

Advocating a judicial reformist attitude to bail in Sierra Leone: a human right and economic argument

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1. Introduction

Following the end of the civil war in 2002, and predictably so, the nation of Sierra Leone saw a spike in crimes and consequently criminal prosecutions in her courts. With her legal system rooted in the common law, the presumption of innocence (but now more in theory and less in practice) is the nucleus of her criminal justice system. At the heart of crimes and prosecutions is the age-old practice/process of bail. Without attempting a universal definition, bail is simply the process/method in a criminal investigation or trial by which a suspect/accused person's appearance at a certain place and on a certain day to answer to allegations of an offence or criminal charges is guaranteed by or without a surety. In Sierra Leone, the police can either grant bail during investigations or the court during preliminary investigations, trials or appeals.¹

In this article, the author will not be examining the nature of the procedure for granting bail and the guidelines² being developed to guide the courts in the grant or refusal of bail to accused persons or defendants. What this work seeks to shed light on is the current judicial attitude, predominantly a practice of refusing bail by the courts (particularly the magisterial courts) and recommend a reformist judicial attitude to bail in consonance with the eternal principles of presumption of innocence, right to liberty and a potential booster of the economic growth trajectories of Sierra Leone. This advocated juridical change of attitude to bail it is hoped would inspire a corresponding change of conduct on the part of the police in the admission of suspects to bail.

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¹ Sections 79 and 80 of the Criminal Procedure Act No.32 of 1965

² There is currently a bail and sentencing guidelines being developed by the Rules of Court Committee.

The author certainly is not oblivious of the merit of the judicial principle requiring the balancing of interests approach in such matters; this will be addressed later in the Article.

This article is prompted by the increasing incidents of refusal of accused persons or defendants to bail for crimes ranging from the lowest degree of misdemeanors to the gravest felony. In recent times, defendants who appear before magistrate courts for public insult and provocation and other public order misdemeanors are more often than not refused bail as if the charges were the worst felonies.

Several contemporary reports on the prison system (lately named correctional services) in Sierra Leone disclose alarming numbers of inmates/prisoners on remands.³ Sierra Leone's sole maximum prison—Pademba Road Maximum prison facility was erected in 1914 to house not more than 300 prisoners. Later it was expanded to accommodate about a thousand inmates/prisoners but sadly it now houses about two thousand inmates.⁴ The percentage of prisoners on remand is about 54%; that is more than half of the prison population in Sierra Leone are standing trial or awaiting trial and have not yet been convicted.⁵

So with the staggering number of inmates awaiting trial or on trial being twice those who are serving sentences it is obvious that the judicial discretion to admit persons to bail pending trial appears to be miserly exercised. This begs the question then why bail is not granted to this colossal number of men and women (usually able-bodied) who languish in the prisons and cells in Sierra Leone. Recent reports on the prison system in Sierra Leone have lamented the uncertainties and characteristic delays that remand prisoners continue to endure in the gravely weak criminal justice system of Sierra Leone⁶. So while the importance of bail to the court in holding the balance between the

³ <http://www.carl-sl.org/pres/contributing-to-reforms-in-the-justice-and-security-system-asjps-support-leads-to-monitoring-of-accountability-practices-in-the-police-and-justice-sector/>; <http://allafrica.com/stories/201309271872.html>; <http://politicosl.com/articles/ordeals-sierra-leones-pademba-%E2%80%98prison%E2%80%99> (accessed 23/02/2017)

⁴ <http://news.sl/drwebsite/exec/view.cgi?archive=10&num=24887> (accessed 23/02/2017)

⁵ Sierra Leone, World Prison Brief Data, <http://www.prisonstudies.org/country/sierra-leone> (accessed 10/03/2017)

⁶ Oswald Hanciles, Sierra Leone: A horror story from court and prison, <http://www.thepatrioticvanguard.com/sierra-leone-a-horror-story-from-court-and-prison> (accessed 10/03/2017). See no. 3 supra

parties will certainly not be over-accentuated in this work, the human right and economic imperatives for bail shall be considered in the discourse in this piece.

2. Is there a right to bail in the laws of Sierra Leone?

Sierra Leone practices common law in her pluralistic legal system. In common law the right to be bailed is 'as old as the law of England' and a refusal or delay to admit a person to bail is at common law an offence against their liberty.⁷ The authors of the 36th Reprint edition of Archbold commented that refusal of bail could also be deemed 'a violation of the Habeas Corpus Act, 1679, and of the Bill of Rights, 1689'.⁸ But does the common law's recognition of bail as a right imply a right to bail in Sierra Leone? The author certainly does not share that view even though common law⁹ is an integral part of the legal system in Sierra Leone.

