CONNECTING COMMUNITIES IN DISCOURSE: HOW THE JUDICIARY, ACADEMIA, GOVERNMENT AND THE INTERNATIONAL COMMUNITY FURTHER THE WORK OF RELIGIOUS FREEDOM

TO DRUM OR NOT TO DRUM - STATUTORY AND CUSTOMARY LAW VERSUS FREEDOM OF RELIGION

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Introductory

Under the rubric of the theme "Connecting Communities in Discourse: How the Judiciary, Academia, Government and the International Community Further the Work of Religious Freedom" this paper attempts to evaluate both the conceptual and practical bases of rules relating to religious freedom in Ghana in the face of underlying tensions between advocates of religious freedom and politicians and administrators keen to protect and justify both policy and law in the light of social realities demanding the resolution of religious discord on the basis of fairness and freedom. The following discussion draws primarily on Ghanaian customary law but evaluates its most fundamental principles in a novel light to reveal rare examples of judicial and academic creativity in the resolution of hotly contested claims. The Judiciary is here conceived as the spearhead of conflict pre-emption in a plural multi-ethnic and multi-religious society. That Ghanaian society is largely characterized by the absence of religious conflict is barely remarked in academic circles. The relative absence of religious dramas has ironically prompted little investigation into factors promoting religious co-existence such as prevails in Ghana.

As in much of the world the main religious communities in Ghana comprise Christians and Muslims. On the other hand, Ghanaian Muslims are divided between the Tijaniyyas, Ahmadiyyas and the Alusunnas. Major religious communities aside, the Judiciary, the State, Academia and non-governmental organizations are considered the major stakeholders in the Ghanaian religious argument. The interconnectedness of the major players in the religious debate runs through the discussion like a golden thread. The Christians are broadly divided into Orthodox and Pentecostals. As ready indicated, intra-religious disputes are largely muted and tensions appear far from the surface. It is suggested that in such a context the thrust of both government policy and judicial intervention ought to be towards sustaining peaceful co-existence as well as seeking innovative new ways to promote religious dialogue.

It is worth emphasizing from the start that the two major religions have in Ghana operated with mutual respect, tolerance and accommodation for centuries. Christianity was introduced by the Portuguese way back in the fifteenth century but gained a particular impetus in the nineteenth century when formal colonization encouraged missionary activities. The Portuguese were said to have catechized and baptized their slaves before shipping them off the coast of West Africa (C.C. Reindorf, ***History of the Gold Coast and Asante***, Basle 1897, p. 213). The work of the Basle missionaries is particularly noteworthy. Drawn from the German-speaking parts of Switzerland, the Basle missionaries were particularly responsible for the first translations of the Bible into the major indigenous tongues as well as the development of the leading vernacular alphabets. Indeed, in 1985 Johannes Zimmermann translated the Bible directly from the Hebrew into the GA tongue. This was followed Christaller's translation of the Bible into the Twi tongue. Reindorf stated: "We are greatly indebted to the Basle

Missionaries, but particularly to Rev. Zimmermann and Christaller, for the great pains taken to cultivate our language sufficiently to become a written language; and we gratefully assert that as long as the world exists their names shall never be forgotten in the annals of the Gold Coast (***ibid***, p. 224)." The great writer noted elsewhere the cost in the lives of the missionaries: "The history of the Gospel Mission in Africa is a history in the ravages of death… the mission party at Cape Coast was reduced by more than one half." The early missionaries were also avid vernacular hymn-writers whose zeal created much of the harmonious that characterized interaction with indigenous society. A parallel process appears to have been contemporaneously set off by early Muslim preachers in Northern Ghana.

