



Redeemer's University Nigeria, Journal of Jurisprudence & International Law (RUNJJIL) Volume 3(1)
2023

A Facile Study Concerning Non-Custodial Sentence in Nigeria's Criminal Justice System: Taking a Leap from the Kenya Jurisdiction

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Abstract

The Nigerian government's major challenge is the scarcity of resources to build new infrastructures and maintain the already overburdened existing ones, including correctional centres across Nigeria. However, in a bid to salvage the deplorable state of virtually all the correctional centres across the country, the Nigerian National legislators enacted the Nigerian Correctional Services Act (NCSA) 2019 and the Administration of Criminal Justice Act (ACJA) 2015. One of the highlights of the ACJA 2015 and Nigerian Correctional Services Act (NCSA) 2019 is non-custodial sentencing provisions. Introducing the innovative non-custodial sentence aims to rehabilitate accused and convicts effectively and decongest the correctional centres. The relevance and legal regulation of non-custodial services in the Nigerian criminal justice system cannot be ignored in spite of challenges mitigating its effectiveness. Thus, this study uses doctrinal and analytical legal research methods to find the non-custodial measures provided in the new laws viz a viz the Criminal Justice System in Nigeria. It concludes that there is a need to take a leap from the Kenya jurisdiction as it concerns the effective application and enforcement of the non-custodial sentence.

Key Words: Criminal, Justice, Non-Custodial, Nigeria, Kenya

1.0 INTRODUCTION

Criminal Justice System or Administration refers to the collection of policies, rules, principles, and practices that regulate v. It is a set of social and legal institutions that enforce the criminal law in line with a defined set of rules.⁷³ It also refers to events that occur in all the processes involved in a criminal prosecution. Although different theories abound on the purpose of the criminal justice system, there are/exist five (5) primary and mostly recognized objectives to wit: (1) Retribution,⁷⁴ (2) Deterrence,⁷⁵ (3) Rehabilitation, (4) Incapacitation⁷⁶ and (5) Restoration,⁷⁷ i.e. restorative justice.⁷⁸ The criminal justice system is mainly retributive, and Nigeria is no exception. It is primarily concerned with punishing offenders with less emphasis on the offended, i.e., the people/ victim involved.

The natural inclination is that an offender will deny his crime to avoid punishment, even when he is internally sorry. No thanks to the adversarial system of adjudication, which places burden to proof on the prosecutor to justify that the accused person is guilty beyond a reasonable doubt.⁷⁹ However, the more recent approach/thought is that punishment is probably the least effective method of dealing with criminal behavior, especially in the face of scarce resources to maintain the disciplinary approach.

However, it suffices to state that there are three arms of the Criminal Justice System in Nigeria to wit; the Court, Police, and the Nigerian correctional Services. The Federal Government has

⁷³ TA Majekodunmi, JA Oluwaseun, ME Idahosa, OO Ikubbanni, and PA Aidonojie, "The causes of the Rising incidence of Terrorism occasioning Deprivation of the Right to Life in Nigeria", *KIU Journal of Humanities*, (2022) Vol. 7(2): 5-19

⁷⁴ R. Aborisade & SF Oni "Crimes of the Fighters": Sexual and Physical Female Arrestees", *Women & Criminal Justice* (2020) 30(4): 243-263

⁷⁵ A. Adebayo "A Review of Plea Bargain Concept in the Anti- Corruption War in Nigeria", *Brawijaya Law Journal*, (2018), 10-21; OO Oladele, PA Aidonojie, JE Uzualu, OO Ikubanni, and AI Oyedeji, "An Empirical Study of Criminalizing Minor Infractions of Tax Laws in Nigeria: The Need for Negotiated Punishments", *KIU Journal of Humanities*, (2022) 7(2), 23-35

⁷⁶ IA Olubiyi "Nigerian Criminal Justice System: Prospects and Challenges of the Administration of Criminal Justice Act 2015", *African Journal of Criminal Law and Jurisprudence*, (2018), (23) 79-86; PA Aidonojie, AO Odojor, and OP Agbale, "The Legal Impact of Plea Bargain in Settlement of High Profile Financial Criminal Cases in Nigeria", *Sriwijaya Law Review*, (2021) 5(2), 161-174

⁷⁷ Restoration. A fairly recently devised concept oftentimes included within the objective of the criminal justice and penal system is restorative justice. It is a process meant to restore justice after act of criminality by the offender to the offended

⁷⁸ PA. Aidonojie, "The Societal and Legal Missing Link in Protecting a Girl Child against abuse before and Amidst the Covid-19 Pandemic in Nigeria" *Jurnal Hukum UNISSULA*, (2022) 38(1), 61-80

