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## An examination of the statutory and institutional frameworks for implementing non-custodial measures in Nigeria's criminal justice administration

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### Abstract

The Nigeria Correctional Service Act was enacted in 2019. Before its enactment, one of the major problems confronting the prisons was overcrowding, which was against the UN Standard Minimum Rules for Non-Custodial Measures. In compliance with the U.N. measures, the Nigerian government enacted the Nigeria Correctional Service Act 2019, and the Act established statutory non-custodial sentencing provisions within its system under the Administration of Criminal Justice Laws. This paper examined the Nigerian legal and institutional framework for implementing non-custodial measures in Nigeria. The paper uses doctrinal legal research to examine Nigeria's total amplitude of non-custodial measures. The paper also adopted the comparative approach by critically examining the positions available in Kenya and Canada. On the Non-custodial measures and concluded that Nigeria must follow the tradition present in these countries for best international practices. We observed that despite the robust non-custodial measures contained in the provision of the Nigerian correctional service Act and the Administration of Criminal Justice Laws, the incidence of overcrowding has not significantly reduced in Nigerian correctional centres. We found that this failure is a result of the need for a more institutional framework to implement the laudable provision of these two pieces of legislation. We also observed that overcrowding in the Correctional Centres is not only caused by the sentenced convicts but primarily those awaiting trial. Therefore, a wholesome implementation of the non-custodial provisions of the Acts, in collaboration with the institutional and diversionary protocols obtainable in Kenya and Canada, should be adopted to reduce the incidence of overcrowding in our correctional centres.

**Keywords:** Non-custodial, implementing, criminal justice administration, institutional framework, statutory framework and prisons

### Introduction

The attempt to address the challenges of the retributive approach to punishment gave rise to the rehabilitative and restorative practice, which is the main philosophy behind non-custodial sentences. Courts are now enjoined to consider non-custodial measures as the default option when the right conditions are present <sup>[1]</sup>. A non-custodial sentence is a punishment given by a court of law that does not involve a prison term, such as a fine or a restriction order" <sup>[2]</sup>. It is a 'criminal sentence that does not require prison time' <sup>[3]</sup>. This means the sentence is served outside any facility designated as a prison or correctional centre <sup>[4]</sup>. Some academic writers, including Justice Cyprian Ajah, have opined that the term "Non-Custodial measure" should be used instead of the term "non-custodial sentence" as the latter does not effectively cover the scope of interventions at both the remand or sentence stage <sup>[5]</sup>.

Over the years, there have been efforts towards prison decongestion by private entities and public institutions in Nigeria. Examples are the Prison Decongestion Unit in the Federal Ministry of Justice, the Presidential Committee on Prison Reforms and the Presidential Advisory Committee on Prerogative of Mercy.

Though the law has provided some legal precautions towards a periodic decongestion of the correctional centres in the form of Goal Delivery, overpopulation persists. Hence there is a clarion call for the adoption of non-custodial measures by the courts in order to depopulate the correctional centre. The former Chief Judge of Lagos State, Hon, reiterated the need for non-custodial sentencing. Justice Opeyemi Oke (rtd.) as follows;

Today in Nigeria, we have seen countless cases where defendants are arrested for minor offences such as burglary and wandering; they are locked up in our prisons for the flimsiest reasons to join the teeming population awaiting trial inmates. They are in our prisons with hardened criminals, and by the time they come out, they have been initiated into a life of crime and are ready to spread terror, death, and destruction in their post-prison escapades <sup>[6]</sup>.

Despite these efforts, Nigerian correctional centres remain overcrowded. This is because suspects and defendants are remanded daily for minor offences adding to the already large number of awaiting trial inmates.

This paper appraises the strength of the extant legal framework of non-custodial measures in Nigeria by comparing it with the framework of a developed country (Canada) and a developing African country (Kenya) to bring into bolder relief the status, challenges and prospects of improvement of the non-custodial measures in Nigeria <sup>[7]</sup>.

### **The historical development of non-custodial sentencing in Nigeria**

Hitherto, Courts had been inclined to use only punitive measures as sanctions for a crime. However, a 1996 study on Magistrate and Area Courts sentencing found both were disposed to custodial sentencing. A report 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 fines <sup>[8]</sup>. However, it has never been in doubt that some form of alternative to incarceration has been incorporated into the Nigerian penal law, particularly in the Criminal Procedure Act, long before the emergence of ACJA <sup>[9]</sup>.