The early missionaries took particular care to avoid conflicts with indigenous religion. Most converts lived in 'Salems' which were settlements close by but apart from the traditional communities. Organized into 'sessions' the early converts led by example to persuade their secular brethren to abandon their secular ways. The twentieth century, however, presented new religious challenges with the emergence of a coherent law of Human Rights. The same period witnessed the pluralization and homogenization of religion as new movements and sects proliferated, radically altering the nature of the religious debate. The most zealous of the religious advocates tend to assert human rights in absolute terms often with inadequate regard to other social interests. Indiscriminate location of churches in densely populated areas in the teeth of zoning restriction led to localized grievances against church activities. Elsewhere in the world religious and other rights were frequently balanced against the public interest, particularly in terms of public health, public safety and public morality. And while article 20 of the Constitution seeks to protect the rights of the sick a small number of religious bodies refuse certain forms of medical care for sick members. In sum, religious advocates in Ghana initially appeared to appreciate inadequately the distinction between "freedom of religion' and "freedom to manifest religion". The latter was frequently undertaken with little consideration of other interests.

Streams of Discourse

It is possible to conceptualize the basic religious debate in Ghana in terms of 'two streams of discourse'. In employing this fluvial imagery a basic distinction is drawn between the discourse embodied in academic writings and judicial decisions and a more political, raucous and public sort of discourse involving politicians, religious advocates and the general public. Through blogs, social software and search engines the latter is often projected and distorted by newspaper coverage as well as digital and interactive platforms of communication with global reach. In the process many vital issues are either plucked out of context or forced to the sidelines. Increasingly both debates are conducted in the context of constitutional and statutory provisions. A number of constitutional provisions reinforced the drive towards State neutrality and religious parity. A neutral secular state appears best suited to mediate the competing claims and assuage feelings on both sides of the religious divide. Yet the Ghanaian state was lineally descended from the English model of statehood which assumed the primacy of Christianity and embodied Christian notions in the state calendar. Thus Christmas and New Year were accorded the status of public holidays and other religious holidays ignored. Parity of status was ultimately achieved with the declaration in the latter part of the twentieth century of major Muslim festival as public holidays as the State sought belatedly to address perceived constitutional and human rights failures in regard to religion. Arguably, new forms of discourse are required for in the face of the new social

context. For one thing the adversarial system of conflict resolution, so peculiar to the common law tradition, appears ill-suited to mediate and resolve strident assertions on both sides of the debate. A new wave of democracy in the Africa of the 1990s inclined politicians and public administrators to caution lest they lost the religious vote.

Article 56 of the Constitution forbids the running of the State along religious lines. In addition article 106 provides for the representation of religious bodies on the table State institutions such as the National Media Commission. The Commission for Human Rights and Administrative Justice (CHRAJ), established under the Constitution provided an institutional mechanism for resolving grievances relating to Human Rights. Statutory intervention in the form of the **Religious Bodies Registration Law** (P.N.D.C.L. 221) sought to regulate religious bodies closely and was uniformly rejected by the churches.

The Primary stream

The first stream of discourse is here considered in terms of judicial and academic trends together with major landmarks shaping the development of legal thought in respect to religion in Ghana. What emerges is a steady and circumspect approach to the impact of laws on religion. The major currents are considered in turn below.

The Judiciary

The judiciary is in an invidious position. It is their role to declare and protect rights conferred by the Legislature and such other rights as are recognized by law and thereby to protect religious freedoms. The final arbiters of potential conflict, it is imperative that the Judiciary develops an objective basis for the application of religious laws. It is submitted that such laws should be based on the following criteria.

1. Constitutionality
2. Fairness
3. Conformity with international standards
4. Avoidance of prejudice and discrimination, and
5. Parity.

In all of the above the overarching philosophy should be the formulation of decisions and rules facilitative of respect and parity of religions. In a globalizing and secularization world it is often tempting to shove religious concerns aside or to subject them to political priorities. The consequences for Africa have often been dire and religious conflicts have often been nasty.