⁷⁹ *Aderemi Aderounmu v Federal Republic of Nigeria* (2019) CA/L/782C/2018; *Ankpegher v State* (2018) LPELR-43906 (SC); section 135 of Evidence Act 2011; *State v Ajayi* (2016)LPELR -40663(SC).

exclusive control or jurisdiction over the Nigerian correctional service.⁸⁰ Therefore, no state government within the federation of Nigeria can own or control any correctional⁸¹ center.⁸²

The establishment of the prison system in Nigeria dates back to the pre-1914 amalgamation of the protectorate of the southern and northern parts of Nigeria.⁸³ Initially, the prisons were mere confinement camps until the Native Authority Prison was established.⁸⁴ It suffices to state that in 1968, the Native Authority Prison was abolished, and subsequently, there was a unification of the prison services in Nigeria. In this regard, it marked the beginning of modern Nigerian Prisons Services as a composite reality.

The mandate or function of the Nigerian Prison Services before the coming into force of the Nigerian Correctional Service Act (NCSA) 2019 was in three folds;

- i. To take any persons into lawful supervision by order of a court of competent jurisdiction.⁸⁵
- ii. To produce suspect(s) in court when required⁸⁶ by the court.
- iii. Identifying the causes or reasons for their behaviour.
- iv. Retraining the convicted criminal to be useful citizens in society.⁸⁷

Furthermore, the Nigerian Correctional Service Act 2019⁸⁸ stipulate that "Correctional Service" shall consist of the following:

1. Custodial Service
2. Non-Custodial Service⁸⁹

⁸⁰ See Item 48 in Section 4 of the second scheduled to the 1999 Constitution of the Federal Republic of Nigeria (as Amended)

⁸¹ PA Aidonjje, OO Ikubanni, N Okoughae and OA Ayoedeji, "The challenges and relevance of technology in administration of justice and human security in Nigeria: Amidst the Covid-19 pandemic", *Cogito Multidisciplinary Journal*, (2021), 13(3), 149 – 170

⁸² PA. Aidonjje, TA Majekodunmi, OO Ikubanni, and N Ibrahim, "The causes of the Rising incidence of domestic violence in Nigeria: Proposing Judicial Separation as a Panacea", *Jurnal Hukum UNISSULA*, (2022) 38(2), 61-80

⁸³PA Aidonjje, AO Odojor, OO Ikubanni, AA Oyebade, AI Oyedeji and N Okuoghae, "The Challenges and Impact of Technological Advancement to the Legal Profession in Nigeria given the Covid-19 Pandemic", *KIU Journal of Humanities*, (2022) 6(4), 5-19

⁸⁴ By 1910 there were Native prisons in Degema, Calabar, Onitsha, Benin, Ibadan, Sapele, Jebba and Lokoja.

⁸⁵ S 3 of the Prisons Act Cap P29 Law of the Federation of Nigeria 2004 (Repealed)

⁸⁶ S. 6 of the Prisons Act Cap P29 Law of the Federation of Nigeria 2004 (Repealed)

⁸⁷ Nigerian Prison Service, 1981; The Guardian, 17 February 1988

⁸⁸ herein after referred to as the " Correctional Service"

⁸⁹ s.1 (2) Nigerian Correctional Service Act, 2019; PA Aidonjje, OA Odojor, OO Ikubanni, AA Oyebade, AI Oyedeji and N Okuoghae, "The Challenges and Impact of Technological Advancement to the Legal Profession in Nigeria given the Covid-19 Pandemic", *KIU Journal of Humanities*, (2020) 6(4): 5-19; PA Aidonjje, and AO Odojor, "Impact and Relevance of Modern Technological Legal Education Facilities amidst the Covid-19 Pandemic: A Case Study of Law Students of Edo University Iyamho", *KIU Journal of Humanities*, (2020) 5(4), 7-1

The functions of the Custodial Service are

- a. They have the function of admitting to custody persons legally incarcerated
- b. Providing secure, safe, and humane incarceration for inmates
- c. Conveying and remanding persons to a correctional centre
- d. Identifying the possible causes of anti-social or oblivious behaviour of inmates;
- e. Conducting risk and assessments that could aid in developing appropriate correctional treatment methods for rehabilitation, reformation, and reintegration;
- f. Implementing rehabilitation and reformation programs to improve the reintegration of suspects or inmates back into the society
- g. Initiating behavior or attitude modification in inmates with medical, spiritual, psychological, and counselling services for all offenders or inmates, including violent extremist
- h. Empowering inmates through the process of vocational and educational programs
- i. Administering related institutions as it concerns correctional centres

However, the Non-Custodial Service is saddled with the responsibility of administering the non-custodial measures to wit-

- i. Coordinating community service
- ii. Probation of convict
- iii. Supervising parole
- iv. Ensuring that there are restorative justice measures and
- v. Furthermore, any non-custodial measure assigned to them by a court of Competent Jurisdiction.

