

EXPLORING THE USE OF NON-CUSTODIAL SENTENCES IN THE ADMINISTRATION OF NIGERIA'S CRIMINAL JUSTICE*

Abstract

Crimes that go unpunished pave way for the reoccurrence of such crimes and other crimes not just by the offender, but by others who would want to test the water. In a bid to deter crime, various sets of punishment have evolved and sentences passed, from confinement which is custodial in nature to those that poses non-custodial and restorative justice characteristics. No doubt, either method adopted has its significant role to play but with the evolution of time and laws. This paper seeks to proffer the best punishment passed as a sentence having recourse to each particular case and law in a bid to embrace new ideals and still achieve the objective of punishment. In the words of Elizabeth Fry, punishment is not for revenge, but to lessen crime and reform the criminals.

Keywords: Punishment, Sentencing, Non- custodial sentences, Restorative Justice

1. Introduction

For a Sovereign State to be functional, it is regulated by laws. One of the key features of such laws, especially criminal Law, is the imposition of punishment for failure to adhere to such a law. Punishment may thus be defined as the authoritative imposition of an undesirable outcome on individuals or groups for unacceptable action or inaction deemed unacceptable or threatening to some norm.¹ It is however the duty of the Legislature, vested with legislative powers, to consider and recognise the particular legal system to determine the best punishment for a crime. Conversely, sentencing is the 'judicial determination of the punishment to be inflicted on a convicted criminal'.² It is the court's imposition and interpretation of a punishment contained in Legislation. Punishment is usually imposed by a sentence of a competent court, as it is also defined as the penalty prescribed by a court to any person convicted for an offence.³ For the purpose of this paper both expressions: 'sentence' and 'punishment' will be used interchangeably. The inference that can be drawn from the above definitions is that, while punishment is usually associated with penalty stipulated in the legislation, sentencing is more procedural inclined and linked with the judiciary and adjudication. In a nutshell it can be said 'if punishment is the object of the criminal law, then sentencing is the way in which principles of punishment are applied to individual cases'.⁴ In addressing the subject of discuss, this paper comprises of six parts, besides this introduction and the conclusion. The second part looks at the philosophy and objective of punishment in a bid to identify the motive of punishment by various schools of thought. Sequel to this, the third part will identify the various types of sentencing aside restorative justice/non-custodial sentences. A brief look at the Jurisdiction of the Magistrate Courts will be done in the fourth part of the paper. The fifth part, which is the crux of the paper, will focus on Non-custodial sentences/Restorative Justice as a modern criminal law concept and will highlight the edge it has over other forms of sentencing. This will buttress the motive for advocating for the use of this concept by the Judiciary. Furthermore, the utility of this concept will be addressed in the sixth part of the paper, recommendations will be proffered and conclusions made in the seventh and eight part.

2. Philosophy and Objective of Punishment

The philosophy of punishment is firmly rooted in the ideology of deterrence. Prior to civilisation in the eighteenth century, the preventive motive of punishment were reflected in unusual ways of punishing individuals and the existence of punishment was greatly influenced by the two main schools which will be briefly looked at.⁵

The Classical School⁶

This school was sponsored by eminent scholars such as Jeremy Bentham and Rousseau founded in the 18th century.⁷ It kicked against the corrupt and arbitrary use of Magistrate powers where criminals were subject to barbaric punishment. Criminals were restrained to dark chambers or pits, completely isolated or even burnt alive. The proponents for the school based its views on the 'social contract' theory making the interest of the society paramount by ensuring that the safety of the public is preserved by meting out punishment and in turn preventing revenge. The school advocated for public trials and equal punishment for same crime regardless of the status of

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¹Prisons: For Punishment or Rehabilitation (2014)< <https://storify.com/vesti1/prisons-punishment-or-rehabilitation>> accessed 13 April 2021

² *R v Mc Caud* (1958) O.R 453, 28 C.R. 77 at 99

³ C. O .Okonkwo, *Sentencing in Nigerian Courts* (2nd edn, Sweet & Maxwell 1980) 23

⁴ Okonkwo and Nash, *Criminal Law in Nigeria*, (2nd Ed. Spectrum Publishers 2000) 37

⁵A. W.Stream, 'Evolution of Punishment' <<http://scholarlycommons.law.northwestern.edu/egi/yiewcontent.egi?article=2635&context+Jecl>> accessed 2 April 2021

⁶ R.K. Sharma, *Criminology and Penology* (Mehra Offset Press 1998) 5

⁷ Ibid

the offender or victim. It believed that punishment instils fear for crime and minimises the occurrence of crime which in turn reflects positively on the society.

The Positivist School⁸

As a rejoinder to the classical school, the positivist school based its theories on practical research. Its research reflected that human actions were influenced by various circumstances that may be beyond their control e.g. temperament, poverty or mental condition. Led by Caesar Lombroso, this school sought to focus on the criminal instead of the crime in a bid to understand the problems of punishment. It went ahead to propose that punishment should be determined by the offender not the crime. The interpretation of this is that, a habitual murderer should be sentenced to death or a mentally ill offender should be rehabilitated not imprisoned and so on. As deduced from the above schools and other upcoming ideologies⁹, the objectives punishment intend to attain depends largely on the foundational ideology and if the society is a pro or anti- social one. Punishment aim to achieve the objectives which will be now be discussed:

Retribution

Punishments that are retributive in nature seek to met out punishment that is contemporaneous to the crime of the offender.¹⁰ That is, minor crimes deserver minor punishment, while crimes such as capital offences, get capital punishment. In other words, the offender is deemed to have gotten the punishment he deserves. Though there have been advocates against capital punishment on the grounds of cruelty and that it destroys the existence of man and all rights inherent thereof¹¹, what is obtainable in Nigerian laws still permits the capital punishment and the second optional Protocol to the International Covenant on Civil and Political Right (ICCPR), which is aimed at abolishing the death penalty, has not been ratified.¹² Retributive punishment looks in retrospect and in justification by the crime committed serves as penitence for damage done.¹³ The core objective for such punishment is to 'let the punishment fit the crime.'¹⁴ It is believed here that since offenders have done or taken unjust advantage of a person or situation, the offender should suffer a just disadvantage in order to balance the scale of justice.

