

AN EVALUATION OF THE SIERRA LEONE SEXUAL OFFENCES (AMENDMENT) ACT 2019

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ABSTRACT

The Sierra Leone Sexual Offences (Amendment Act) 2019, gave the chief justice of Sierra Leone the power to solely draw mandatory sentencing guidelines for the offences of rape and other sexual offences. The Act makes it a mandatory life imprisonment sentence for adults who commit rape on a minor. This has been interpreted to mean; life behind bars for the rest of the lives of those convicted for the offence. This position takes away the discretion of judges, who ought to take into account other considerations when passing sentence. The Act also departed from the established practice of parliament laying out the punishment for the crime in the statute. This issued sentencing guidance states that, the Rules of Court Committee will be consulted when the guidance is reviewed. Such consultation which the chief justice has intended to undertake, may not be within committee's remit, as laid down in the constitution. Does this therefore make the legislation flawed? This article postulates that the Act is contentious on many grounds, which has made it problematic.

Keywords: Chief Justice of Sierra Leone, Rules of Court Committee, Sierra Leone Sexual Offences (Amendment Act) 2019, Sierra Leone 1991 Constitution, life imprisonment.

INTRODUCTION

The Sierra Leone Sexual Offences (Amendment) Act 2019, (the Act, the 2019 Act), has a commencement date in 19 September 2019 and date of assent in 4 November 2019. The Act states that, “the only penalty for an adult convicted for the rape of a child below the age of 12 is a mandatory life imprisonment.” (Sierra Leone 1991 Constitution, 2019). It was passed by parliament aimed at addressing the issue of sexual offences against minors. This is against the background of frequently reported rape and sexual assault cases against minors, some as young as a month old (statehouse.gov.sl, 2019). It was the public anger backed by concerns raised by Non -Governmental Organisations and other activists which led the government to react, by passing the Act.

Section 7 (1) of the Act amended the previous legislation on the offences; the Sexual Offences Act 2012, which had the sentencing guidelines laid out in the Act itself. Also, section 7(2)(B) of the 2019 Act, gave the chief justice the sole responsibility to issue mandatory sentencing guidelines (the Guidelines) to be applied by all courts in the land, for every case relating to the sexual offences. And indeed, the chief justice issued the Guidelines, on 6 January 2020. By parliament giving this responsibility to the chief justice who is head of the judiciary this may have blurred the separation of power principle.

This article argues that by giving responsibility to the chief justice to solely enact guidelines by an Act passed by parliament, would potentially abrogate the right to a fair hearing before an impartial court as enshrined in the Sierra Leone 1991 Constitution, (the Constitution). It is further argued that the life imprisonment sentence, which has been interpreted to mean` life behind bars for the rest of the lives of convicted persons` takes away the discretion of judges to consider other factors, when passing sentence. Additionally, in the issued Guidelines, the chief justice stated that, the Rules of Court Committee (RCC), would be consulted when the Guidelines would be reviewed from time to time. As the functions of the RCC is clearly prescribed in the Constitution, any additional role giving to it, which has not been re-defined by the Constitution, may not have legal basis, it would be argued.

The article is discussed in three parts. The first part focuses on the problematic nature of the Act. The second part on the removal of Judge’s discretion during sentencing. The

third part, dwells on the role of the RCC in issuing the sentencing guidelines, which is then followed by the conclusion.

THE PROBLEMATIC NATURE OF THE 2019 ACT

The chief justice issued guidelines makes it compulsory that every court in the land follows those guidelines. By so doing, it gives the conventional meaning of guidelines a different meaning as they are meant to serve as a guide or be advisory only. Here they have been made sacrosanct. The relevant part of the Act reads, "...the chief justice shall within 3 months of the coming into force of the amendment Act, issue a compulsory sentencing guideline to be applied by the court in all cases where an offender is being sentenced for a sexual offence." (Sierra Leone 1991 Constitution, 2019)

This is where the Act becomes problematic, in giving the chief justice the sole responsibility to draw up the sentencing guidelines for the offences contained in the Act. To that end, it is necessary to draw comparison with the practice of the legal systems of a few countries around the world in the context of drawing sentencing guidelines. In the United Kingdom, for example, the Sentencing Council for England and Wales, is a 13-man body, tasked with such responsibility. It promotes greater consistency in sentencing, whilst maintaining the independence of the judiciary. The Council produces guidelines on sentencing for the judiciary and criminal justice professionals and aims to increase public understanding of sentencing (Sentencing Guideline, 2021). The primary role of the Council is to issue guidelines on sentencing which the courts must follow unless it is in the interests of justice not to do so. This article notes that, the Sentencing Council continues to maintain the independence of the judiciary even though it forms part of the Ministry of Justice.

