. It also calls for a relook at the entire legal system that has been the legacy from the British colonial government, which must be restructured and reformed to make it relevant to the ever-changing socio-economic and political contexts and aspirations of Ghana.

CONCLUSION

The paper analyzed the British legacy of legal system in contemporary Ghana. The research based its analysis on relevant textual and field materials. The finding showed that socio-economic context of the colonial period seemed to shape or frame-work the kinds of legal system the colonial master, the British erected in the then Gold Coast, now Ghana. For example, as in so many other colonies, the British saw the courts as the appropriate way of dealing with cases associated with trade and resentment of local people at the sharp deals of its merchants. The erection of the legal system helped the British colonial government to assume a broader and more lasting political control in the trading posts for their trade agenda. Today, Ghana faces new challenges in the form of neo-liberalism. Her economy is still predominantly agrarian. There is the reality of illegal mining that destroys mining environment in geometric proportions. There is also the challenge of sanitation. To overcome these challenges, Ghana needs not only to erect new laws that are relevant but also enforced to meet and direct the

socio-economic process currently taking place. There is need for periodic review of existing laws in consonance with ever-changing social, economic and political processes. It means a relook at the entire legal system inherited from the British colonial government for restructuring to meet ongoing socio-economic contexts of Ghana.

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