

NON-CUSTODIAL SENTENCING IN THE MAGISTRATE COURTS

BY

SUMI IJEAMAKA ANAGBOGU, ESQ

SENIOR MAGISTRATE, ANAMBRA STATE JUDICIARY

REMARKS

I am delighted and honoured to have the privilege to be invited to present a paper on a topic that signifies an emerging paradigm shift in the sentencing pattern and practice of the Courts in Nigeria and in the whole wide world.

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I am profoundly grateful to the Administrator of the National Judicial Institute, Honourable Justice R.P.I. Bozimo, OFR. May God continue to bless and keep you as you excellently discharge your huge responsibilities.

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ABSTRACT

It is evident that sentencing as a judicial process is the end result of a criminal trial. It is imperative that the sentence imposed by the Court is fair and just. Non-custodial sentences are sanctions that do not require the convict or offender to serve a “prison term”. Previously, Courts had been predisposed to using only punitive measures as sanctions to deter offenders from criminal actions. Studies have shown that significant deterrence has not been achieved that way. This has resulted in the advocacy for a change of pattern, being a shift in the sentencing disposition and practice of Courts towards a reformatory approach. Chiefly tied to the effectiveness of magistrates in justice delivery is the concept of “access to justice”. Access to justice has been obstructed heavily by congestion of Nigeria’s Correctional Service Centers in an abysmal level. This situation can be ameliorated by Magistrates deploying non-custodial pre-trial Orders and Sentences in their practice. It has been found empirically through authentic statistics that the overcrowding of the Correctional Centers is caused by those who were not sentenced to prison terms but those who were remanded in correctional centers by Courts, awaiting their trial. The same goes for a small number of them who are there for factors such as revocation of their bail conditions *inter alia*. This paper examines the status of the use of non-custodial sentencing in magistrate courts, principles, factors taken into consideration before sentencing and available options provided by the substantive law.

INTRODUCTION

The passing of an appropriate sentence on convicts by Courts, signifies a fair trial and a sound judgment. To this end, there are two guiding principles of approach, namely, retributive and utilitarian principles. The retributive looks backwards to what the offender did and accordingly punishes him commensurately as a form of deterrence and just payment for his offence. While the utilitarian approach looks to the future and punishes in a reformatory, restorative and educative manner to achieve deterrence and ensure that the offender takes responsibility for his actions which offend the law.

This paper is informed by the utilitarian approach. This approach is mirrored in the non-imprisonment sanction, popularly referred to as non-custodial sentences or measures. Examples of these measures are fine, compensation, probation, and binding-over, etc. which are provided for in our various substantive law such as the Criminal Code, Penal Code, Criminal Procedure Act, CPA, Criminal Procedure Laws CPLs for the States, Administration of Criminal Justice Act, ACJA. Administration of Criminal Justice Laws of the States, ACJLs, among others.

These non-custodial alternative sentencing options are similar to those offered by developed countries of the world but who have fashioned out greater innovative options within the international standard for best practices such as the United Nations Standard Minimum Rules For Non-Custodial Measures (The Tokyo Rules).

Magistrates being at the grassroots of justice delivery system are beseeched daily with a great number of cases, particularly criminal cases. Within this bracket, the Court is substantially occupied with a great number of criminal pre-trial and summary proceedings. These proceedings in turn, create significant opportunities for making pre-trial orders. It is noteworthy to state that most pre-trial orders stemming from criminal or quasi-criminal pre-trial proceedings usually affect adversely, the liberty of suspects who are eventually remanded/detained in the Correctional Center's custody.

The use of non-custodial pattern of sentencing and the making of non-custodial pre-trial Orders in the adjudicative work of magistrates will tremendously reduce the congestion of the country's Correctional Centers, improve access to justice and increase effectiveness of Magistrates in the criminal justice delivery system

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The theme for this Refresher Course, "The Magistracy and Effective Justice Delivery" is very aptly connected to the topic of the day and manifests an emerging and compelling shift from the predominantly old disposition for "prison terms", detention and remand in Correctional Centers by way of pre-trial Orders, to passing of non-custodial sentences where appropriate and having a quick disposition toward making non-custodial pre-trial Orders.

DEFINITIONS

Sentence / Sentencing

Sentence is defined as “The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrong doer”.¹

Sentencing can be referred to as the: “Post conviction stage of the criminal justice process in which the defendant is brought before the court for imposition of sentence”²

Sentencing therefore, is the imposition of punishment on the convicted offender by the trial Court.