Although the maintenance and administration of the custodial and non-custodial services in Nigeria are left exclusively within the control of the Federal Government of Nigeria, the reception of a person into the Nigerian custodial centre's is not limited to the machinery of the Federal Government of Nigeria alone. This concerns the fact that State Governments can also admit suspects or criminals into the correctional centre. Therefore, it suffices that the population and the extent of custody of the inmates or suspects per time are not determined by the authority of the Nigerian prisons but by other apparatus or government agencies at the Federal and State level. It must be noted that there are about 250 correctional centres in

Nigeria, spread across the six geopolitical regions of Nigeria.⁹⁰ The conventional custodial centre is mainly meant to remand persons awaiting trial and convicts.⁹¹

2.0 HISTORICAL DEVELOPMENT OF NON-CUSTODIAL SENTENCING IN NIGERIA

At various times of his social development, man had designed models for attaining a full-proof criminal justice system. The various models were hitherto designed and applied in the face of increasing industrialization, urbanization, population explosion, unemployment, and increased high-tech crimes. There has been continued commission of crimes at the snap of the finger, coupled with the limited resources available to the state to effectively detect, prevent or combat crime while dispensing quickly and effectively with trials of offenders and managing the prison system flawlessly. In this regard, non-custodial sentencing developed due to the international recognition that imprisonment, though a legal sanction for an offender, does not constitute a panacea for crime prevention, rehabilitation, and reintegration.

The international recognition of non-custodial sentences culminated in codified international frameworks such as:

- i. The UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)⁹²
- ii. The UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)⁹³
- iii. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁹⁴

⁹⁰ I Aliyu “Decongestion of Nigerian Prison: An examination of the role of the Nigerian police in the application of the holding-charge procedure in relation to pre-trial detainees”, *African Human Rights Law Journal*, (2019), 19(2), 1-16; CC Ani, “Corruption in Criminal Justice Administration: The Role of the Legal Profession”, *Nigerian Bar Journal*, (2011), 7(1): 102-183

⁹¹ P Egielewa and PA Aidonjio, “Media and Law: An Assessment of the Effectiveness of the Freedom of Information Act by Journalists in Nigeria using Auchi, Edo State as a Case Study”, *International Journal of Current Research in Humanities*, (2021), (25): 415-434

⁹² J Badamasiuy, & M. Bello, “An appraisal of administrative justice and good governance in Nigeria”, *Journal of Politics & Law*, (2013), (6): 216-230

⁹³ United Nations Standard Minimum Rules For the Administration of Juvenile Justice (The Beijing Rules) Adopted by General Assembly resolution 40/43 of 29 November 1985 < <http://www.ohchr.org/Documentation/professional/Interest/beijinrules.pdf>.> Accessed 20-20-2020.

⁹⁴ A John, & A Musa, “Delay in the Administration of Criminal Justice in Nigeria: Issues from a Nigerian viewpoint”, *J Law Pol Glob*, (20214), (26): 130-138

- iv. The United Nations Rules for treating Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules).⁹⁵

In Nigeria, correctional (prison) centres face numerous challenges, including but not limited to poor hygiene, poor feeding, sexual abuse, outdated educational facilities, and overcrowding, to say the least, thereby defeating the essence of setting up the prison itself.⁹⁶ These numerous challenges not only infringe on the inmates' rights, but also impede their educational and vocational training, which in the long run, affects the future adjustment of inmates to an ordinary life outside incarceration. Therefore, a newer model is needed.

The courts mostly hinged on a punitive/disciplinary approach in the administration of criminal justice before enacting the ACJA 2015 and NCSA 2019. However, with the coming into force of the above laws, Nigeria's Criminal Justice System administration is tending more towards recuperative justice though in its emergent stage. The ACJA 2015 and the NCSA 2019⁹⁷ have obviously provided the criteria for controlling the non-custodial sentences in line with international best practices. Non-Custodial sanction as a substitute for incarceration is imposed as a penalty for non-violent convicts or suspects of minor offences who will not threaten the public.