Academic Discourse

A legal framework provides an objective basis for the development of consistent jurisprudence on religious freedom. Article 21(1)(c) of the Constitution of Ghana provides for freedom of religion within the context of code of Human Rights. It is instructive that litigation on this constitutional provision has been scanty. However, various forms of religious contention short of open conflict religious are not

unknown to Ghanaian law. Particular legal controversies raged over two colonial ordinances, the **Marriage Ordinance** 1884 (Cap 127) and the **Marriage of Mohammedan's Ordinance**, 1910 (Cap. 129). The former provided a mechanism for the registration of marriages in monogamous form. Although it did not specifically seek to regulate Christian marriages, it nonetheless promoted the contracting of such marriages. Section 48 the **Marriage Ordinance** 1884 sought to regulate succession to the property of parties to such marriage by restricting the devolution of the bulk of the estate to the surviving spouse and children. The consequences were frequently absurd as under traditional forms of intestate succession it was the extended family that usually succeeded in case of intestacy. In a succession of cases, including **In re Anaman** (1907) Sarbah's Fanti Law Reports 98 and **In Re Otoo** ('27-'29) Div. Ct 213 it was held that a party to an Ordinance marriage had virtually contracted out of indigenous law and could not make a traditional nuncupative will. Also, children to such marriages were held to be ineligible to succeed to their deceased father's property. The judicial trend was ultimately reversed in the cases of **Bamgbose** v. **Daniel** (1947) A.C. 237 and **Coleman** v. **Shang** (1959) G.L.R 81; A.C.345. In both cases the question of definition of a 'child' was held to be a matter for the **lex loci domicilii**. In the result once a child born out of wedlock was duly acknowledged by the father he was held to qualify as a 'child' under customary law.

Section 10 of the **Marriage of Mohammedan's Ordinance** 1910 (Cap 129) provided for prescriptions of Islamic law relating to succession to property to regulate the devolution of the property of a deceased Muslim. The conundrum was that the Qur'an provided in clear terms for the succession to the property of deceased Muslims. What section 10 did was to restrict that religious prescription to the distribution of the property of deceased Muslim who had registered their marriage under the **Marriage of Mohammedan's Ordinance**. To qualify for the distribution under Cap 129 three conditions had to be met.

1. The deceased should have been a Muslim,
2. He should have registered his marriage under the Ordinance; and
3. He should have died intestate

Hardly and Muslims actually registered their marriage. In consequence few Muslims estates qualified under the law for the distribution according to the provisions of section 10 of the **Marriage of Mohammedan's Ordinance** and, in effect, in accordance with Qur'anic prescription. This led to much anguish within the Islamic community where the provisions of the statute were largely ignored. The attitude of the Judiciary was reflected in the cases of **Brimah** v. **Asana** (1959) G.L.R 32 and **Kwakye** v. **Tuba** (1960) G.L.R 160.In both cases a Muslim had died intestate and relatives and beneficiaries had sought to distribute the estate according to the provisions of Cap 10 only to be disappointed. In each case the court decided that as the deceased had not registered his marriage under Cap 10 the provisions of the statute were inapplicable to the distribution of the estate. As a result the distribution of both estates was held to be regulated by the personal laws of the intestate. The decisions led to understandable disappointment within the Islamic community but were easily justified on the basis that religious law could not be permitted to prevail in a secular state. This remained the position until the

enactment in 1985 of the **Intestate Succession Law** (P.N.D.C.L. 111) section 19(b) of which repealed relevant provisions of the **Marriage Ordinance 1884** (Cap 127) and the **Marriage of Mohammedan's Ordinance** 1910 (Cap 129). The **Intestate Succession Law**, 1985 (P.N.D.C.L. 111) introduced notions of uniformity, parity and fairness into Ghanaian law of intestate succession regardless of form of marriage, ethnic origin and religion, leading to the diffusion of tensions associated with perceived differentials in judicial approach to succession on account of religious background. In effect Law 111 constituted a commendable legislative intervention in an area of the law that appeared to treat citizens differently with regard to religion.

But in fairness it ought to be noted that the **Marriage Ordinance** 1884 did not specifically provide for Christian marriages. It simply provided a framework for the contracting and celebration of civil marriages. In praxis, however, Muslims refrained from the contracting and celebration of marriages under the **Marriage Ordinance** in preference to socially recognized forms of Islamic marriage. There was therefore a glaring cleavage between judicial attitudes and social reality. Consonant with the cleavage Muslims quietly ignored the provisions of State law and continued to distribute the properties of deceased Muslim intestates according to Qur'anic precepts. There is as yet insufficient data to determine whether the enactment of the intestate Succession Law has made significant difference to Muslim attitudes.