There can be no sentence without conviction, which means that some form of sentence must follow conviction”³.

Conviction has been defined in the case of ***Mohammed v Olawunmi*** as “an act of a court of competent jurisdiction adjudging a person to be guilty of a punishable offence. It is nonetheless, a conviction even where the ensuing penalty is not imprisonment nor fine but the finding of sureties for good behavior.....”⁴

CUSTODIAL SENTENCE / SENTENCING

Custodial sentence is defined as “In relation to an offender 21 years or over, a sentence of imprisonment and under that age, detention in a young offender institution etc⁵. This sort of sentence is deployed if the convicted defendant is

¹ Black’s Law Dictionary, 8th Edition, Garner, pg 1393

² Hon. Justice Olasehinde Kumuyi, Chief Judge, Ondo State, The Principles Of Sentencing, being a paper presented at the Induction Course for Newly Appointed Judges and Kadis, NJI, LAW JOURNAL, (2013) 8 NJIL) Pg 33 .

³ Ibid

⁴ (1993) 4 NWLR (pt. 287) 254 SC as compiled in Compendium Of Laws Under The Nigerian Legal System 2nd Edition, vol I, Ogwuche, 2008, pg 428.

⁵ Osborn’s Concise Law Dictionary, 8th Edition, Kutherford & Bone, 1993, pg 104

trapped in prison cell, or in any restrictive institution or where a Court in lieu of imprisonment, orders that the offender be detained for a certain number of hours within court premises or at any police station.⁶

Paradoxically, the detention at the court premises or the police station can be considered a non custodial measure as against imposition of prison term.

NON-CUSTODIAL SENTENCE / SENTENCING

This term is the exact converse of custodial sentence and has been defined as “A punishment given by a court of law that does not involve a prison term, such as a fine or a restriction order”⁷. Similarly non-custodial measures can be employed by Courts as a form of Sentence or Order during trials or pre-trial proceedings.

A more encompassing definition is thus: “The concept of “non- custodial measures” means any decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment, such decision can be made at any stage of the administration of criminal justice”⁸.

It is my humble submission that by the above definition, a decision of non-custodial alternative Orders such as

⁶ Section 355 ACJL 2010, Anambra State. Also definition of imprisonment by Osborn’s Dictionary, Op.cit. pg 171

⁷ Collins English Dictionary, Harpercollins, <https://www.collinsdictionary.com>, Accessed 15/3/21

⁸ UN doc. ST/CSDHA/22, Commentary On The United Nations Standard Minimum Rules For Non-Custodial Measures (The Tokyo Rules). Rule 2.1, cited in Human Rights In Administration Of Justice: A manual On Human Rights For Judges Prosecutors And Lawyers Chapter 9: The Use Of Non-Custodial Measures In The Administration of Justice. Pg 4. Accessed 15/3/21

conditional release can be made at any stage during pre-trial and *ad hoc* summary proceedings in criminal cases.

OFFENDER

The Tokyo Rules defines offender in the light of its application: That the term “offender” shall be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages of the administration of criminal justice and these persons are referred to as “offenders” irrespective of whether they are suspected, accused or sentenced. Consequently the term “offender” is used in a generic sense, without detracting from the presumption of innocence⁹.

COMPETENT AUTHORITY

This term means any member of the judiciary, a prosecutor or a body that is empowered by law to make decisions about the imposition or implementation of a non-custodial measure¹⁰.

Examples of non-custodial sentences are fines, canning or corporal punishment, probation, forfeiture, community service, restrictions etc. **Non- custodial measures** may include Orders such as bail, verbal sanction or caution, and conditional release etc.

NOMINAL SENTENCE¹¹

This is a criminal sentence in name only, an exceedingly light sentence¹².

⁹ **Ibid**

¹⁰ **Ibid**

¹¹ Op.cit. Black's

¹² **Op.cit. Black's Law Dictionary, pg 1394**

STATUS OF THE USE OF NON-CUSTODIAL SENTENCING PATTERN IN MAGISTRATE COURTS IN NIGERIA

The impression had always been formed by critics and legal analyst that only minimal usage of non-custodial pattern of sentencing has been made by magistrates in their practice as adjudicators.

In a study conducted in the northern part of the country in 1996, on sentencing pattern and practice of Magistrate and Area Courts, it was found that both types of Courts were disposed towards custodial sentencing with or without fine, and with an only alternative of imprisonment in the default of payment of fine¹³.