3.0 NON-CUSTODIAL SENTENCES UNDER THE ADMINISTRATION OF CRIMINAL JUSTICE ACT (ACJA) 2015 AND THE NIGERIAN CORRECTIONAL SERVICE ACT (NCSA) 2019

It must be noted that the ACJA 2015, and the NCSA 2019, provide for several non-custodial sentences as alternatives to the defendant's incarceration. Some of these non-custodial sentences include:

⁹⁵ United Nations Rules for the Treatment of Women prisoner and Non –Custodial measure for woman offenders (the (Bangkok Rules) <<http://www.ohchr.org/Documentation/professional/Interest/bangkokrules.pdf>> accessed 20 February 2020.

⁹⁶ MC Eze “Institutional reforms and the development of Nigeria prison services 1999-2007”, *Journal of African studies and development*, (2010), 2(5): 21-34; PA Aidonojie, OO Ikubanni and AA Oyebade, ‘Legality of EndSARS Protest: A Quest for Democracy in Nigeria’ *Journal of Human Rights, Culture and Legal System*, (2022), 2(3): 209-224, <<https://doi.org/10.53955/jhcls.v2i3.40>>; PA Aidonojie, OO Ikubanni and N. Okoughae, “The Prospect, challenges and Legal Issues of Digital Banking in Nigeria”, *Cogito Multidisciplinary Journal*, (2022), 14(3): 186 – 209; PA Aidonojie, J Nwazi, and E. Ugiomo, “The Legality, Prospect, and Challenges of adopting Automated Personal Income Tax by States in Nigeria: A Facile Study of Edo State”, *Cogito Multidisciplinary Journal*, (2022) 14(2): 149 – 170

⁹⁷ S. 38 of the Nigerian Correctional Service Act, 2019 provides for the National and State Committee on Non Custodial Measures, which is the body that monitors and coordinates the implementation and application of non-custodial measures.

- i. Plea Bargaining.
- ii. Compensation, cost, restitution, and the award of damages
- iii. Parole sentence
- iv. Probation sentence
- v. Suspension Sentence.
- vi. Fines and community sentence

3.1 Plea Bargaining

As a significant part of the Nigerian Criminal Justice System, the plea bargain is amply provided for in the Administration of Criminal Justice Act.⁹⁸ Under the Act, the prosecutor is required to receive and consider the concept of plea bargain from the defendant or suspect charged with an offence, either directly from the suspect or defendant or on his behalf. However, a prosecutor may offer a plea bargain to a defendant or suspect charged with an offence.⁹⁹

The prosecutor may also, by legal means, enter into plea bargaining with the accused or defendant. The consent of the victim must be sought during or after the presentation of all relevant evidence of the prosecution but before the production of the evidence of the defence¹⁰⁰ subject to certain conditions to wit:

- i. that the evidence of the prosecutor is not enough or insufficient to prove the guilt of the defendant beyond a reasonable doubt;
- ii. that the defendant has arranged to return the items or monetary fund of the crime or make restitution to the victim
- iii. In a case of intrigue, the defendant or suspect has fully liaised with the investigation and prosecutor of the crime by providing cogent information for the successful prosecution of other offenders.¹⁰¹

⁹⁸ S.270(1-18) with similar provisions in S.270(1-17) of the Edo State Administration of Criminal Justice Law, 2018

⁹⁹ s.270 1(a-b) ACJA 2015

¹⁰⁰ s.270(2) ACJA 2015

¹⁰¹ s.270 (2) a-c of ACJA 2015

By the Act, the prosecutor is only required to accept or make an offer for a plea bargain based on the interest of justice, and public policy, interest, and to prevent abuse of the legal process.¹⁰² The prosecutor and the suspect or his authorized representative may, before the plea was taken, have agreed on terms of the sentence, lesser offence, a plea of guilty, and or appropriate conviction.¹⁰³ Plea Bargain is only possible when after the prosecution has made inquiries with the investigating police officer and the victim and with due regard to circumstances relating to the offence, the defendant, and public interest.¹⁰⁴

It must be noted that a person who has been convicted and sentenced through the use of a plea bargain cannot be charged again on the same matter with the same fact for a greater offence earlier charged to which the defendant or suspect had pleaded to a lesser offence.¹⁰⁵ In this regard, where the judgment of a court on a criminal case was reached by plea bargaining, an appeal shall not be entertained against it in any other court. Thus, a trial court becomes a court of finality in respect of a plea-bargaining case, except where fraud is alleged.¹⁰⁶

3.2 Cost, Compensation, Damages, and Restitution¹⁰⁷

The ACJA 2015 makes provision for the Court, in addition to sentencing instead of any other penalty approved by law, to order the convict to pay for the cost,¹⁰⁸ compensation, and expenses,¹⁰⁹ or the defendant may make restitution¹¹⁰ to the victim of the crime for which an offender or suspect was convicted or to the victim's estate.¹¹¹

3.3 Probation

Probation supervision is a non-custodial sanction or sentence that can be traced to the 19th Century in the works of John Augustus of the USA.¹¹² It is one of the most used concepts in reducing congestion in correctional centres in the USA for minor crimes.