Customary legal framework

Article 11 of the constitution of Ghana defines the laws of Ghana to include English common law, the doctrines of equity, the Constitution and the "customary law of Ghana". The "customary law of Ghana" is defined to include rules of prevailing within the various communities of Ghana. In origin these were ethnic-based rules which had over time developed to constitute an essential part of the corpus of Ghanaian law. They were an essential part of the colonial system of adjudication for section 87 of the **Supreme Court Ordinance** 1876 provided that in the adjudication of cases in the erstwhile Gold Coast (the former name of Ghana) European judges were to take account, in appropriate cases, of "native laws and customs" particularly in the areas of marriage, succession and property. Through a vast body of cases so decided a not inconsiderable corpus of precedents had developed by the turn of the nineteenth century. The publication of Sarbah's **magnum opus**, **Fanti Customary Laws** in 1897 aided both the ascertainment of customary and recognition of the principles underlying that law. This was in spite of several hurdles that existed initially. Judges were uniformly of European origin and although they frequently sat with judicial assessors their understanding of native law was at best vague. Consequently, to qualify as 'customary law' a particular rule of law had to be proved so often in court that its existence became a 'notorious fact'. The decision of Judicial committee of the Privy Council in the case of **Angu** v. **Atta** (1916, Privy Council decisions, 1909-1918) is a case in point. This was upon the same basis upon which English law of evidence takes judicial notice of facts and saves the necessity of proof. Again, customary law had to pass a 'repugnancy test'. Therefore a particular rule of customary law could be held to be 'repugnant' being "contrary to equity, good conscience and natural justice". As a result of the repugnancy doctrine not every fact was acceptable as customary law. On the whole matters relating to religion were either ignored or excluded from the corpus of rules regarded as 'customary law'

Notwithstanding, chieftaincy or chiefship was recognized as essential to customary land tenure. It is argued here that chieftaincy can hardly be conceptualized without its religious underpinnings. The concept of the 'Stool' is particularly significant for Ghanaian land tenure, modeled by the early jurists on parallel concepts in English law. A sacred wooden seat, the 'stool' represents the traditional polity. I have noted elsewhere that "the stool is a locus of power in any traditional political entity" (See N.A. Josiah-Aryeh, **The Property Law of Ghana**, Accra 2005, p. 47). It is no mere inanimate object but a symbol of great reverence. As the occupant of the stool the chief is a representative of the community. Ancestors and predecessors of the chief may have played key roles in the acquisition of land. In customary law conception the stool usually possesses an 'allodial title' in lands attached to it and stool subjects may in turn, occupy such lands subject to express grant or the absence of prior occupation by other subjects or grantees, depending on the degree of development of the community.

The concept of 'No Ownerless Lands' is often referred to as the first principle of Ghanaian law. Analogous to the English law concept of **Nulle terre sans seigneur** this principle facilitates the assumption that any land located anywhere in Ghana is vested in the nearest stool. Thus was avoided the endless confusions and claims which notions of res nullius would have entailed. The case of **Wiabo** v.**Solomon** (1910) Ren. 410 is in point. The religious underpinnings of land law are again evident in the fact that the customary conception of land embraces lagoons, lakes, religion as well as **res religiosae** such as graves and tombs which last is often indicia of ancient ownership and the basis of some of the best-founded claims.

Jurists contributed significantly to the development of the customary law from first principles. Sarbah's work aside, Ollennu's **Principles of Customary Land Law in Ghana** (London 1962) and his **Law of Testate and Intestate Succession in Ghana** (London 1966) did much to refine the rules of customary, promote the infusion of concepts from English equity jurisprudence and facilitated the development to a uniform customary law in Ghana bestriding both religious and ethnic differences. For instance, Ollennu's decision in **Brimah** v. **Asana** and **Kwakye** v **Tuba** emphasized that rather than succession according to Islamic precepts the distribution of the properties of the deceased should in both cases is regulated by personal law. There was also a concern in Ollennu's writings to reduce the communities of Ghana into two; namely, matrilineal and patrilineal communities thus aiding simplification of the relevant rules. The works of the pioneering jurists has been continued by a succession of writers.