The Constitution of Sierra Leone¹⁰ is the *grundnorm* of the Republic and the fountain of fundamental rights of all persons in Sierra Leone. Chapter III of the Constitution of Sierra Leone (Act No.6 of 1991) spells out the constitutionally protected rights within the frontiers of Sierra Leone and is applicable to all persons regardless of race, tribe, place of origin, political opinion, colour, creed or sex.¹¹ The right to bail as a separate and distinct right from other civil and political liberties is not stipulated in the said Constitution. However, there are some rights in the Constitution of Sierra Leone that are directly related and relevant to the liberty of a suspect or an accused.

The Constitution of Sierra Leone guarantees the right of liberty of every person in Sierra Leone.¹² However, the same section circumscribes the enjoyment of the said right to liberty by inclusion of instances when the said right can be curtailed or limited.

⁷ (T.R.F. Butler & M. Garsia) Archbold, Pleading, Evidence & Practice 1995 Reprint 36th Edn pg 71, para.202 WM. W. Gaunt & Sons Inc

⁸ *ibid.*

⁹ Section 74 of the Courts Act 1965.

¹⁰ Act No. 6 of 1991

¹¹ Section 15 of the 1991 Constitution.

¹² Section 17.

Section 17 (1) *No person shall be deprived of his personal liberty except as may be authorised by law in any of the following cases, that is to say-*

- a) *in consequence of his unfitness to plead to a criminal charge; or*
- b) *in the execution of a sentence or order of a court whether in Sierra Leone or elsewhere in respect of a criminal offence of which he has been convicted; or*
- c) *in the execution of an order of the High Court or the Court of Appeal or the Supreme court or such other court as may be prescribed by parliament on the grounds of his contempt of any such court or of another court or tribunal or commission of inquiry as the case may be; or*
- d) *in the execution of an Order of a court made in order to secure the fulfilment of any obligation imposed on him by law; or*
- e) *for the purpose of bringing him before a court or tribunal, as the case may be in execution of the order of a court, or*
- f) *upon reasonable suspicion of his having committed or of being about to commit a criminal offence, or...*

The principle of presumption of innocence of an accused person until proven guilty is provided for in section 23(4) of the Constitution of Sierra Leone stipulates:

Section 23 (4) *Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved, or has pleaded guilty:*

Now turning to the statutory provisions on bail in the Criminal Procedure Act 1965:¹³ Section 79 provides as follows:

- (1) A person charged with murder or treason shall not be admitted to bail, except by a judge.
- (2) When a person is charged with any felony, other than murder or treason, the court may, if it thinks fit, admit him to bail.
- (3) When a person is charged with any offence other than those referred to in subsections (1) and (2), the court shall admit him to bail, unless it sees good reason to the contrary.

¹³ Act No.32 of 1965

It is obvious from both the Constitution and the relevant statute that there is no specific provision on the right of accused persons/suspects to bail. In fact the provisions of Section 79 seem to suggest a wider discretion on the part of the courts to grant or not to grant bail. However, it is the author's view that a conjunctive reading and interpretation of sections 17(1)—right to liberty, 23(4)—presumption of innocence, of the Constitution and Section 79(3) of the Criminal Procedure Act 1965 would imply that bail is an entitlement especially in regard offences other than murder, treason or other felonies. Note that the author has refrained from using the word 'right' since that terminology carries legal connotations of enforceability of right which entitlement does not always have. 'Entitlement' could be interpreted as only a shield and not a sword to activate a right unlike 'right' which is invariably both a sword and a shield. While subsections 1 and 2 of section 79 of the CPA do not suggest any entitlement to bail and have wider margins of discretion, subsection 3 in fact stipulates that the court shall admit to bail (for non-felonious offences) leaving very little room for the exercise of discretion. Almost invariably, 'shall' in a statutory provision implies a mandatory obligation¹⁴ and so from the wording of Section 79(3) the court is legislatively obligated to admit to bail or in other words, accused persons are statutorily entitled to be admitted to bail for misdemeanors.

The view of the author is that for misdemeanors an application for bail is superfluous and that the court in that instance should only request the prosecution to bring to the attention of the court opposing matters so that it can direct its vision to the limitation of the entitlement in Section 79(3) '*unless it sees good reason to the contrary*'. In the absence of such good reason, which should be canvassed by the prosecution and the defence granted an opportunity to respond, the court should admit persons to bail for the category of offences spelt out in Section 79(3) of the CPA.

Although there is no specific provision on the right to bail, the author holds the view that the human right to liberty and presumption of innocence should guide the consideration of the court in the admission

¹⁴ *Grunwick Processing Laboratories Ltd. and Others Respondents v Advisory, Conciliation and Arbitration Service and Another Appellants* (House of Lords) [1978] A.C. 655

of persons to bail during preliminary investigation/trial as the case may be. Also, it is about time that economic implications of detention of suspects and accused persons on the livelihoods of families, the human resource capacity or labour market were judicially considered.