¹⁰² s.270 (3) ACJA 2015

¹⁰³s.270 (3-4) ACJA 2015.

¹⁰⁴ s.270 (5) ACJA 2015

¹⁰⁵ s 270 (17) ACJA 2015

¹⁰⁶ .S.270 (18) ACJA 2015

¹⁰⁷ Restitution means recompense for injury or loss.- www.merriam-webster.com Accessed 20-20-2020

¹⁰⁸ S. 322(1) ACJA 2015

¹⁰⁹ 319(1) ACJA 2015

¹¹⁰ S.321 ACJA 2015

¹¹¹ 321 (a) ACJA 2015

¹¹² A Ogbovor, *from Hell to Hell, the Travails of Ex- prisoners in Nigeria*. (Paper presented at the 11th International Conference on Penal Abolition (ICOPA X1), held in Tasmania, Australia 2006) 4-4

The NCSA and ACJA recognise probation as one of the non-custodial systems to rehabilitate offenders or convicts¹¹³. For a defendant or suspect to qualify for probation, the ACJA further provides that the court must consider the offender's character, previous criminal records, state of mental health, age, and any other relevant issue. Also, the court may order a defendant's probation without proceeding to conviction.¹¹⁴ In this regard, an order may be made by the court dismissing the case or discharging the defendant on the circumstance that the defendant entering into a recognizance, with or without sureties, or that he must be of good conduct and to appear in court at any time during such period not exceeding three years.¹¹⁵ The Court may also request the defendant to compensate the victim (s) for his criminal activities.¹¹⁶ Such payment can be made by the defendant or by proxy.¹¹⁷ The probation order by the court must not exceed a period of three (3) years and can be varied at the discretion of the Court at any time.¹¹⁸ However, if the convict fails to observe any of the conditions, the court may issue a warrant for the defendant's arrest or a summons. Where the Court is aptly convinced that the convict has failed or refused to observe his recognizance's condition, based on the report from the probationer's officer in charge, the Court may convict and sentence¹¹⁹ the defendant.

3.4 Parole

Parole is the release or an act of letting a prisoner free from imprisonment before the defendant serves the complete sentence on the grounds of good behaviour or conduct.¹²⁰ It is a period of discretionary supervised release from prison.¹²¹ The parole system as a non-custodial measure can be traced or tracked to the 20th century when unclassified sentencing dominated the American system. The release of a prisoner by parole is not a right but the parolee's request with valid and compelling valid reasons. As a major part of Nigeria's Criminal Justice System,

¹¹³ S.453 of the ACJA defined a "probational order" as an order containing a condition specified in S.455 of this law.

¹¹⁴ ACJA S.454(1)

¹¹⁵ ACJA S.454(2)

¹¹⁶ ACJA S.454(3)

¹¹⁷ ACJA S.454(3) b

¹¹⁸ ACJA S.458(a)1

¹¹⁹ The sentence need not be by the same court that with held the prison sentence but by any other Court .See ACJA s.459(2) (3)

¹²⁰JS Okwendi & R Nwankwoala (2014), "The Role of Restorative Justice in Contemplating the Justice System and Restoring Community Values in Nigeria", *Asian Journal of Humanities and Social Sciences* (2014), 2(3): 127-141

¹²¹ OA Ladapo, "Effective investigations, a pivot to efficient criminal justice administration: Challenges in Nigeria", *African Journal of Criminology and Justice Studies* (2011), 5(1 & 2), 79-94

parole is obviously provided for by the Administration of Criminal Justice Act¹²² and the Nigerian Correctional Services Act.¹²³

The Act empowers the court to order the release or suspend a remaining inmate or suspect's term of imprisonment to a time in prison for at least 15 years or life. This is with regard to the recommendation or reference of the Comptroller General of Correctional Facilities that the inmate is of good behaviour or conduct and has served at least one-third of his prison terms. In this regard, the court may order the suspension of an inmate's remaining term of imprisonment and release the defendant from prison.¹²⁴ It is the duty of the Comptroller General of the Nigerian Correctional Service to rehabilitate, supervise parolees, and take other steps to ensure the effective execution of non-custodial measures.¹²⁵