An earlier empirical investigation in 1972, using Lagos State as a case study on sentencing practices in magistrate courts, concluded that the most frequently used disposition was imprisonment, followed by imposition of fine¹⁴

A common discovery in both the 1996 and 1972 studies, is the prevalent disparity of sentencing patterns among courts in similar cases. Both studies discovered that Magistrate and Area Courts did not make sufficient use of non-custodial sentences like imposition of fine only, binding - over orders, compensation and probation etc¹⁵.

¹³ Hillary Ageva Ubwa, *Sentencing Patterns And Practices In Nigerian Lower Courts*. Post Graduate Dissertation, Amadu Bello University, Zaria 1996, Opac-bsum.edu.ng/Opac-detail, Accessed 15/3/21

¹⁴ Ibid

¹⁵ Ibid

More recently, the same problems discovered in the lower courts still persists. Pre-dominant inclination towards passing of “prison term” can safely be said to be widespread. “According to records from the Nigerian Prisons Services sources as at April 2011, of the 48, 632 prison inmates in Nigeria, 34, 819 or 72% were awaiting trial with an average duration in custody of 3. 7 years between arrest and commencement of trial. In 2014, the total number of prison inmates was 56,785 out of which 18,042 or 31% were convicted prisoners, while awaiting trial inmates figure was about 38, 743 (68.2%). By October 2015, the figure was 63,000 with 75% awaiting trial inmates on record. According to the records, on 29th August 2016, the figures are as follows: Total inmates population: 63,000, convicted inmates population; 17,897(28%) awaiting trial inmates, 45, 263 (72%)”¹⁶.

From the above statistics, it is evident that the high numbers of awaiting trial prisoners is not reducing and the problem of overcrowded prisons is not really **caused by the number of imprisoned persons but the number of non imprisoned persons populating the prisons**¹⁷.

Clearly, the congestion of Correctional Service Centers is not caused by the custodial sentences passed on offenders by the Courts, but by the legal system that allows summary procedure and criminal pre-trial detention Orders, *ad hoc* procedures such as remand proceedings and other

¹⁶ Ugonna Ezekwem, National Expert on Justice Sector Reforms UNODC, Exploring Non-Custodial Sentencing In Magistrates Courts, 2017 Orientation Course for Newly Appointed Magistrates, www.nji.gov.ng, pg 2, Accessed 20/3/21

¹⁷ Ibid

Orders made for the detention of suspects in Correctional Service facilities.

There is no gain saying the fact that it is now crucial for magistrates to utilize non-custodial pattern of adjudication when granting interlocutory and ancillary Orders arising from applications made in criminal proceedings such as restrictions, conditional discharge, compensation etc. This disposition can very well achieve decongestion of prisons, faster than any other legal and judicial intervention.

THE REMAND PROCEEDINGS COMPLICATIONS

Under this procedure, any suspect arrested for an offence which the Magistrate lacks jurisdiction to try, shall be remanded (usually in correctional centers). This procedure is provided for in the ACJA, and the States ACJLs.¹⁸

Although the law always provides checks and balances with regard to the proceedings, there still exists, loopholes through which certain elements in the system exploit the proceedings to achieve illegal and undue advantage over other members of the society. The law stipulates that a Magistrate may remand an accused or any person brought under the section for remand, when he has examined the reasons for the arrest and request for remand as exhibited in the Prescribed Report and Request for Remand form filed by the police¹⁹.

The process of remand is fraught with exigencies and this fact produces a complication when coupled with the Court's

¹⁸ S. 293-299 ACJA, S. 132-137 ACJL Anambra State

¹⁹ S, 294 ACJA, Section 132 (2) ACJL, Anambra State

bulk of fixed cases, both criminal and civil. The preparedness of the Magistrate sitting alone, to begin, on the spur of the moment to examine the usually bulky Reports, before remand, is intensely hindered.

This is not difficult to comprehend, when one considers that in practice, remand procedure is a summary procedure in the magistrate courts. The process is expected to be conducted the very day it is assigned. The police prosecutors are not usually disposed to going back to their police stations with the suspects, accused persons or defendants.

The consequence of the above situation is that the Magistrate may not be in a position to discover trumped – up charges or the lack of nexus between the content of the Prescribed Report and the main charge against the suspect, to which the magistrate has no jurisdiction to try. As soon as this happens, the next only possibility will be to remand the suspect for lack of jurisdiction.