Similarly, in the United States, sentencing guidelines are issued by the United States (US) Sentencing Commission. Further to that, the US, Supreme Court case of *Blakely v. Washington* (BLAKELY & WASHINGTON, 2004), establishes that sentencing guidelines are now considered advisory only.

It must be added that in some instance's legislations set out broad rules which govern how judges and magistrates decide upon the sentencing of offenders. For instance, prior to establishing the Sentencing Council in England and Wales, through the Coroner and Justice Act 2009, it was the Criminal Justice Act 2003, which sets out, among other things, the rules on how murderers should be sentenced. That position is in consonance with the Sierra Leone Sexual Offences Act 2012, which had laid down the sentences for the offences contained in the Act. For example, under the head, Part IV, Section 6, sentencing, it states that:

A person who intentionally commits an act of sexual penetration with another person without the consent of that other person commits the offence of rape and is liable on conviction to a term of imprisonment not less than five years and not exceeding fifteen years.

Evidently, the 2019 Act sharply departed from the 2012 Act in respect of fleshing out the punishment for the offence. It is noted that, parliament did not make any disclosure or made its intention known as to why the 2019 Act did not flesh out the sentencing guidelines as was previously done in the 2012 Act. It is hereby appropriate to cite the former Lord chief justice, Rt Hon Lord Phillips of Worth Matravers, in his lecture, "Who decides the sentence?" Prisoners' Education Trust Annual Lecture, 14 October 2008, where he states:

The primary way that Parliament influences the sentence is by making statutory provisions that restrict the discretion of the judge as to what sentence to impose... In this way Parliament indicates its view of the relative gravity of the offence and the judges have regard to this when imposing individual sentences. (United Kingdom Parliament website, 2009).

The above therefore makes it crystal clear that when a statute is passed by parliament, it is for it to specify the punishment for the crime, as was rightly done in the 2012 Act.

As things currently stand, the 2019 Act by not defining the punishments which the crimes attract and leaving that responsibility solely in the hands of the chief justice, departed from the established norm. According to Lord Reed of Allermuir, President of the Supreme Court of the United Kingdom appearing before the House of Lords Constitution Committee, on 4

March 2020, he stated that, “Judges are not staging a power grab to take over parliament’s role and do not make up law as we go along” (O Bowcott, 2020). This article sides with this view as expressed. By omitting the punishment of the offences in the statute and passing that responsibility to the chief justice, it would be inferred that, the chief justice as head of the judiciary has been allowed to take responsibility of a parliamentary function, that in essence blurs the separation of powers principle, it is argued.

Another complex situation which the 2019 Act creates is, if its lawfulness is to be challenged, or the sentence passed by a judge is appealed and the matter arrives at the Court of Appeal, the highest appellate court in the land in which he sits as president, what would be his position? This situation would potentially abrogate the appellant’s right to a fair hearing, before an independent court as stated in our Constitution. Simply because, the chief justice in that particular instance, cannot be said to be presiding in an independent court. As the scenario played out would be the chief justice serving both as a player and a referee.

An additional argument regarding the problematic mandatory nature of the Guidelines, arises from the definition of rules and guidelines. A rule is an accepted principle or instruction that states the way things are or should be done and tells you what you are allowed or not allowed to do (Cambridge on line Dictionary, 2021). On the other hand, guidelines are information intended to advise on how something should be done or what something should be (Cambridge on line Dictionary, 2021). To further clarify that, guidance is advisory, the Crown Prosecution Service of England in their Instruction for Prosecuting Advocates, states, “This guidance assists our prosecutors when they are making decisions about cases (www.cps.gov.uk, 2021).” This should therefore leave no further clarification that, guidance should not be sacrosanct. Also rules may attract punishment if they are not followed, whilst guidelines do not.

Hence, despite the Guidelines being described as mandatory, but in the strictest meaning of the word, they are no longer guidelines, because they have been made not to be so.

THE REMOVAL OF JUDGE’S DISCRETION DURING SENTENCING

With the current 2019 Act, the offence of rape in some instance now carries a compulsory penalty of life imprisonment, as found under section 14 of the Guidance. This has been strictly

interpreted to mean;` life behind bars for the rest of the convicted person's life; as the only sentence available for the crime`.

Based on the foregoing, it is evident that, the interpretation takes away the discretionary nature of sentencing by judges. Because other factors, such as the offender's blameworthiness, whether the crime was motivated by hatred or prejudice, whether there were aggravating or mitigating circumstances, whether the offender pleaded guilty, his previous character amongst other, are no longer relevant to be considered. As William W. Schwarzer, a former US Federal District Judge also explains, "there should be judicial discretion in sentencing (William W. Schwarzer, 1991)." This sentiment stands at odds with the Guidelines issued regarding the Act.