Deterrence

As the name implies, deterrence is the prevention of criminal behaviour by fear of punishment.¹⁵ The use of punishment here serves as a warning to other intending offenders. People are deterred from crime when the punishment is implemented or the awareness of the punishment is created. Its objective, dual in nature, caters firstly for the offender (individual deterrence) to deter them from committing further crimes. Secondly, deterrence to others (general deterrence) by their knowledge of the punishments and persons who have served such punishment. Using death penalty as an example, the court is of the opinion that the death penalty '...is a good law to serve as deterrence in a mundane society where heartless and dangerous citizens abound in plenty.'¹⁶ For the punishment to serve its deterrent purpose, the certainty of the implementation of such punishment must be ascertained. That is, offenders should be punished and in reasonable time as 'justice delayed is justice denied.' This form of punishment may not be proportionate to the crime committed in other to prevent commission of such crimes. The philosophy behind this is that when the offender compares the gain or pleasure that may be achieved from the crime to the hideous force of the punishment; he is likely to have a second thought.¹⁷ Though there are still few cases of recidivism and resilient offenders.¹⁸ It may however be seen that punishment that are not

⁸ Ibid

⁹ There has been a number of other schools of thought that have sprung up with time such as the Functional School which looks at the purpose punishment serves in making the society functional.

¹⁰ Stanford Encyclopaedia of Philosophy < <https://plato.stanford.edu/entries/justice-retributive/> > accessed 10 April 2021

¹¹ O.Okpara, *Human Rights Law & Practice in Nigeria* (Chenglo Ltd., 2000) 127; see *Furman v Georgia* (1972) 408 US 238 at 288 ; see also Sec. 34 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). See B.O. Nwabueze, *The Presidential Constitution of Nigeria* (Hurst & Co., 1981) 411 where Professor Nwabueze argues that it is contrary to the constitutional protection and therefore not permissible.

¹² See E. Azinge, 'The Death Penalty: An effective Deterrent to Drug Trafficking and Abuse?' in B.Ajibola (Gen. ed.), A.U.Kalu and Y. Osibanjo (eds.), *Narcotics: Law and Policy in Nigeria* vol 8 (FMJ Law Review Series, 1990) 350 at 354

¹³ M. Calvadino, *The Penal System : An Introduction* (2nd edn, Sage 1997) 39

¹⁴ See R. Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory* (2003); see also R. Perry, 'The Third Form of Justice' (2010) *Canadian Journal of Law and Jurisprudence*

¹⁵ Black's Law Dictionary, 9th Ed.

¹⁶ Per Fabiyi JCA in *Akinyemi v State* (1999) 6 NWLR pt 465, 607.

¹⁷ J. Bentham, 'Principles of Penal Law' in J. Brown (ed.), *The words of Jeremy Bentham*, 1843.

¹⁸ Regardless of the Bills passed into law May 4, 2009 in Imo State (Edo State has a similar law) providing the death penalty for convicted kidnappers or owners of premises used for kidnapping, this crime has not totally been eradicated. See Amnesty International Press Release, 'Nigeria: Imo Death Penalty Decision puts Victims at Risk', May 07, 2009 available www.amnestyusa.org accessed 29 March 2021.

proportionate (i.e. seem graver) to the crimes committed are often more deterrent in nature.¹⁹ This form of punishment is often contrasted with Retribution which bases its punishment on the severity of the crime.

Incapacitation

To incapacitate means to make someone unable to work or do things normally, or unable to do what they intended to do.²⁰ Incapacitation as it relates to punishment or sentencing is usually associated with imprisonment,²¹ death penalty or remand in a psychiatric home and this is determined by the gravity of the offence committed and the mitigating circumstance of the offender. Incapacitation may be temporal or permanent²² and the idea behind it is to reduce the reoccurrence of the crime committed by the same offender. It's a form of custodial sentence to punish and reform the offender, as well as deter others.²³ The reason being, most times the only protection that can be assured to the society is to put such persons away.²⁴ It may be perceived that imprisoning an offender may not incapacitate the offender, as criminal activities still go on in the prisons and on release of convicts. This may have informed other extreme incapacitation measures which will further 'disable' the offender.²⁵ This is criticised and is 'penny wise pound foolish' as such measures incur high cost of maintenance for prisons especially for inmates serving the life term, the social cost of catering for persons with disabilities and the inability to reverse cases of mistaken facts.²⁶ This is the direct opposite of the non-custodial measure of punishment.

Rehabilitation

Having regards to the fact that some persons have criminal minds, there are many other factors and circumstances (e.g. mental disorder and poverty) that push an offender to crime. This has given birth to possibility of rehabilitation, which empowers and reforms the mind and character of the offender.²⁷ This concept of punishment is primarily positivist in nature and one of the foundational stones for restorative justice in modern criminal law. Rehabilitation acts as an individual deterrence but this time focuses on reforming the offender's mind, making him/her decide to refrain from subsequent commission of offences. Rehabilitation as a punitive concept in criminal law has its spot light on how amenable the offender is by securing conformity through constructive drive rather than fear,²⁸ thereby making the offender less inclined to commit crime even in the absence of a penalty attached.²⁹ Criticisms have trailed Rehabilitation to the extent that most rehabilitation centres still incapacitate and its use prone to abuse where offenders are kept there indefinitely.³⁰ This then becomes a contradiction of the ideals of non-custodial measures in modern criminal law.