The second complication is created by pressure from the police prosecutors, often in collaboration with their Divisional Police Officers (DPOs), on the Magistrate to remand in Correctional Service Centers suspects who are detained in their police stations. The difference with the first case, is that here, the Magistrate has jurisdiction to try the case but the police say they have not yet concluded their investigations; they are apprehensive that the suspect will abscond; or that they can no longer guarantee the

suspect's welfare and good health in their custody. These reasons are not exhaustive.

Unfortunately, this is usually the position with poor suspects who have no one coming forward to "perfect" their bail conditions or bring food for them at the police station, or those who are at loggerheads with more powerful individuals. Often the real charges against and issues pertaining to these suspects are of a simple nature. Suffice it to say that remand proceedings and other applications which end up in the remand of suspects, exclude the opportunity for Magistrates to pass non-custodial sentence and make orders that are non-custodial in nature in majority of the cases.

GENERAL PRINCIPLES APPLICABLE TO NON-CUSTODIAL SENTENCING

The object of criminal law is punishment of a convicted offender²⁰ what then is the object of punishment, so employed? There are two essential ways of punishment²¹ and they are retributive and utilitarian approaches.

Retributive: Fair deserts

This approach is the crudest form of punishment, involving mere vengeance and infliction of pain by the society, on behalf of itself, the injured individual, on the wickedness of the offender. This is usually done to assuage the public sore feelings or show its revulsion. This approach is usually adopted to have the offender pay for what he has done²².

²⁰ Okonkwo, Naish, *Criminal Law in Nigeria*, 2nd Edition, Spectrum, 2012, pg. 28.

²¹ *Ibid*

²² *Ibid*

This method of punishment is backward looking with regard to crime and responsibility for it.

Utilitarian Objects of Punishment

This is a forward looking approach. This type of punishment considers the future results of it in order to prevent future crimes. There are four main types of utilitarian principles²³.

Disablement

This is not a maximum approach. This punishment looks to imprison an offender for a certain period. Under this approach, “the society will be willing to take the risk of a certain amount of reoccurrence of crime by letting potential recidivists go free after a certain period of imprisonment²⁴.

A milder form of disablement is frequently used against offending motorists, for instance, an order of disqualification from driving for a period of time.

Deterrence

This principle works in two modes, punishment may be handed down in order to deter the offender or it may be imposed in order to deter the general public from committing the same crime.

Non- custodial sentence can be employed under this principle, taking into consideration the facts and circumstances of the case.

Rehabilitation or Reform

This approach is aimed at transforming the attitude of the offender and cause the offender to voluntarily refrain from the offence in the future. This form of punishment involves

²³ Ibid

²⁴ Ibid

individualization treatment of the offender in order to reform him. This approach is usually employed for offences that do not cause grave threat to the community but rather, are offences which are such that the offender can still be rehabilitated. An example of this approach is an Order of Probation²⁵.

Educative

This principle is allied to both the deterrent and rehabilitative aspects of punishment. The purpose of this punishment is to educate people out of a certain way of behaviour which is prevalent. This attempts to change social difficulties and attitudes by the force of the law²⁶

Constitutional Principle

The constitution of the Federal Republic of Nigeria requires the penalty for an offence to be prescribed in a written law²⁷. In other words, only an accused person alleged to have committed an offense known to the law that can be put on trial, if found guilty, convicted and then sentenced.

PROCEDURAL PRINCIPLES

Minimum Penalties

Where the law which creates an offence prescribes a minimum penalty for offenders upon conviction, the discretion of the Court is relatively limited. Here, the Court can impose a higher penalty but cannot impose a penalty less than the minimum. If the minimum penalty is a term of

²⁵ **Ibid**

²⁶ **Ibid**

²⁷ **5. 36 (12) 1999 Constitution As Amended 2011**

imprisonment, the Court cannot impose a fine in lieu of imprisonment²⁸.

Note: It is submitted, that in cases where the minimum penalty is a term of imprisonment, the magistrate is not at liberty to impose other forms of non-custodial sentence to the exclusion of the minimum term of penalty. The non-custodial sentence and /or ancillary order can be an addition if appropriate in the circumstances.

Penalties Without Option of Fine.