3.5 Suspended Sentence and Community Service

The Court is empowered to suspend a sentence passed on a convict or suspect and order the convict or inmate to perform specified service in their community or other community or place. The suspended sentencing is one of the non-custodian sanctions or punishments in the NCSA that the ACJA embraces.¹²⁶ It is limited to non-capital offences.¹²⁷ It excludes offences involving or including the use of arms or offensive weapons and sexual offences. The foremost considerations in employing suspended sentencing by the court are the nature or type of the crime, the offender's antecedents,¹²⁸ the possibility of rehabilitation outside the Correctional Centre's and the need to decongest the prison.¹²⁹ The Chief Judge of the State is empowered¹³⁰ by law to establish community service centres in all state's judicial divisions. The registrars of Courts in the various judicial division supervise these community service centres. This is to

¹²² S. 461 ACJA 2015

¹²³ S.37 NCSA 2019

¹²⁴ s 468 ACJA, 2015,

¹²⁵ S. 40 NCSA 2019.

¹²⁶ S.460(1)-(2) ACJA provides; Notwithstanding the provision of any other law creating an offence, where the Court sees reason, the Court may order that the sentence imposed on the convict shall not be required to serve the sentence in accordance with the condition of the suspension.

The Court may, with or without conditions, sentence the convict to perform specified services in his community or such community or place as the court may direct.

¹²⁷ S.460 (3) ACJA. A convict shall not be sentenced to suspended sentence or to community service for an offence involving the use of arms or offensive weapon, or for an offence which the punishment exceed imprisonment for a term of three years.

¹²⁸ S.461 (6) ACJA 2015

¹²⁹ DL Mackenzie, *Sentencing and Correction in the 21st Century; Setting the stage for the future* (University of Maryland, college Park, MD 2001).

On the 06-04-2020, a Chief Magistrate Court handed a Nigerian popular artist and her husband a 14 days community sentence for unlawful assembly contrary to the Lagos State Government Regulation on COVID-19.

¹³⁰ S.461 (1) ACJA 2015

ensure the implementation of a community service order as prescribed by any Judge in that state. The nature of the community service include environmental sanitation,¹³¹ assisting in the production of agricultural produce, and any other type of service and construction of mining, which in the opinion of the Court, would have a practical, beneficial and reformatory effect on the character of the suspect or convict.¹³² A defendant sentenced to community service is not entitled to be sentenced to a term of imprisonment for the same offence.¹³³ Although, where there is a default on the part of the defendant to perform or execute his community service sentence to the Court's satisfaction, the defendant can be sentenced to a specific term of imprisonment for the remaining portion of the community service.¹³⁴ It must be noted that a community service order must not exceed six months¹³⁵ of five hours of daily work.¹³⁶ It suffices to state that the Court has the power to reduce the community service period up to 1/3 of the original sentence.¹³⁷ The Controller General of the Nigeria Correctional Service is saddled with the responsibility to appoint supervisors to monitor those sentenced to community service and report cases of compliance and ineffective non-compliance to the Court¹³⁸.

3.6 Fines

A fine is a penalty or sanction used instead of imprisonment or probation. It is often used as a non-custodial sentence, as captured in the ACJA.¹³⁹ The Court is empowered to either allow the defendant the time to pay a fine or direct that such fine is paid in installments or even postponed. In any circumstance, the convict or defendant is released only subject to the convict giving security with or without sureties on a specified time to pay the fine. A convict or defendant in default of the payment with regard to a prescribed fine would have to serve some term of imprisonment upon being re-arrested.¹⁴⁰

3.7 Restorative Justice

¹³¹including cutting grasses, washing drainages, Cleaning the environment and washing public places,

¹³² S.461(4) a-c (5) ACJA 2015

¹³³S.461(7) ACJA 2015

¹³⁴ S.463 (1) ACJA 2015

¹³⁵ S.466 (1) ACJA 2015

¹³⁶ S.462(1) ACJA 2015

¹³⁷ S.464(a) (b) & (c) ACJA 2019

¹³⁸ S.42(1) a-c NCSA 2019

¹³⁹ S.327.(1) a-e, (2-4) ACJA 2105

¹⁴⁰ 327 (4) ACJA 2015

Under the Nigerian Correctional Services Act, it provides for restorative justice measures¹⁴¹ as a non-custodial measure at the instance of the Controller General of Prisons (CGP). The CGP is required to provide the platform for the following;

- i. Victim-offender system of mediation
- ii. Family group conferencing
- iii. Community or societal mediation

In achieving this purpose, the Correctional Service shall cooperate with the court and other relevant government agencies.¹⁴² Restorative justice under the NCSA 2019 may occur

- i. At the pre-trial stage of a case
- ii. At the trial stage of a case
- iii. During when the defendant is imprisoned
- iv. Post-incarceration.¹⁴³