Restitution

Crime committed by an offender is usually against the State and a victim. Apart from it being a wrong act, persons referred to as the Victims of Crime suffer damages or loss from such acts. It is in a bid to re-instate or compensate such victims instead of just satisfying abstract legal principles the philosophy of Restitution came about. Its objective is an attempt to make amends for the victim and is hardly viewed as punishment and offenders are made to take responsibility for their actions by apologies, refund of stolen items or even community service.³¹ Usually taking the form of compensation and fine ordered in addition or in lieu of any other penalty, this concept well

¹⁹ For example the provision of death penalty (by stoning) for the offence of rape if married may appear to deter the incidence of rape in 'Sharia States' as opposed to 'non-Sharia States'. See sec. 129 of the Shari'ah Penal Code, Laws of Zamfara State of Nigeria 2000; also under the Malaysian Criminal Law, the penalty for Drug Trafficking is the death penalty, this has deterred drug traffickers to carry out their activities in that jurisdiction.

²⁰ Cambridge Dictionaries Online <http://dictionary.cambridge.org/dictionary/english/incapacitate> accessed 4 April 2021

²¹ Imprisonment physically incapacitates an offender and the terms of the imprisonment are determined by the provision of the law and the crime committed.

²² P.A. Anyebe, 'Sentencing in Criminal Cases in Nigeria and the case for Paradigmatic Shift' (2011) vol. 1 *NIALS Journal CLJ* 186

²³ *Ademoye v State* (2014) All FWLR pt 729at 1212

²⁴ *Re Sargent Lawton* (1975) 60 Crim. App. R. 74

²⁵ See sec 93(1)(g) of the Shari'ah Penal Code, Laws of Zamfara State of Nigeria 2000

²⁶ P.A. Anyebe, op. cit. p.188; see M.A. Owoade, 'Sentencing: Guiding Principles and Current Trends', (2009) vol. 2 *NJI Journal*

²⁷ United Nations Office on Drugs and Crime (UNODC) <https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html> accessed 10 April 2021

²⁸ V. Clarkson and M. Keating, *Criminal Law Texts and Materials* (3rd edn, Sweet & Maxwell 1994) 54

²⁹ See N. Walker, 'Punishment Denouncing or Reducing Crime' in P. Brook (ed), *Reshaping the Criminal Law* (1978)

³⁰ P.A. Anyebe, op. cit. p.189; see M.A. Owoade Op. cit. p 310

³¹ Parade, 'A New Kind of Criminal Justice' (2009) <http://parade.com/38506/parade/091025-a-new-kind-of-criminal-justice/> accessed 29 April 2021

reflected in International³² and Nigerian criminal law³³ cannot be enforced when the item of the offence cannot be identified or has been exchanged.³⁴

3. Types of Sentencing

The existence of different punishment is stemmed from the classification of crime which is usually based on the punishment imposed by the law that creates such offence.³⁵ Crimes are majorly classified into: felony, misdemeanour, simple offences.³⁶ It should be noted however, that these classes are not exhaustive.³⁷ Coined from the objectives of punishment, various types of sentencing have been in existence. A particular sentence may be passed by a judicial authority relying on cogent evidence and upon the prosecution proving its case beyond reasonable doubt³⁸ as Suspicion no matter how strong cannot take the place of legal proof.³⁹ The following are the predominant types of punishment that are pronounced as Sentences in Criminal Law.

The Death Penalty

Earning its constitutionality by virtue of sec. 33(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the death penalty is the maximum sentence for capital offences.⁴⁰ Under the Nigerian law, offences that carry the death penalty include: treason,⁴¹ murder,⁴² treachery,⁴³ robbery with fire arms or weapon,⁴⁴ trial by ordeal resulting in death,⁴⁵ false evidence leading to conviction of innocent person,⁴⁶ rape⁴⁷ and kidnapping.⁴⁸ This type of sentence having the dual objective to incapacitate and deter is executed in various mode depending on various factors. Generally, except otherwise provided by statute,⁴⁹ the death sentence in Nigeria is carried out by hanging.⁵⁰ The Supreme Court in *Olowofoyekun v State*⁵¹ opined that though failure to comply amounts only to a mere clerical irregularity, a judge passing the death sentence is duty bound to pronounce the manner in which the sentence is to be carried out to avoid apprehension that it may be carried out by any other means. As obtainable in most legislation, for every general rule, there is an exception. A person who had not attained 18years at the commission of the offence shall not have the death sentence pronounced or recorded against them.⁵² Similarly, sec. 404 ACJA provides that where a pregnant woman is guilty of a capital offence, the death sentence shall be passed on her but its execution shall be suspended until the baby is delivered and weaned. An offender may however be reprieved by the State or the Federation in the exercise of its prerogative of mercy. The cruelty involved in the execution of the death sentence has called for its abolishment.⁵³ It is tagged as abhorrent to civilised sentiments, inhuman and degrading.⁵⁴ The right to relief or appeal may be indirectly foreclosed where the sentence

³² Principle 8 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1986, provides that offenders should make fair restitution to victims, their families and their dependants. Principle 9 calls on governments to review practices and laws to include restitution as a sentencing option in criminal cases.

³³ See sec. 321 and 319 Administration of Criminal Justice Act (ACJA) 2015; sec 357 and 365 of the Criminal Procedure Code, Laws of the Federation of Nigeria(LFN) 2004; sec. 78 Penal Code LFN 1990; 261 and 268 Criminal Procedure Act LFN 2004; sec. 31 Police Act LFN 2004

³⁴See *Akosa v R* (1950)13 WACA 43;see also *R v Akinloye* (1931)10 NLR 98

³⁵ See Aguda, *Principles of criminal liability in Nigeria*, 85

³⁶ S.E. Akinbiyi, *Crimes, Defence and Sentences* (1st edition Streams Communication 2006) p 17

³⁷ There are other classifications of crime which include, crimes that are ‘*Mala In se*’, ‘*Mala prohibita*’, crimes with moral turpitude, major crimes, petty crimes, indictable and non-indictable offences - see S.E. Akinbiyi *Ibid*.