Where the law which creates an offence prescribes a penalty without an option of a fine, upon conviction, the Court does not have the discretion to impose a fine in lieu of or as an option to the prescribed penalty. The above position was held in **Dada v Board of Customs & Excise**²⁹. However, where a law prescribed a penalty and is silent on the option, the Court has discretion to impose a fine in lieu of, or as an option to the penalty prescribed for offenders upon conviction³⁰. If the said penalty that is silent on an option of fine is a term of imprisonment, as is usually the case, then the Court can completely abandon the term of imprisonment and simply impose a sentence of fine only.³¹

²⁸ Osamor Bob, *Criminal Procedure Laws & Litigation Practices* 1st Edition, 2004. Pg 475, Also S. 282(5) C.P.A, 5,23 (5) C.P.C, S. 316(5) ACJL Lagos, S. 358(5) ACJL Anambra

²⁹ 1982(2)NCR 79 as cited by Osamor Ibid

³⁰ Ibid

³¹ S. 358(1) ACJL Anambra State, S.390(1) CPL Anambra State

However, the amount of fine imposed shall not exceed the maximum fine authorized to be imposed by the Magistrate under the Magistrates' Court Law and jurisdiction.

Furthermore, there are limitations as to term of imprisonment imposed on the defendant in the default of payment of the fine.

Specific Amount of Fine

Where the provision for a specific amount of fine has been made, Court cannot increase the fine.³²

Disposition And Other Considerations

“Passing of sentence is not caught by precedents. The facts and evidence in each case must be considered critically before imposing the sentence”³³

“Sentencing as a whole ought to be a rational process in the sense that a sentence should be passed with a specific principle or principles in mind – retributive, or deterrence, or deterrence and rehabilitation etc”³⁴.

It has been advocated thus:

“A judge must remember that the purpose of sentencing is to protect the society as a whole from dangerous action of the prisoner, to assist as far as possible the victim of the crime, to reform the offender and prevent other people from being criminal. In applying any of these principles, the judgment must be humane, not imposing a draconian

³² Hon. Justice Olajide Olatawura, Rtd, JSC, Recording of Evidence, Judgment Writing, Execution Of Judgment And Sentencing. Pg 26. 2001. Induction Course for Newly Appointed Judges and Kadis In Nigeria. NJI Handbook.

³³ Ibid

³⁴ Okonkwo & Naish op cit pg 38

punishment or an inhumane one. Concurrent not consecutive sentences should often be given. If it is a fine, it must not be excessive or disproportionate to the gravity of the offence”³⁵.

In deciding the principles of sentencing to adopt, the Court is expected to consider issues that mitigate or aggravate the punishment to be given. These may include plea of guilt, the age of the offender, nature of crime, mental status of offender, prevailing circumstances surrounding the commission and provocation etc³⁶.

To this end and to eliminate disparity of sentencing pattern for similar crimes, **Practice Directions on Sentencing Guidelines** are available in the different state judiciary, particularly Lagos, Anambra and Cross River States. These guidelines are a set of rules made by the various Chief Judges. Magistrates are expected to adhere to them when imposing Sentence and making Orders.

The Anambra State Practice Direction³⁷ has as its objective; prevention, restraint, rehabilitation, deterrence, education, retribution and restitution. These principles must be considered by the Courts in determination of the sentence to impose.

Furthermore, the Practice Direction enjoins, the Courts to consider the following factors in the process of determining the sentence to impose:

³⁵ Hon. Justice M.B. Belgore, *The Judge And Judging, 2002 Induction Course for Newly Appointed Judges And Kadis In Nigeria. NJI, Handbook*

³⁶ *Ibid.*

³⁷ *The Anambra State Courts (Sentencing Guidelines for Offences Against The State, Person, Public Order, Morality, Homicide, Property, And Corruption) Practice Direction, 2019. Or. 1. R. 3(a) (i) – (vii) pg 3 – 4.*

- (a) The interest of the victim, the convict and the community
- (b) Appropriateness of non-custodial sentence or treatment in lieu of imprisonment.
- (c) Necessary aggravating and mitigating evidence or information, for example, previous conviction and absence of previous conviction/being a first offender, respectively.
- (d) Sentencing to a term of imprisonment shall apply to those offenders who should be isolated from society and with whom other forms of punishment have failed or are likely to fail. This shall be determined in accordance with the sentencing guidelines in the Practice Direction.
- (e) A trial court shall not pass the maximum sentence on a first offender except in a mandatory sentence.
- (f) The need to treat each case on its own merit.³⁸

The Tokyo Rules³⁹, is an international legal framework for non-custodial measures, and has an applicable scope for our own legal system where the Law and Rules allow.