3. The human right argument for bail

Sierra Leone is a state party to the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the African Charter on Human and Peoples' Rights (African Charter), and has recently ratified¹⁵ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Articles 9 and 14 of the ICCPR provides for the right to liberty and presumption of innocence of accused or persons facing criminal investigation. These provisions are strikingly similar to the provisions in Sierra Leone on the right to liberty and presumption of innocence (supra). The UN Human Right Committee's which is the highest body tasked with the mandate of interpreting human right provisions in the ICCPR and ICESCR made their general comments on presumption of innocence as a human right as follows¹⁶:

30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle...

In regard the issue of bail the UN Human Right Committee has reiterated that pre-trial detention '*should be the exception and that bail should be granted—except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses,*

¹⁵ Ratified on 2nd July 2015

¹⁶ General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (Article 14) (2007)

or flee from the jurisdiction of the State...A state would need to provide grounds for the concern and explain why they could not be addressed by setting an appropriate sum of bail and other conditions of release'.¹⁷

The body authorized to interpret the provisions in the twin UN covenants on human rights has interpreted the right to liberty and the presumption of innocence to mean that 'bail should be granted as a rule and not the exception'. In essence, the admission of persons to bail is at the very heart of the spirit and intendment of the right to liberty and the right to be presumed innocent until proven guilty. While the ICCPR does not have a specific provision on the right to bail, the said right to bail is inextricably bound with the presumption of innocence right. It seems international human right's rationale for granting bail is the right to be presumed innocent (*ei incumbit probatio qui dicit, non qui negat*-one is considered innocent until proven guilty).

In a comparative context, the South African Constitution, there is a right to be released from detention albeit with limitations. The constitutional court of South Africa has held in regard this provision as follows:¹⁸

Section 35(1)(f) in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by s 12.14. The second is that notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions.

4. The economic implications of the rampancy of refusal to admit persons to bail pending trial

Sierra Leone is one of the least developed countries on the planet despite its numerous natural resources. What this means is that the economic livelihood of her people are severely constrained. Recently UNDP estimates that about 70% of the youthful population of Sierra Leone are unemployed.¹⁹ In current times, economic progress has

¹⁷ Hill and Hill v. Spain [2 April 1997, UNHRC, 526/1993; Violation of Article 9(3)] (para. 12.3)

¹⁸ Bongani Dlamini v The State and Others CCT 21/98; Per Kriegler J, para.6.

¹⁹ <http://www.sl.undp.org/content/sierraleone/en/home/countryinfo.html>

plateaued out following the Ebola outbreak and drop in the iron ore prices (which had become the nation's economic mainstay). With the population of the sole maximum prison being almost double its capacity, there are no doubt huge economic implications in terms of administrative and other costs in running and maintaining security in and around the prison.

The author argues that the effect of the court's pervasive refusal to exercise its judicial discretion in the admission of bail has double-fold economic implications. First, it means spending national resources (precious taxpayers' money) on a category of inmates which could have been avoided by the grant of bail and secondly, disruption of the economic and social livelihoods of the very persons remanded.

4.1 *High cost on national budget*

In the schedule to the Appropriation Act 2017, which is the national budget for the fiscal year 2017/2018, Le.87.9 billion is allocated in the said budget to the Sierra Leone Police while Le.34.3 billion is allocated to the Sierra Leone Correctional Services.²⁰ The allocation to the correctional services is laudable as compared to previous allocations and also it is almost half of what is allocated to the police force. However, it is worthy to note that if a preventative (police) rather than a curative (incarceration) approach were adopted the police would have been allocated thrice the sum allocated to the correctional services so that crimes are prevented and not merely prosecuted and criminals incarcerated. Such approach might substantially help in reducing the high rate of commission and prosecution of crimes and that would naturally minimize the costs in maintaining or running the correctional services.

Clearly there is a cost burden involved in refusing to admit accused persons to bail and even more so in the rampancy of punitive sentences (rather than the imposition of fines, where that is statutorily possible). There is unanimity of opinion on the manifest weakness of the criminal justice system of Sierra Leone in both national and

²⁰ <http://politicosl.com/articles/sierra-leone-amends-tax-regime-2017-budget> (accessed 10/03/2017)

international reports.²¹ The mass detention of persons who are refused bail (which is about half the population of the said maximum prison) clearly is not a depiction of the strength of the criminal justice system but a glaring weakness. Strong criminal justice systems even admit accused persons charged with murder to bail (the recent example is Oscar Pistorius who was admitted to bail while facing trial for murder in South Africa). The judicial attitude in refusing bail in cases of misdemeanors is putting a strain on the national budget and most certainly an economic burden on the correctional services to keep, provide security and daily provisions for the many inmates on remand. The author did not find any literature on the cost of keeping one person on remand in the Pademba Road Maximum prison but it is obvious that with the rising number of inmates on remand comes ranging logistical (resource) issues.