³⁸ *Anekwe v State* (2014) All FWLR pt 744 at 94

³⁹ *Udor v State* (2014) All FWLR pt 749 at 1115

⁴⁰ Sec. 3(1) Geneva Conventions Act LFN 1990 also makes persons liable to the death penalty under the Nigerian law where such person commits or is involved in the killing of a person protected by the Convention.

⁴¹ Sec. 37 and 38 Criminal Code; sec. 41 Penal Code

⁴² Sec. 319 Criminal Code; sec. 221 Penal Code

⁴³ Sec. 49A Criminal Code

⁴⁴ Sec. 1 Robbery and Fire Arms Act LFN 2004

⁴⁵ Sec. 208 Criminal Code; sec. 214 Penal Code

⁴⁶ Sec. 159 Penal Code

⁴⁷ Sec.129 Sharia Law. Death Sentence under Sharia Law is usually carried out by Stoning

⁴⁸ Imo State Prohibition of Hostage Taking and Related Offences Law 2009

⁴⁹ The Robbery and Fire Arms Act LFN 2004 provides for death by firing squad

⁵⁰ Sec. 37 (2) and sec. 367 of the CPA; sec. 273 CPC provides that the punishment of death is inflicted by hanging the offender by the neck till he is dead.

⁵¹ (1984) 5SC 192

⁵² Sec. 405 ACJA

⁵³ A day to the execution, the weight of the prisoner is taken for rehearsals with a sand bag of same weight to ascertain the length of the rope to be used to avoid either decapitation or the death taking too long. The rope is greased, boiled and stretched to allow a smooth slide. The prisoner’s hands and legs are tied and he is blind folded before he is hanged. See O.Duru, ‘The Constitutionality of Death Penalty Under Nigerian Law’ (2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142981> accessed 13 April 2021

⁵⁴ O. Okpara, *Human Rights Law and Practise in Nigeria* (Chenglo Ltd, 2005)

has been wrongfully imposed. In the celebrated case of *Bello v AG Oyo State*,⁵⁵ the Supreme Court held that the conviction of the accused by the State Government prior to the hearing of the appeal at the appellate court was a premature act and a contravention of the constitution. But this was sadly an irreversible act. Conversely, proponents for the death sentence have since and still regard the right to life as a qualified right and it cannot be said that the death penalty has been outlawed.⁵⁶ On a personal note, it is believed that death penalty has not served the purpose of deterrence. Using armed robbery as a case study, the average rate of armed robbery increased by 12.5% from 1971-1985 after the introduction of the death penalty for the offence.⁵⁷

Imprisonment

Based on the English penal practice, the organised prison system was introduced in Nigeria through the Lagos colony in 1861 and the Northern Protectorate in 1900.⁵⁸ However, its mode of operations has evolved with time. The court deviating from its punitive meaning has defined imprisonment generally as the restraint of man's liberty.⁵⁹ It may be a restraint in an open field, enclosed place or any place the person is said to be a prisoner as long as his liberty is contained.⁶⁰ In strict association for punitive purposes in a legal system, the definition that would be suitably employed is: 'a term of judicial sentence available for a convicted offender of adult age, involving incarceration in prison for either life or a specified period of time.'⁶¹ From the above definition, it can be deduced that imprisonment comprises of three main features. Firstly, it is a term of judicial sentence. A prison sentence is passed by a court of competent jurisdiction and must not exceed the maximum it has jurisdiction to impose or as provided by the law.⁶² Secondly, children are exempted from a sentence of imprisonment. Sec. 452(1) Administration of Criminal Justice Act (ACJA) makes the provisions of the Child's Right Act applicable for alleged cases of child offenders.⁶³ Thirdly, the sentence of imprisonment may either be for life or a specified duration. In the case of the former, it is usually an equivalent of 20 years.⁶⁴ While in the later it could be extended, suspended or a partly suspended sentence.⁶⁵ Some offences however, impose in addition to imprisonment a fine or an option of fine in lieu. Similarly, a term of imprisonment has attached to it hard labour except the statute creating it expressly exempts it.⁶⁶

Fine

Fine is a sum of money to be paid especially to the government as a penalty for an offence.⁶⁷ For sentences, a fine may either be imposed by the court as a punishment on its own or compliment as an option for imprisonment. A fine seems to be the most commonly specified sentence. The courts are guided by the financial means of the offender in order not to lead to a default making him serve a prison term. Like imprisonment, the courts cannot exceed the maximum prescribed but may impose a term of imprisonment where the offender refuses or is unable pay such fine.⁶⁸ With its English origin, this sentence may also be seen to be more economically beneficial (especially in economic related offences) in terms of enforcement and practicability as compared to other forms of punishment.

Caning or Whipping⁶⁹

Gradually fizzling from most legal systems that practised it, caning maybe passed in addition to other punishment. Caning is carried out by applying a light rod or cane or both on an offender in the presence of an administrative officer.⁷⁰ Canning or whipping may be used in alternative to sentence of six months imprisonment depending on the prevalence of the crime or antecedence of the offender.⁷¹ It should be noted that men and women over 45years cannot be canded. On pronouncing any of the sentences above, the trial court is obligated to specify the particular

⁵⁵ (1986)12 SC 1

⁵⁶ *Kalu v State* (1998)12 SCNJ 1

⁵⁷ P.A. Anyebe, op cit p. 169

⁵⁸ W. Orakwe, 'The Origin of Prisons in Nigeria' <<http://www.prisons.gov.ng/about/history.php>> accessed 13 April 2021