THE SCOPE OF NON-CUSTODIAL MEASURES

The relevant provisions of the Rules shall apply to all persons subject to prosecution, trial or the execution of a

³⁸ **Ibid, Or. I R. 3 (b) – (g)**

³⁹ **United Nations Standard Minimum Rules for Non-custodial Measures, adopted by General Assembly resolution 45/110 of 14 December, 1990 .www.ohchr.org. Accessed 15/3/21. Op Cit. in another web site in a secondary doc.**

sentence at all stages of the administration of criminal justice and these persons are referred to as offenders irrespective of whether they are suspected, accused or sentenced⁴⁰.

The Rules shall apply without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status⁴¹.

The Rules advocate that the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible. A particular Rule seeks to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of the society and to avoid unnecessary use of imprisonment⁴².

The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.⁴³ Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law⁴⁴.

⁴⁰ **Ibid Rule 2.1**

⁴¹ **Ibid Rule 2.2**

⁴² **Ibid Rule 2.3**

⁴³ **Ibid Rule 2.4**

⁴⁴ **Ibid Rule 2.5**

Legal Safeguards

The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the right of the victims.⁴⁵

Avoidance of Pre-Trial Detention

Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due respect for investigation of the alleged offence and the protection of the society and the victim. In case pre-trial detention is made for the investigation and protection of the society, the period should not last longer than necessary.⁴⁶

Sentencing Disposition

Having a wide range of non-custodial measures, the judicial authority, should take into consideration in making its decision, the rehabilitation needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.⁴⁷

The sentencing authorities may dispose of cases in the following ways *inter alia*:

- Verbal sanction, such as admonition, reprimand, and warning.
- Conditional discharge
- Status penalties
- Economic sanctions (fines & day-fines)

⁴⁵ Rule 3

⁴⁶ Rule 5

⁴⁷ Rule 8

- Probation, community service etc.

Any other mode of non-institutional treatment and some combination of the measures listed therein⁴⁸

Finally, in making use of any non-custodial sentencing alternative, the Court must work within the purview of the enabling laws and Practice Directions for Sentencing Guidelines.

Reason for the adoption of any non-custodial Order or Sentence is required to be stated and recorded by the Courts.

NON-CUSTODIAL SENTENCING OPTIONS AVAILABLE TO THE COURTS

Fine

This is defined as a sum of money ordered by the court to be paid on conviction for an offence⁴⁹. The substantive law such as Criminal Code, Penal Code, and other procedural laws prescribe as a penalty: fine, imprisonment, imprisonment or fine, or both⁵⁰ for offences and procedure, respectively.

It is advocated that a person convicted of a minor offence rather than being sentenced to a term of imprisonment is given an option of fine. However, in imposing the fine, the Court should take into account the means of the offender and his ability to pay the fine.⁵¹

⁴⁸ **Rule 8.2**

⁴⁹ **Osborn's Concise Law Dictionary, 8th Edition, Sweet & Maxwell, 1993.**

⁵⁰ **S. 389 CPA, S.74 Penal code, S.318 ACJL, Lagos State, S. 363 ACJL, Anambra State.**

⁵¹ **Honouable Justice Olasehinde Kumuyi, Op. Cit. ,Also S.366 ACJL, Anambra state.**

In the case of **Ogunbayo v State**⁵², it was held that where the law prescribes imprisonment with an option of a fine, in sentencing procedure, the fine comes first and in default, the imprisonment takes effect and not the other way round.

It is submitted that, in imposing fine as a non-custodial sentence or as a pre-trial summary procedure order, a Magistrate can combine the order of fine with one or two or perhaps a few of other existing non-custodial alternatives. However, the combination should not be excessive.

Caning or Corporal Punishment

Under the CPA, when a person is convicted of an offence for which the penalty is six months imprisonment or more, the court may, having regard to the prevalence of crime in that jurisdiction or the antecedents of the offender, sentence such offender to caning. The sentence may be in addition to or in lieu of imprisonment. The Penal Code provides that any Court in addition to imprisonment may order canning.⁵³

Where the offender is found guilty and sentenced for more than one offence, the aggregate sentence cannot exceed twelve strokes of the cane.⁵⁴ Female person or a male who has attained the age of forty-five years, is excluded from this sentence.⁵⁵

“However, it is pertinent to note that corporal punishment of flogging or caning humiliates the individual. It is degrading by reason of the acute physical pain it inflicts and should

⁵² (2007)8 NWLR (pt. 1035) 157 SC

⁵³ S. 387 CPA, S.77 Penal Code

⁵⁴ S. 386 (2) CPA

⁵⁵ S. 308 (4) CPC, S.385 CPA

therefore be impermissible in any society that profess to respect the dignity of the human person. In a Zimbabwean case, **Stephen Ncube v State**⁵⁶, the court described the penalty of whipping as not only inherently brutal and cruel, it is relentless in its severity and contrary to the traditional humanity practiced by almost the whole of the civilized world being incompatible with evolving standard of decency”.⁵⁷

This punishment may be applied to juvenile cases for the purpose of correction.”⁵⁸

Probation

The Black’s Law Dictionary⁵⁹ defines the term probation as “a court imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison”.