To that end, it is useful to mention that some crimes in England and Wales as in Sierra Leone, have mandatory life sentences in their statutes, such as murder and rape. The guidelines on sentencing for the crime of rape is based on *Millberry and Others*.(2003) 2 Cr. App. R.(S) 31). The mentioned case lays down the starting point when sentence is to be passed; aggravating factors and mitigating factors are to be considered when passing sentence. Needless to say, in Sierra Leone, the compulsory nature of the Guidelines takes away the discretion judges which should be exercised in such matters.

The Criminal Bar Association of England and Wales commented on how judicial discretion is integral to the criminal justice system:

Judges must be allowed to retain a discretion to decide upon a sentence that is appropriate for the particular facts of an individual case. The exercise of this discretion, based upon a full consideration of the individual case, is exactly the judgment that a judge is expected to bring to the criminal justice system. (publications.parliament.uk, 2008).

The above supports the position as to why judges should have discretion when it comes to sentencing.

THE ROLE OF THE RULES OF COURT COMMITTEE

Section 145(1) of the Constitution states that, “there should be an RCC in which the chief justice is chairman” ([sierralii.org](#), 1991). The committee’s main responsibility is to make rules regulating the practice and procedure of all Courts in Sierra Leone, which shall include rules relating to the prevention of frivolous and vexatious proceedings. However, the Chief justice’s sentencing guidelines at para 15 reads: “These Sexual offences Guidelines shall be subject to review as and when necessary as determined by the chief justice in consultation with the Rules of Court Committee” (Section 145(2) of the Constitution, 1991).

To be clear the RCC’s role in Sierra Leone is not dissimilar to that of many other commonwealth countries. For example, the RCC in the Court of Queen’s Bench Division in Alberta, (Canada) is similarly constituted; where the chair is the chief justice ([www.albertacourts.ca](#), 2021). Another similar example is the Rules Committee of New Zealand. In that jurisdiction, the Committee may undertake ancillary activities such as consultation, promoting statutory change where it is needed to co-ordinate with procedural rules, annually reviewing cost levels to update cost schedules, publicising proposed and enacted rule changes, and assisting with seminars about new rules ([www.courtsofnz.govt.nz](#), 2021).

In Ghana, the RCC adopt rules that facilitate the hearing of cases ([www.ghanajustice.com](#), 2019). It does not involve in drafting sentencing guidelines. The Sierra Leone RCC’s role as in those countries mentioned, is similarly rooted in their various constitutions. For example, in New Zealand, the provision could be found under section 51B of the Judicature Act 1908 and continues to section 155 of the Senior courts Act 2016. From the foregoing it is to be noted that the RCC’s role, deals with procedures for the conduct of business in court, such matters as time limitations, pleadings allowed, and grounds for appeal ([law.duke.edu](#), 2020).

Insofar as section 145(2) of Sierra Leone’s constitution, is concerned, it is unequivocally clear about the role of the RCC (Section 145(2) of the Constitution, 1991). The 2019 Act also gives legal authority for the said committee to make rules as read in section 42(A) of the previous 2012 Act. These rules in this context relates to court rules and procedures, when an accused is charged with the offence. What right has the chief justice, to alter the role of the RCC as

decided by the Constitution, from making rules on court matters and procedures, to being consulted in the issuance of guidelines regarding an Act passed by Parliament? The author submits that, this is not within the constitution. And until, that consultative role of the RCC is re-defined to accommodate the future intention of the chief justice, then that consultation may not have legal basis within the constitution, it is argued. This position finds strength in Lord Reed of Allermuir 's statement cited above, (O Bowcott, 2020).

CONCLUSION

The Act by not stating the punishment of the offence as it should have done, departs from the established conventional pattern. It was for parliament to have outlined the crime and the punishment but leaving that responsibility to the chief justice makes the Act problematic. To that, it should be added that, parliament in passing the responsibility of laying out the punishment in the statute, and passing it to the chief justice, blurs the principle of separation of power.

The Act gave the chief justice the sole authority to draw mandatory sentencing guidelines for the offence. These guidelines are now compulsory instead of being advisory in nature, in the process, they have eroded away the exercise of discretion by judges when it comes to sentencing. This is a steep departure from what guidelines should be. In that, they are only meant as information, which may not be strictly adhered to. This is in view of the fact that, there are factors such as mitigating or exculpating situations, blameworthiness, etc, which needs to be considered in passing sentence. The discretion which the compulsory guidelines has removed, takes away an integral part of the criminal justice system.

The role of the constitution spells out the RCC role, vi a viz, to draw rules regarding court proceedings. By consulting the body when the sentencing guidance is reviewed, the chief justice has attached additional responsibility to it, when the constitution has not re-defined its constitutional role. Therefore the above arguments would support the assertion that the 2019 Act, may have been a bad piece of legislation.

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