⁵⁹ *Alflec ltd v Lee* (2013) 6NWLR pt 1349 at 9

⁶⁰ Ibid

⁶¹ Lanre Adediji, 'Sentencing Practice in Nigeria' <<http://thelawyerschronicle.com>> accessed 21 April 2021

⁶² O. Doherty, *Criminal Procedure in Nigeria: Law and Practice* (Ashford Colour Press, 1999) 317

⁶³ Sec. 204 of the Child's Right Act LFN 2004 provides that a child who has committed an offence shall be subjected only to Child Justice System as set out in the Act ; sec. 221(1) CRA goes further to exclude imprisonment, corporal punishment and death sentence from being pronounced on a child and pregnant women (thereby protecting the unborn child); sec. 94 Sharia Penal code

⁶⁴ *Ozuloke v The State* (1965)NMLR 125

⁶⁵ See N.Walker, *Sentence : Theory, Law and Practice* (Butterworth's, 1985)

⁶⁶ Sec. 377 CPA

⁶⁷ The Free Dictionary by Farlex <<http://www.thefreedictionary.com/fine>> accessed 2 April 2021

⁶⁸ This is because most statutes provide for imprisonment or an option of fine.

⁶⁹ Referred to as Haddi Lashing under the Penal Code and applicable to offenders of the Muslim faith

⁷⁰ Ibid

⁷¹ Sec. 387 CPA

punishment passed on the accused. However, failure to do this does not invalidate the proceeding, conviction or sentence by virtue of the Criminal Procedure Code.⁷²

4. Jurisdiction of the Magistrate Court

It is trite that the courts are at the fore front of the Administration of justice. This paper highlights Magistrates courts because of the role it plays in the justice administration. Under the Nigerian legal system, Magistrate courts are founded on the provisions of Sec. 6(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). This section vests judicial powers of the state in courts which the section relates. Subsection 6(4) goes further to provide that:

- (4) 'Nothing in the foregoing provisions of this section shall be construed as precluding-
- (a) The National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court.'

The above provision of the constitution vesting power on the House of Assembly of a State to establish courts is delineated by the Magistrate Court Law and Rules. These Laws and Rules are made by the Chief Judge of the relevant state. Though not a superior court of record, it is authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.⁷³ It is a court of summary jurisdiction and usually the first in criminal justice delivery. The Constitution therefore serves as a foundation for states to establish the various grades of Magistrate courts. These state laws spell out their jurisdiction, practice and Procedure amongst others. Due to its jurisdiction,⁷⁴ the Magistrate court is usually the first port of call for the adjudication of 'common crime.' Apart from adjudicating on such matters at first instance, records have shown that not all cases dispersed with by the magistrate go on appeal to the High Court.⁷⁵ The implication of this is that the sentence that would have been passed by the Magistrate is final where the right of appeal is not exercised. This goes without saying that Magistrates should be encouraged and trained in adopting innovations, such as non-custodial sentencing, in the adjudication and dispensation of matters brought before them. As will be seen in the latter part of the paper, the ACJA is at the fore front and an enabler of non-custodial sentences. States should take steps not just to adopt their own ACJL but to implement its provisions.⁷⁶ This to a large extent depends on the modifications made in the law.

5. The Concept of Non-Custodial Sentence and Restorative Justice

Prior to the enactment of the Administration of Criminal Justice Act 2015 in Nigeria, non-custodial sentences was practised and existed in International Instruments.⁷⁷ As the name implies, non-custodial sentence is simply a sentence passed that does not involve imprisonment.⁷⁸ This form of sentence evolved as a result of the various challenges that brewed from imprisonment.⁷⁹ The concept adopts a restorative approach. On the other hand, Restorative justice is the modern criminal law concept that is devoid of focusing solely on abstract legal principles. Its focus is on the needs of the victim, the offender and the community recognising the need for a paradigm shift. This concept has been defined and elucidated as:

...a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.⁸⁰

The idea of the concept is hinged on the need to recognise the victims of crime, the obligation placed on the offender to make amends and the concept of 'healing' for the victim and the community. It basically engages all parties with the aim to avoid recidivism by giving the victim a direct say in the judgement which in turn makes the offender understand the harm he has caused. In contrast to the adversarial legal process, restorative justice

⁷² *Salisu v State* (2014) All FWLR pt 743 at 2053; sec. 269 and 275 CPC.

⁷³ Sec. 6(5)(k) Constitution FRN 1999 (as amended)

⁷⁴ The magistrate courts are empowered to entertain cases such as theft, traffic offences, tenancy matters, etc

⁷⁵ See Appeals (Magistrate) <<http://www.fcthighcourt.gov.ng/appeal-magistrate/>> accessed 14 April 2021

⁷⁶ About 30 states have passed their ACJL

⁷⁷ Such instruments include United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) 1990; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985; and the United Nations Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (The Bangkok Rules).

⁷⁸ *Ibid*

⁷⁹ They include: overcrowding, out dated facilities, sexual abuse and other factors that affect an inmate's adjustment to an ordinary life outside incarceration.

⁸⁰J. Braithwaite, 'Restorative Justice and De-Professionalization' (2004) <https://muse.jhu.edu/login?auth=0&type=summary&url=/journals/good_society/v013/13.1braithwaite.html> accessed 21 April 2021

seeks expand legally relevant issues and strike a balance between a numbers of issues that include: (a) Offenders and the needs of victims, (b) Therapeutic and retributive model of justice, (c) The need to rehabilitate the offender and duty to protect the public.⁸¹ In a nutshell, while a typical justice system deals with what laws have been broken, who broke it and what punishment they deserve. On the other hand, restorative justice addresses more keenly and looks beyond the former. It addresses who was hurt in the process or at the end of the crime, what their needs are and are vested with the obligations to make the amends.⁸² The movement for restorative justice opining that the prisons have failed to serve as a correctional tool have advocated for non- custodial sentence. It is the 'Modern Criminal Law' that advocates for non-custodial sentences. In addressing the excessive use of imprisonment, which has a lot of kickbacks, introduced some alternatives to imprisonment which has been sought and found.⁸³ Apart from the alternatives to custodial sentences which we shall be examining shortly, Restorative Justice is synonymous with Restorative Justice Conferencing. Some of these alternatives often referred as non-custodial sentences⁸⁴ were alien to Nigerian Laws; others existed and were seldom implemented while the rest are relatively new and still testing the waters.⁸⁵