Probation in Nigeria was first introduced into the statute books in 1945 when the Criminal Procedure Act was enacted. It was the first statute to make provisions for the probation of both juvenile and adult offenders by sections 413 & 435-440 (now repealed in 2004). After this Act, various states adopted the Act's provisions when the conditions were first created in 1967. In addition, juvenile offenders' probation was also provided in the Children and Young Persons Law in 1946.

According to world prison brief records sources, the total number of prison inmates was 56,785 in 2014; 18,042 (31%) were convicted, and 38,743 were awaiting trial <sup>[10]</sup>. (68.2%). In October 2015, the figure was 63,000 total inmates and 75% awaiting trial inmates on record. By 2016, the statistics are as follows: Total inmates 63,000, convicted inmates population and 45, 263 (72%) awaiting trial. The current prison population as of October 2022 is 76,213, with awaiting trial inmates at 52,924, 69.4% of the total prison population <sup>[11]</sup>. This apparent increase in the prison population has resulted in activism for a shift in sentencing disposition and practices towards a reformatory approach. As a result, the ACJA 2015 responded to Nigeria's dire need for legislation to eliminate unacceptable delays in disposing of criminal cases and introduce non-custodial measures.

Thus in 2015, the Administration Of Criminal Justice Act came to the rescue to put in place progressive measures, which, if properly implemented, will significantly enhance the criminal justice system in Nigeria and enable enforcement and rehabilitation agencies effectively fight crime and rehabilitate offenders. The development of non-custodial measures has been justified by arguments based on their cost-effectiveness, reintegrative, and rehabilitative benefits.

The Nigerian correctional Service, formerly called the Nigerian Prison Service, has also received much criticism ranging from overcrowding and unhealthy environment for inmates below the United Nations standard minimum rules for treating prisoners (Mandela Rules). To bring the Nigerian administration of the criminal justice system to State of the art, President Mohammad Buhari, on 31st July 2019, signed the Nigerian correctional service act 2019, which repealed the prison act of 2004. The Act is structurally divided into three

parts, and part three deals only with non-custodial Service <sup>[12]</sup>. The entrenching of non-custodial sanctions in the Nigerian penal laws re-echoes the traditional African communities' informal but efficacious ways of controlling crime. It is, therefore, a pertinent observation that the basic features of African criminal justice are perceptible in non-custodial sanctions.

### **The legal and institutional framework of non-custodial sentencing in Nigeria**

**Legal framework:** Most of the Non-Custodial Sentencing provisions are contained in both The Administration of Criminal Justice Act (ACJA) 2015 and the Nigerian Correctional Service Act 2019 <sup>[13]</sup>. These are novel and notable pieces of legislation dealing with this area of our law. Non-Custodial Sentencing Provisions Under The ACJA 2015. The ACJA applies to Criminal offences established by an act of the National Assembly <sup>[14]</sup>. Whereas Lagos, Rivers, Anambra and a few other States have enacted an Administration of Criminal Justice Law (ACJL). However, the ACJL of the different states is basically in pari materia with the ACJA. The ACJA 2015 and the ACJL of most States make adequate Non-Custodial sentencing provisions, including the following: Cost, Compensation, Damages and Restitution, Fines, Deportation, Probation, Suspended Sentence, and Community Service. Detention at a Rehabilitation and Correctional Centre and Parole.