Arguably customary law concepts were employed in yet another way to avoid conflicts with migrant Muslim communities in southern Ghana. Often poor and landless such communities developed across poorer parts of major towns and cities without the acquisition of specific land rights. Notions of 'customary law licence' were developed by the early writers to justify such settlements and to avoid possible disputes over land rights which might have easily taken on the character of religious conflict and persecution. For instance the jurist, Ollennu, postulated that all they needed was allegiance to the landowners leaving them free to live in peace and amity with indigenous communities.

Non-Academic Discourse

While the foregoing types of quiet discourse were accompanied frequently accompanied by strident and cacophonous discourse of another sort, altogether street-like in nature but in true fact often the midwife of the earnest sorts of public soul-searching that tend to produce ad hoc solutions to long-festering social problems. It has been emphasized elsewhere in this paper that turbulent religious discord is not characteristic of Ghanaian religious discourse. In what follows an attempt is made to sketch and analyze the course of one such discord.

To Drum or Not to Drum

Over the past decades or so the nearest to a breakdown of religious discourse and explosion of religious tensions occurred in the guise of a cultural conflict in the capital which assumed the form of a religious misunderstanding. It was in essence an avoidable conflict stemming from the non-enforcement of noise nuisance rules by both public and local authority. Indeed throughout the city noise levels which would have outraged European citizens beyond measure are daily tolerated. Church services are unduly prolonged. In August each year traditionalist landowners demand utter silence of drums and instrumentation during a period of three weeks. The fact that the drum ban occurs in the heart of the national capital tends to thrust it to dimension out of all proportion to its significance. In 1999 a conflict arose from the ban which had been imposed preparatory to key cultural events associated with the traditional New Year. For time immemorial the ban and been imposed and uniformly respected, the orthodox churches included. In fact, the pioneer missionaries spent prodigious amounts of energy researching traditional society and seeking peaceful co-existence. As Accra expanded a multiplicity of churches appeared together with peoples and congregations that felt that they owed no allegiance to traditional authorities. The sense of non-allegiance was aggravated by the fact that the drum ban was enforced by traditional spiritual leaders.

It is arguable that the equitable remedy of interlocutory injunction might have been employed to resolve the conflict. That would have entailed commencement of action, an option the traditionalists were unwilling to consider. What started as random acts of enforcement by traditional religious leaders very much out of step with the own largely Christian indigenous communities, started to take on ethnic dimensions as religious alliances threatened to shift in favour of allegiance. Government stepped in. Following which a committee was set up only to recommend the very things the law already provides for; namely, that noise abatement laws must be strictly enforced. At the height of the dispute the present writers wrote a seminal article entitled **To Drum or Not to Drum** detailing the tensions, inadequacies and inequities that appeared to stoke tensions. It was shown that there was in fact no religious discord at all as the majority of the followers of the traditional leaders were in fact Christian as were a significant number of the 'priests' themselves. On the other hand the dispute appeared to provided a trigger for the venting of collective urban grief by people who appeared to have been shortchanged over the years by successive governments and had seen no trade-offs and compensations for large scale land grabs and other uncompensated losses. Thus what was feared as a possibly the tip of a major religious discord blew over without as much as a judicial resolution in the manner outlined in the foregoing pages.

Concluding observation

In conclusion it is worth observing that although academic discourse in Ghana has so far succeeded in resolving religious arguments, puny as they are, possibilities exist within Africa's rapidly changing social milieux of grievance politics harnessing well-founded group complaints behind flimsy religious discord. There is a further danger that such grievances may then take on a cultural character and feed on legitimate but unconnected group complaints. In other words a fundamental divide is discernible in the debates surrounding Ghanaian religion but such debates are largely peaceful and academic in nature. Such debates as occur in the street and in blogs are either phoney or insignificantly religious in character. Notwithstanding, by exalting the centrality of debate over the resolution of real grievances the State might unwittingly aid in stoking such disputes.