Discharge

This is the release from custody and exempt from punishment. A discharge order may be given where the law that creates an offence does not specify a mandatory punishment.⁸⁶ Discharge is conditional where the offender is not sentenced unless a further offence is committed within a stipulated period. In such cases, the conditional discharge will not constitute a conviction unless the offender breaks the condition for the conditional discharge.⁸⁷ The offender is then punished for the earlier offence and the new one.⁸⁸ On the other hand, an absolute discharge is reflected on an offender's criminal record for about a year from the date of the discharge.⁸⁹

Binding Over

A binding over is a measure in restorative Justice where offenders enter recognisance before a court to be of good conduct and keeping peace for a specified period not exceeding three months.⁹⁰ Its essence is to enhance peace and orderliness in a community. The court may however bind over an offender with or without sureties and can order that a defaulter be imprisoned. The term of imprisonment must not exceed three months or one year for indictable offences in addition to the original punishment. The offender will be required to pay a specified sum of money in the event that the recognisance is breached. It is usually applied to minor offences such as street fighting and environmental sanitation.⁹¹

Suspended Sentence and Community Service

Definite sentence may be imposed on an offender which is then suspended for a specified period on the condition of the offender's good behaviour. The offender pledges to be of good behaviour especially during the suspended period.⁹² The only major difference between a suspended sentence and an order of binding over is the imposition of a condition which is usually a service to the community. Sec 460(1) ACJA provides: '... where the court sees reason, the court may order that the sentence it imposed on the convict be with or without conditions...' Such suspended sentences are not applicable to heinous offences such as the use of arms, sexual offences or offences

⁸¹ Ibid. The Canadian Resource Centre for Victims of Crime characterised it into four key values: Encounter, Amends, Reintegration and inclusion.

⁸² Philosophy of Restorative Justice< <https://hamilton-bridge.ca/philosophy-of-restorative-justice/>> accessed 20 April 2021

⁸³ R. Hood, 'Criminology and Penal Change' in Hood (ed.), *Crime, Criminology and Public Policy* p.376

⁸⁴ UN Standard Minimum Rules for Non- Custodial Measures (Tokyo Rules) 1990 referred to non-custodial measures as 'any decision made by a competent authority, at any stage of the administration of criminal justice, which requires a person suspected of, accused of or sentenced for an offence to submit to certain conditions or obligations that do not include imprisonment. The term refers in particular to sanctions for an offence that require an offender to remain in the community and to comply with certain conditions.' – see Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures <<https://www.ncjrs.gov/pdffiles1/Digitization/147416NCJRS.pdf>>accessed 2 April 2021

⁸⁵ The relatively new non-custodial sentences are championed by the Administration of Criminal Justice Act 2015, prior to which existed its State counterpart (Administration of Criminal Justice Law, Lagos State 2011)

⁸⁶ Criminal Convictions and <sentencing <https://lawontheweb.co.uk/legal-help/criminal-convictions-and-sentencing>> accessed 4 April 2021

⁸⁷ R v Patel (2006) ECWA Crime 2689

⁸⁸ Sentencing Council <<https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/discharges/>> accessed 20 April 2021

⁸⁹ Law Facts <<http://lawfacts.ca/criminal/sentences>> accessed 20 April 2021

⁹⁰<<http://www.hkcliv.org/en/topics/policeAndCrime/Criminal-Records-and-the-Rehabilitation-of-OffendersOrdinance/Criminal-Rec>> accessed 2 April 2021

⁹¹ Law and Technology Centre, The University of Hong Kong <<http://youth.clic.org.hk/en/usefulInfo/Punishment-and-sentencing-options/Binding-over/>> accessed 31 March 2021

⁹²M.I. Edokpayi, 'Suspended Sentence: Its Desirability in Nigeria' <<http://nigerianlawguru.com/articles/criminal%20law%20and%20procedure/SUSPENDED%20SENTENCE,ITS%20DESIRABILITY%20IN%20NIGERIA.pdf>> accessed 31 March 2021

that carry a term of 3 years imprisonment or more. The philosophy behind this is, the court having regards to the decongestion of prisons, rehabilitation of prisoners and prevention of convicts for simple offences from mixing with hardened criminals.⁹³ The community service to be rendered is usually carried out in any community specified by the court and overseen by the Registrar in charge of the particular Community Service Centre.⁹⁴ In the writer's view the introduction of community service could be likened to a term of imprisonment with hard labour with the exception of confinement or custody of the convict. Though similar, it is totally different as the community stands to gain more in the latter. The reason being that since it is non-custodial, the prison is saved of congestion and financial burden of the state is less on maintenance. The community also stand a better chance of gaining from the services rendered by the convict since it is a more organised system than 'hard labour' that is not really defined and community oriented. The nature of community service ordered may include environmental sanitation of public environs, agricultural production, construction and any other service that is beneficial and reformatory in nature.⁹⁵ Community services are performed for a period of not more than 6 months and a convict may be sentenced to a term of imprisonment for the term not served if he defaults. Conversely, the community service may be reviewed, on the recommendation of the Community Service Centre, where the convict has shown remorse.⁹⁶

Parole

Parole is another conditional release of convicts prior to the expiration of the term. Unlike Binding over and suspended sentence, the convict must have served some of the term before being released on parole, either for medical or compassionate reasons, on supervision for a specified period. An order of Parole is usually based on the recommendation of the Controller General of Prisons that the convict has been of good behaviour and has served at least one third of his term where the term is at least 15 years.⁹⁷ It should be noted that prior to the convicts release on parole, the convict shall undergo a rehabilitation programme to enable him reintegrate to the society.⁹⁸

Deportation

The Administration of Criminal Justice Act 2015⁹⁹ defines 'deport' as the legal expulsion or removal from Nigeria of a person not being a citizen, to his country. This in turn means that non-citizens may not be kept in the confines of Nigerian prisons where he/she has been sentenced to a prison term without an option of fine. In such a case the court instead makes a recommendation to the Minister of Interior that the convict be deported in the interest of peace, order and good governance.¹⁰⁰ However, where he is sentenced to a term of imprisonment, the sentence shall be served before the order of deportation is carried out. It should be noted that this order does not apply to Nigerian citizens¹⁰¹.