Some scholars have described probation to be “a non-custodial measure, whereby an offender is rehabilitated, rather than punished, by undergoing some compulsory treatment and supervision process aimed at reforming him.”⁶⁰

In Nigeria, any offender, whose charge is proved, may be put by the court, to probation, by dismissing the charge or discharging the offender conditionally on his entering into a recognizance, with or without sureties to be of good

⁵⁶ **Op. Cit.** cited in *The Principles Of Sentencing*, Hon. Justice Olasehinde Kumuyi, (2013) 8 NJILJ pg 41.

⁵⁷ **Ibid**

⁵⁸ **Ibid**

⁵⁹ **Op. cit.** 8th Edition.

⁶⁰ **Yekini, Salisu, Probation As A Non-Custodial Measure In Nigeria : Making A Case for Adult Probation Service. Pg 103, African Journal Of Criminology and Justice Studies: AJCJS Vol 7, Nos 1 & 2 (2013)**
<https://www.academia.edu>, Accessed 14/3/21.

behavior for a period not less than one year and not exceeding three years. However, the following factors must be considered:

- (a) The character of the offender
- (b) The antecedents of the offender
- (c) The age, health and mental condition of the offender
- (d) The trivial nature of the offence
- (e) The extenuating circumstances under which the offence was committed.

If the court finds it expedient, may without convicting the offender, grant an order of probation.⁶¹ This is a form of conditional release of offenders. Compensation for loss or injury and costs may be awarded in addition. Also order for restitution of stolen property may be made.

In practice, this non-custodial measure was and is still dominantly used for juvenile delinquents⁶² Recent research carried out in 2010, shows that a typical convict in Nigeria prisons is a semi-literate male, in the prime of his youth (18-29 years). It was shown that most convicts are unemployed, self-employed and are convicted of property related crimes. This confirms that probation would have been better employed to rehabilitate these offenders than imprisonment as certain extenuating factors are responsible for their conduct.⁶³

⁶¹ S. 435 CPA, S. 396 ACJL Anambra State, S. 454(1), (2) ACJA

⁶² Yekini, Op. Cit,

⁶³ Ibid

Community Service

This term has been defined to be “A non-custodial sentence which restricts an offender’s liberty”⁶⁴ and as “An order requiring an offender to do unpaid work”.⁶⁵

In Nigeria, community service is a post conviction order. It is provided for in ACJA and ACJL Lagos but it is still not provided in the ACJL of some states such as Anambra.

Community service order cannot be made for offences such as those involving use of arms, offensive weapon, sexual offences or for an offence which penalty exceeds imprisonment for a term of three years.⁶⁶

FORFEITURE, SEIZURE, RESTITUTION AND DISPOSAL OF PROPERTY.

These are orders of court for disposal of property regarding which an offence has been committed. Properties used for commission of crime or acquired by corrupt individuals, or property used in postal crimes may be ordered to be forfeited. Confiscation of such properties is provided for under the law. Moveable and immovable properties can be restored to the rightful owners by Order of the Court, before, during or at the conclusion of the trial.⁶⁷

These orders are non-custodial and can be used without resorting to prison term in sentencing offenders for petty crimes.

⁶⁴ **Op. Cit. Osborn’s**

⁶⁵ **Ibid**

⁶⁶ **S. 460 ACJA**

⁶⁷ **S. 263 – 273 CPA, ACJA, Various ACJLs**

BINDING- OVER / CONDITIONAL DISCHARGE

This is an order made by a court in a criminal case, requiring an offender to be of good behavior and to keep the peace. This order is flexible as it can be made against the complainant, defendant alone, witnesses and supporters of both complainant and the defendant, or both parties.