4.2 *Disruption of economic livelihood*

Contemporary social and economic commentators have made a case against mass incarceration especially in countries like the US²² and other developed countries. The author identifies with those arguments and will state that not only does the refusal to admit persons to bail by the courts result in a pressure on the meager natural resources but it also does disservice to the economic wellbeing of those persons refused bail. Firstly, a remanded accused person is deprived of economic opportunities and some who are employed would stand the risk of losing their job while on remand. Secondly, the labour market of Sierra Leone is denied the skills and potentials of the horde of inmates on remand and for a nation with huge human resource deficit, this is certainly not in the economic interest of the nation. Thirdly, most people in Sierra Leone like many Sub-Saharan African societies are family-oriented, this means that the relatives/families that depend on the income or resources of those inmates on remand would be economically deprived and those dependents might very well end up

²¹ The Sierra Leone Human Right Report 2016; World Justice Project, Rule of Law Index 2016 data.worldjusticeproject.org (data on Sierra Leone at page 133)

²² Grace Wyler, The Mass Incarceration Problem in America, <https://news.vice.com/article/the-mass-incarceration-problem-in-america> (accessed 10/03/2017)

committing crimes in their struggle to survive. Abrams writing on the "Lost Productivity and the Value of Freedom" states that:²³

While incarcerated, offenders are restricted from performing work that could be beneficial both to themselves and to society. They also lose a number of other opportunities afforded to those who are free...

So not only is the crowd of inmates on remand by reason of not being admitted to bail a stress on taxpayer's money it is also economically disempowering for those people who could otherwise be on bail and continue to be economically useful until they are convicted. So it cannot be more patent that the rampancy of judicial refusal to admit persons to bail is economically unhelpful for Sierra Leone. And a disruption of the economic livelihood of those persons who even though not convicted have begun to pay the economic price in addition to the restriction of their personal freedom of movement.

5. Conclusion

It is about time that the courts approached the issue and practice of bail with a human right and economic perspective. Firstly, as discussed *supra*, a conjunctive interpretation of the right to liberty and the presumption of innocence provisions suggests that bail should not be approached without the lens of the human rights of the accused persons. Fundamental right is or should be the bedrock of every criminal justice system. Sadly, this is hardly the case in the corridors of justice in Sierra Leone. The author views rights not as favours doled out to a helpless, dying or impoverished people, but as core human values and entitlements that are vested in every human and where they are recognized by a nation's constitution, they must be accorded the utmost respect in every judicial decision involving them.

The author is aware of a preliminary work in developing bail and sentencing guidelines. It is a commendable step though a belated one and it is hoped that the said guidelines would be human right-centred

²³ Abrams, David S., "The Imprisoner's Dilemma: A Cost-Benefit Approach to Incarceration" (2013). Faculty Scholarship paper 553 at page 948. http://scholarship.law.upenn.edu/faculty_scholarship/553 (accessed on 23/02/2017)

and would accelerate the demise of the inconsistency of the reasons in the consistency of the refusal of bail by the lower and upper bench.

Also as canvassed *supra*, a cost-benefit approach to remanding persons in the correctional services should be adopted by the courts especially at this time when the bail guidelines are being developed. The large number of inmates on remand is a direct result of the frugal exercise of the judicial discretion to grant bail and the resulting economic consequences of the same are avoidable and should be avoided. It would be prudent to use the modest national resources to rehabilitate convicted prisoners so as to help them re-integrate into society and not to spend on remand prisoners resources that could be avoided in the first place. Remand inmates who are eventually discharged or acquitted are never really compensated by the state even though they would have lost several years of their economic lifespan. It is about time that the courts took into consideration the economic implications of their commonplace refusal to admit accused persons or defendants to bail on the nation's budget and the resulting economic deprivations of those persons.

The author fully understands the need to have persons who face prosecutions on summary trial or trial to be available at all times for prosecution/trial, should also be given due consideration in the admission of bail of accused persons. That is why bail is and should be granted on terms and not with indiscretion. Because if bail is not granted on terms/conditions, accused persons might flee prosecution and victims would be denied their own right to justice. The author would also suggest that payment of bonds be introduced in addition to sureties for felonious crimes. This would ensure that in breach of any conditions of a bail, such sum(s) could be made payable to either the state or the victim in cases of flight. So while protecting the rights of both accused persons and victims, the economics is in order.