This modern criminal law sentence is particularly of great benefit in that it gets rid of criminal aliens and saves the community the cost of maintaining them in the prisons.

Compensation Order

In contrast to Fines, compensation order is monetary fee disbursed to the victim of crime by the offender. Its objective is in twofold: firstly, to prevent the unjust enrichment of the offender and secondly to restore the victim as far as possible to the *status quo ante crimum* where restitution is impracticable.¹⁰² Compensation orders are employed in cases of personal injury or offences relating to property e.g. sexual offences or damaged property.

Forfeiture

Forfeiture not a substantive sentence per se is associated with offences involving bribe. It entails giving up something or have it taken away as a consequence of punishment for wrong done.¹⁰³ A sentence for forfeiture requires the offender to surrender the article of the offence to the State. By virtue of the Criminal Code,¹⁰⁴ sums of money to be forfeited may be enforced in a manner as if a payment of fine is to be made. This form of sentence

⁹³ Sec. 460 (4) ACJA 2015

⁹⁴ See generally sec. 461 ACJA

⁹⁵ Sec. 461 (4) ACJA

⁹⁶ Sec. 461 (3)(e) ACJA

⁹⁷ Sec.468(1) ACJA

⁹⁸ Sec. 468(2) ACJA

⁹⁹ Sec. 439 ACJA; see Sec. 402 CPA

¹⁰⁰ Sec. 440 ACJA

¹⁰¹ Sec.448 ACJA; see *Shugaba Darma v Minister of Internal Affairs* (1981) 2NCLR 459

¹⁰² A. Olatubosun, 'Compensation to Victims of Crime in Nigeria: A Critical Assessment of Criminal – Victim Relationship' (The Indian Law Institute. Journal of the Indian Law Institute) <http://14.139.60.114:8080/jspui/bitstream/123456789/12584/1/008_Compensation%20to%20Victims%20of%20Crime%20in%20Nigeria_A%20Critical%20Assessment%20of%20Criminal%20Victim%20Relation.pdf> accessed 2 April 2021

¹⁰³ Blacks Law Dictionary, 9th Ed.

¹⁰⁴ Sec. 19 CC

is well recognised by the Nigerian law.¹⁰⁵ It should therefore be applied more often; proceeds of crime should be forfeited and should not be enjoyed by the offender. There will be no use to convict a criminal and allow him enjoy the proceeds of his crime. It will also serve as a deterrent.¹⁰⁶

Probation

Not new to the Nigerian Legal System, this non-custodial sentencing falls in the class of sentences that are seldom implemented.¹⁰⁷ Probation is a non-custodial court sanction where a juvenile or adult offender is diverted from commitment to a correctional institution and released subject to conditions imposed by the court and under the supervision of a probation officer.¹⁰⁸ In making an order for probation, the court has regards to the character, age, antecedents, mental condition of the offender, as well as the nature of the offence and the circumstance under which the offence was committed.¹⁰⁹ Prior to its enforcement, a recognisance with specified conditions to be observed may be entered into. The probation officer may require the offender to appear any time during the period not exceeding 3 years or as specified by the order. In addition to the order, damages for compensation and cost for the proceeding may be paid by the offender.

6. Utility of Non-Custodial Sentencing and Restorative Justice in a Criminal Justice System

In the words of Braithwaite¹¹⁰ 're integrative shaming, disapproval of the act within a continuum of respect for the offender, disapproval terminated by rituals of forgiveness, prevents crime.' This is one of the tenet of restorative justice and what it intends to achieve. Though regarded as an ambitious model of justice by proponent against it, proponents for it still advocate that it is more productive and does not in any way make a mockery of the justice system.¹¹¹ In advocating for the application of non-custodial and restorative justice inclined sentences, one cannot help but look at the other side of the coin as there is every likelihood of it having a number of disadvantages.¹¹² The major snag is that it cannot be applied to all crimes and maybe perceived as justice denied. Also, the major characteristic of custodial sentences being confinement is a shortcoming of restorative justice because the proponents against it believe that the public is protected from offenders when they are confined.¹¹³ This assertion may not be totally correct as all non-custodial sentences are governed by an administrative process and convicts are still monitored. On the other hand, there are cases of jail breaks and successful escapes where convicts still find their way into the society. Other 'Worries' of Restorative Justice as Braithwaite¹¹⁴ observed is the likelihood of the practice to increase victim's fears of re-victimisation, it may worsen the stigmatisation of the offender, it is prone to capture the dominant group in the restorative process and the possibility of rights being breached because of the impoverished articulation of Procedural Safeguards. Looking at the above shortcomings it will be observed that the advantages outweigh them. The following are a fraction of the advantages.¹¹⁵ With the need for identification of the victims of crime, both non-custodial sentence and restorative justice provides the victim and the offender with proof that justice was not only done but seen as done. For example, sentencing a robber to prison without compensation for the victim of the robbery is not sufficient justice. This goes without saying that it will in turn reduce the victim's desire to carry out revenge against the offender.¹¹⁶ The crime rate will be reduced and the vicious circle will be prevented. It has even been proven to address post-traumatic stress such crimes may have caused the victim of crime.¹¹⁷ For the Administration of the criminal justice system, they