Concerning the above, the implementation of restorative justice measures is required to be done by a supervisor appointed by the correctional service.¹⁴⁴

4.0 A COMPARATIVE ANALYSIS OF NON-CUSTODIAL SENTENCING UNDER OUR CRIMINAL JUSTICE SYSTEM AND THAT OF KENYA

Kenya is a country in East Africa with a coastline on the Indian Ocean. It attained independence from the British on December 12 1963, and became a Republic in 1964. Kenya has formal and informal (customary) Criminal Justice systems, with no court. She has five stages of the Criminal Justice System, i.e. (1) Investigation, (2) Arrest, (3) Pre-trial activity, (4) Trial sentencing, and (5) Correction.¹⁴⁵ Its three main goals are doing justice, controlling, and preventing crime, which is *impari materia* with Nigeria's criminal justice system but at an advanced stage in its non-custodial measures. In comparison, however, Kenya applies non-

¹⁴¹S.43 (1) a-d, 2 & 3 NCSA 2019.

¹⁴² S.43(2)NCSA 2019

¹⁴³ S.432 (3) NCSA 2019

¹⁴⁴ S.432 (4) NSCA 2019.

¹⁴⁵ www..coursehero.com Accessed 20-10-2020

custodial sentencing as an alternative to retribution, especially for minors and first-time offenders, to reduce prison incidences and recidivism.

This paper shall briefly consider non-custodial sentencing in Kenya under three heads to wit; Plea bargain. Restitution and fines, Probation, Forfeiture, and Community service with a basic legal framework and distinct organizational structure.

4.1 Plea Bargain

A plea bargain is provided for as a non-custodial sentence in Kenya under S. 137 (a-o) of the Kenyan Criminal Procedure Code 2012. It does not only require the involvement of the prosecution, the victim(s), and the accused person in the plea negotiation. The agreement must be reduced into writing and signed off by the accused voluntarily or by a legal representative of his choice.¹⁴⁶ The agreement must also contain all other promises or terms that parties have agreed to be bound with. The main features of a plea bargain in Kenya are the same as that of Nigeria,¹⁴⁷ save for the court's non-involvement in the plea negotiation and the discretion the Court can exercise to accept or reject the plea agreement.¹⁴⁸

4.2 Probation

The Probation Offenders Act, Cap 64 2012, provides Kenya's legal framework for probation. One of the main features of the Act is the establishment of the Department of Probation and Aftercare Service (DPAS), saddled with the responsibility of promoting and enhancing the administration of justice, community safety, and public protection through the provision of social inquiry reports, supervision and reintegration of non-custodial offender, victim support and social crime prevention. The DPAS also promotes harmony and peaceful co-existence between the offender and the victim through conciliation, victim protection, and participation in crime prevention initiatives. The principal beneficiaries of Probation in Kenya are the first offender, women, and minor offenders, and it applies to all categories of offences.¹⁴⁹ In Kenya, the court sentence is based on the interview report the prescribed officer had with the accused person, the victim, and other persons directly or remotely connected to the crime. The interview

¹⁴⁶ *Republic v David Kinyua Gachoi* (2018) eKLR

¹⁴⁷ S,270 (1-18) ACJA 2015

¹⁴⁸ *Republic v David Kinyua Gachoi* (supra)

¹⁴⁹ In *Republic v FL*, (2017) e KLR, A mother who was convicted for manslaughter had her prison term reduced to 3year probation on the consideration that she has been of good behavior but for the unfortunate incident and that she had five other children and a husband to take for.

aims to measure the probation's effect on the offender. Most importantly, the victim's consent must be obtained before a victim can enjoy probation.

There is/are no provisions under the ACJA 2015 and the NCSA 2019 for the robust requirements enumerated above in Nigeria. Courts are usually reluctant to apply for this order, especially with regard to adults, principally because of the possible collusion between the probation officer and the offender on probation¹⁵⁰

4.3 Restitution, Fine(s), and Forfeiture

Restitution, Fines, and Forfeiture are some of the non-custodial sentences frequently applied in the Criminal Procedure code of Kenya. Restitution as a non-custodial measure is limited to cases where the claim for damages is small, or the injury is minor.

Not only is a fine encouraged instead of a custodial sentence, especially where the payment of a fine will suffice. The Courts frown at excessive or outrageous fines.¹⁵¹ Where there is clear evidence before the Court that the property in question legitimately belongs to an accused, Forfeiture will be upheld instead of a custodial sentence.