This order can be made at pre-trial stage, during trial and after trial has been concluded or even if charge is dismissed.⁶⁸

Binding-Over Order can be deployed as non-custodial sentence and as a conclusive pre-trial Order. It can be a post conviction order which is passed on any person convicted of an indictable offence, tried summarily in lieu of any punishment to which he is liable, requiring him to enter into recognizance, with or without sureties to keep the peace.⁶⁹ This is a form of conditional discharge that can end a summary trial without the convicted offender/defendant going to jail.

Conditional discharge can be said to mean that the defendant is absolved from punishment if he does not commit any offence during the period set by the court.

It is necessary to say that under the law, where conditions for Binding- Over are not complied with, the person bound

⁶⁸ Ss. 300, 309 C.P.A

⁶⁹ S. 309 C.P.A, S. 206 ACJL Anambra State

over may be committed to Correctional Service Center for a certain term.

NOMINAL SENTENCE / ABSOLUTE DISCHARGE

Nominal sentence has been defined⁷⁰ to mean a light sentence or no sentence at all. This can be employed for minor offences where the Court can make an order combining any of the available alternatives, such as fine, Binding- Over or Restitution to an Order of Discharge at the end of the summary trial without giving a sentence of imprisonment.

Absolute Discharge means that the defendant / accused or offender, can be released unconditionally without any penalty. It is suitable in cases where the defendant though guilty of the offence, is not thought to deserve any punishment.⁷¹ An absolute discharge is the most lenient sentence available to the court.

OBJECTIVE OF NON-CUSTODIAL SENTENCE / MEASURES

The purpose of non-custodial measures in general is to find effective alternatives to imprisonment for offenders and to enable the authorities to adjust penal sanctions to the needs of the individual offenders in a manner proportionate to the offence committed.⁷²

However conditions and restrictions are attached to them and violation of any of them can lead to imprisonment.⁷³

⁷⁰ **Op. cit. Black's Law Dictionary**

⁷¹ **Op. cit. Okonkwo, Naish**

⁷² **Op. cit. U.N. Doc. The Tokyo Rules 1.1**

⁷³ **Ibid**

ADVANTAGES OF USE OF NON-CUSTODIAL SENTENCES AND MEASURES

Employment / Economic Status

These Orders and Sentences allow offenders to be at physical liberty and are thus able to find and keep jobs.

Social and Education Opportunities

Non-custodial measures and form of sentencing allow adjudged offenders and suspects to enjoy family life, access other members of the society, though with certain qualification and allow them opportunity to engage in educative programmes. This therefore allows for literacy promotion and attainment.

Decongestion of Correctional Service Centers

The use of non-custodial measures for pre-trial and summary procedures in magistrate courts promotes and ensures decongestion of prisons. Non-custodial sentencing measures are typical and potent tools for attaining significant decongestion of the prisons, given that it is now an unrelenting challenge to the legal system and the country.

Access To Justice Opportunities

Non- custodial community based approach when employed by prosecutors, lawyers, judges and magistrates in minor,

summary or pre-trial criminal proceedings, creates greater pathways for justice to be delivered to the public.

Others

Non-custodial options are a better punishment for simple offences; Non-custodial measures still meet the purpose of criminal punishment by way of utilitarian approach.

The duties under the non-custodial measures allow the offender to comprehend the gravity and disadvantage of his offensive behavior in a practical manner; as he shoulders the responsibility for his actions. This approach may well call back his conscience.

DISADVANTAGE

It is my humble and considered opinion, with regard to usage, that there is no significant and relative disadvantage, since non-compliance with the non-custodial order of court or measures taken by any stakeholder within the confines of the law, will attract severe measures, such as various “prison terms” as stipulated by procedural laws aforementioned in this paper. When used appropriately in trial of non-serious crimes, the use of non-custodial options is but a “first instance solution”.

CONCLUSION

The use of non-custodial sentencing pattern and deployment of non-custodial measures in pre-trial and

summary procedures by magistrates is an obvious necessity.

These measures can help in eliminating onerous workload and delay in completion of cases, provide reformation of offenders, access to justice and decongestion of the Correctional Service Centers.

I therefore advocate the following:

1. Development of more modern non-custodial alternatives which are adaptive to the existing legal system.
2. Improvement and development of sentencing guidelines practice procedure, by relevant stakeholders, to identify the existing alternatives to imprisonment in the law and enhance greater flexibility in the scope of usage.
3. More training to familiarize Magistrates with existing international standards that promote the use of non-custodial measures, which may be useful within the context of their discretion and professional responsibilities.

Thank you for your patience.