¹⁰⁵ See Part 34 ACJA 2015; sec. 51 and 58 CC; sec 47 Corrupt Practice and other Offences Act 2000; sec. 20 Economic and Financial Crimes Commission Act 2004

¹⁰⁶ *Nwude v FRN* (2016) 5NWLJ Pt 1506 at 484

¹⁰⁷ See Sec. 453 – 458 ACJA 2015

¹⁰⁸ C. C. Ani, 'Sentences' (NIALS PG School notes, 2014/2015 Session) 33

¹⁰⁹ Sec.454(1)ACJA

¹¹⁰ J Braithwaite, 'Restorative Justice: Theories and Worries' (123rd International Senior Seminar Visiting Experts' Papers) <http://www.unafei.or.jp/english/pdf/PDF_rms/no63/ch05.pdf> accessed 1 April 2021

¹¹¹ The Limits of Restorative Justice, <http://www.victimweek.gc.ca/symp-colloque/past-passe/2009/presentation/arl_1.html> accessed 8 April 2021

¹¹² Some of the potential problems of Restorative Justice include: perception of being soft on crime, pressure on victims, not all offenders are remorseful and misuse of Restorative Justice. See Canadian Resource Centre for Victims of Crime, *Restorative Justice in Canada: What Victims Should Know* <<http://www.rjilooet.ca/documents/restjust.pdf>> accessed 8 April 2021

¹¹³ Get Revising <<https://getrevising.co.uk/grids/advantages-and-disadvantages-of-custodial>> accessed 28 March 2021

¹¹⁴ J Braithwaite *Op Cit*.

¹¹⁵ L.W.Sherman and H.Strang, 'Restorative Justice: The Evidence' London: The Smith Institute (2007) <<http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-6-benefits-of-restorative-justice/#sthash.s5ygapoT.VBEFxD7g.dpbs>> accessed 28 March 2021

¹¹⁶ Ibid

¹¹⁷ Ibid

both help to cut the cost of administering other forms of criminal justice.¹¹⁸ For the offender, it reduces the likelihood of recidivism.¹¹⁹ Other advantages include:¹²⁰

- a. The prisons are less crowded.
- b. Offenders that committed simple crimes are not mixed up with hardened criminals and stand a chance of coming out worse than they went in.
- c. There are more opportunities open to the offender after serving his or her term of a non-custodial sentence.
- d. There is a higher chance of rehabilitation.

7. Conclusion and Recommendations

In achieving the tenets of punishment and the administration of criminal justice, new methods should be tried where old methods have failed or are more cumbersome and one sided. Nigeria has taken a cue from Canada who in 1996 amended her sentencing principles, as embodied in its Criminal Code, in a bid to foster sentences that are community based.¹²¹ This can be seen from the provisions of the Administration of Criminal Justice Act 2015 and other laws that existed even before it. The UN Standard Minimum Rules for Non-Custodial Measures 1990¹²² in setting basic principles to be observed, promotes the use of non-custodial measures because if properly applied addresses all the traditional aims of incarceration which include retribution, reparation, deterrence and incapacitation.¹²³ As seen in the Rules¹²⁴ one of the fundamental aim of the UN Standard Minimum Rules for Non-Custodial Measures is to see that the community is also involved in the administration of criminal justice on one hand and make the offenders have a sense of responsibility towards the society on the other hand. Furthermore, as a member State Nigeria is required to develop measures in the system that are more non-custodial inclined than imprisonment.¹²⁵ The onus rests on the courts, starting with Magistrates, for the implementation of these measures is key in the positive reform of any Criminal Justice System. Legal Practitioners ought to protect the sanctity and integrity of the Administration of Justice system. Prosecutors, Judges, magistrates and legal practitioners should embrace and opt for non-custodial sentences, where applicable as they are adequately provided for in our laws¹²⁶. Imprisonment should be reserved as a last resort in a bid to capitalise on the gains of restorative justice.¹²⁷ Government can partner with non-governmental organisations for development of service delivery for non-custodial sentences. The provisions of the Nigerian Correctional Service Act 2019 on non-custodial measures should be adhered to. Section 38 specifically provides for National and State Committee on Non-Custodial Measures for the coordination and monitoring of the implementation and application on non-custodial measures. The provision of the F.C.T. Courts (Sentencing Guidelines) Practice Direction, 2016 should be implemented to the latter especially where statutes permits the exercise of sentencing discretion.¹²⁸ The same goes for other states of the Federation.

¹¹⁸ For example an offender sentenced to 3months imprisonment for stealing and item worth N3,000.00. The budget/cost of maintaining such a prisoner for the period of the sentence would at least be triple the item of the crime excluding compensation

¹¹⁹L.W. Sherman op cit.

¹²⁰ Get Revising Op Cit

¹²¹ Canadian Resource Centre for Victims of Crime, *Restorative Justice in Canada: What Victims Should Know* <<http://www.rjlilloet.ca/documents/restjust.pdf>> accessed 8 April 2021

¹²² Also known as the Tokyo Rules

¹²³ C.C.Ani op cit p 4.

¹²⁴ Rule 1.1

¹²⁵ Rule 1.5

¹²⁶ *J.B. Estate Dev. & property Limited v Nzegwu* (no. 2) (2016) 6NWLR Pt. 1507at 141. As per Iyizoba JCA,

¹²⁷ See J. Halliday, 'Review of the sentencing Framework for England and Wales: Making Punishment Work' in P. Hungerford-Welch (ed), *Criminal Litigation and Sentencing* (6th edition Cavendish Publishing 2004) 556

¹²⁸See generally, F.C.T. Courts (Sentencing Guidelines) Practice Direction, 2016