4.4 Community Service

Community Service Orders were introduced in Kenya by the Community Service Orders Act No.10/1998. The offenders committed to the Community Service Order (CSO) are grouped into two categories. The first categories consist of offenders sentenced to a one-day community service order, referred to as "short term," who are the majority. Most offenders in this group are charged with very petty offences such as illicit liquor consumption, playing pool, and affray. The notable feature in the committal of such cases is that courts do not call for a pre-sentence report and are referred to as "direct placements." The other group consists of offenders mainly sentenced to between one month and 36 months. Most of these involve relatively serious offences such as stealing, possessing narcotic drugs, possessing illicit liquor, and possessing motor vehicle theft. This category is referred to as "long-term," and the courts usually call for a pre-sentence report.

A unique feature of the Community service Order in Kenya compared to that of Nigeria is that it is not limited to a minor offence, and community service orders can span for three years,

¹⁵⁰ KS Nwankwo, *Community Service as an alternative to imprisonment in Lagos State, Nigeria*(Masters Dissertation, Institute of Social Studies, Netherlands 2008)

¹⁵¹ *Republic v Edward Mbuvi* (2017) eKLR

unlike the maximum duration of 6 months of a 5hours work engagement type of labour in Nigeria.

5.0 CHALLENGES FACING NON-CUSTODIAL SENTENCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN NIGERIA

Having taken a critical look at the non-custodial sentence in the Administration of Criminal Justice in Nigeria viz a vis that of Kenya, it is evident that there are conspicuous gaps that need to be filled up if the much desired positive change in the administration of criminal justice in Nigeria is to birth.

Firstly, the provisions in the ACJA2015 and the NCSA reforms 2019 put the judiciary in the driver's seat in applying the non-custodial sentence/ measure in criminal justice administration in Nigeria.

Secondly, the writer observed that despite the copious provisions in the ACJA 2015 and the reforms in the NCSA's 2019, the non-custodial measure is basically at the courts' discretion and perceived only as a complement of the custodial measures in its application.

Thirdly, the infrastructures, facilities, mechanisms, and technical know-how for the successful operation of a non-custodial sentence are at the embryonic stage¹⁵² in Nigeria compared to Kenya, which does not only have an adequate legal framework¹⁵³ it possesses sufficient supportive organizational structure within its criminal justice system and

Fourthly, the few facilities made available by the government in Nigeria have not been maximally utilized. E.g. there is abundant evidence that Borstal Institutions¹⁵⁴ and remand centres meant for young offenders below the age of 21 years are mostly unused sixty years after the idea was first conceived.

6.0 CONCLUSION/RECOMMENDATIONS

¹⁵² Apart from recognizing Parole as one of the non custodial sentence under the ACJA 2015 & NCSA 2019, it lack an in-depth operation guide line to deploy its use

¹⁵³ Service Order Act Revised in 201, Criminal Procedure Code Cap 75, Laws of Kenya, Victim Protection Act N0.17 of 2014, Borstal Institution Act Cap 92 Laws of Kenya 2009

¹⁵⁴ G Oduntan, "Prescriptive strategies to combat corruption within the administration of justice sector in Nigeria" *Journal of Money Laundering Control*, (2017) 20(1): 35-51

The ACJA and the NCSA reforms are two separate legislations that can go a long way in no small measure in improving the Nigerian criminal justice system if its innovative provisions are painstakingly followed or implemented on the one hand. Furthermore, if there is a synergy between the judiciary and the correctional services for its full application or implementation, the other hand.

In this regard, in achieving a better administration of Criminal Justice in Nigeria, all hands must be on deck to effectively activate the non-custodial measures. Toward this end, it is recommended as follows:

1. That there is a need for a deliberate and rigorous effort to build a national database where information concerning every citizen in Nigeria is conserved from birth to death. The existence of a biometric database of convicts or suspects will not only sway the judges into considering the non-custodial sentencing, but it will also inspire and boost its sustenance as no judge wants its order/judgment flouted.
2. No doubt, the provisions of the ACJA 2015 and the NCSA 2019 reforms put the judiciary in the driver's seat in applying non-custodial sentences/measures in the administration of criminal justice in Nigeria. It follows, therefore, that the bench must embrace judicial activism. The Court must depart from the old regime and be willing to adopt and implement the provisions of the ACJ, 2015, notwithstanding the numerous challenges,¹⁵⁵ especially in the face of prison congestion, rampant jailbreaks, and recidivism.
3. The Court must refrain from judicial pronouncement that tends to showcase itself as working against a shift towards non-custodial measures, which is the global trend.

¹⁵⁵ SA Ogunode, "Criminal Justice System in Nigeria: For the Rich or the Poor?" *Humanities and Social Sciences Review*, (2015), 4(1), 28-42.