- 1. Costs, Compensation, Damages And Restitution:** The court may order a convict to pay costs, compensation and damages and to make restitution to victims of the crime. This may be an alternative to imprisonment or could be part of the terms of any imposed sentence. These payments are made to the victim, not the government <sup>[15]</sup>.
- 2. Fines:** The court may order the defendant to pay only fines, with or without a sentence of imprisonment <sup>[16]</sup>.
- 3. Deportation:** The court may order the expatriation of a non-citizen defendant from Nigeria to his own country. This is for offences punishable by imprisonment without the option of a fine <sup>[17]</sup>. The court also has the power to endorse to the Minister of Interior that any person (not a citizen) may be deported for breach of the peace and perpetuating dangerous conduct <sup>[18]</sup>.
- 4. Probation:** Probation is a court-imposed criminal sentence that is subject to some conditions. For example, a convicted person is released into the community instead of incarceration <sup>[19]</sup>. This probation can take the form of conditional release <sup>[20]</sup>
- 5. Suspended Sentence:** A *suspended sentence* involves the suspension of the enforcement of imprisonment terms upon clear conditions or no conditions at all by the court <sup>[21]</sup>. It is, however, limited to offences with penalties below three years. It also excludes sexual offences.
- 6. Community Service Order:** A community service order requires a convict to do voluntary or unpaid work in the community as the penalty for the offence in the place of imprisonment. The court may sentence an offender to community service <sup>[22]</sup>. However, neither a suspended sentence nor community service order can be made in cases involving the use and possession of arms or offensive weapons, sexual offences, or offences for which the penalty exceeds three years imprisonment <sup>[23]</sup>.
- 7. Confinement in rehabilitation or correction centre:** The court has the power to order that a convict be sentenced to confinement in a rehabilitation or correction

Centre established by the government in lieu of imprisonment <sup>[24]</sup>. Rehabilitation centres belonging to state governments across the country are left in ruins as their structures and facilities are decrepit. An investigation by Daily Trust has shown fake correctional centres were uncovered in parts of the country, revealing their hideous nightmares.

- 8. Parole:** Parole is a release of a convict from prison subject to certain conditions (conditional release) during the term of imprisonment and before the completion of the sentenced prison term. The ACJA empowers courts, on the recommendation of the comptroller-general of the Nigerian Correctional Service, to release inmates on parole on two conditions. Firstly, that the inmates are of good behaviour, and secondly, that the inmates must have already served their non-parole periods; the ACJA states that inmates that are sentenced to at least fifteen years or life imprisonment must have done at least one-third of their sentence before they can be recommended for parole.

Unfortunately, ACJA is silent on parole conditions for those sentenced to less than fifteen years of imprisonment. It is also unclear how the comptroller-general would calculate one-third of life imprisonment to recommend such inmates for parole. In addition, ACJA does not provide conditions that courts may attach to the release of inmates on parole <sup>[25]</sup>.

A prisoner released under this provision shall undertake to attend a rehabilitation programme in a government or appropriate facility, to support proper reintegration into society.

Most states still need to embrace these provisions and have maintained the status quo of the old regime of custodial sentencing. Many judges are uncomfortable with the provisions relating to non-custodial sentencing because non-conviction of an offender is perceived as tantamount to treating the offender with kids' gloves and negating the essence of finding the charge proven.

#### **Pre-trial non-custodial measures**

Section 293 provides that a suspect arrested for an offence beyond the magistrate court's jurisdiction should be brought before a magistrate court for remand within a reasonable time <sup>[26]</sup>. This process enables an uncharged suspect to be kept in custody pending his bail or the delivery of legal advice from the chambers of the Attorney General. The remand order should be at most fourteen days renewable for another period set of fourteen days to a maximum of 56 days. The provision of legal advice by the office of the Attorney General effect has a time frame. (s. 376 prescribes 14 days) The legal advice shall then be copied to the court as to whether to charge or release the suspect.

In reality, however, these pre-charge and pre-trial time protocols have yet to be executed as stated due to the failure of the Attorney General to deliver his legal advice promptly. Many suspects awaiting this legal advice remain in prison for years, and magistrates are reluctant to implement sections 296(6) and (7)

The *Nigerian Correctional Service Act 2019* (NCSA) also provides regulations and guidelines for restorative justice measures, Parole, Probation and Community Service and any other alternative measure ordered by the court to the Correctional Service (section 37). The duties of the Controller General in this regard include ensuring the administration of

non-custodial measures and developing a yearly plan of non-custodial service programs <sup>[27]</sup>.

The whole part of Part II of the Act is devoted to Non-Custodial Measures, which include <sup>[28]</sup>:

Community service, Probation, Parole, restorative justice measures and any other non-custodial punishment assigned to the Correctional Service by a competent court

The above (e) gives the courts the power to decide which non-custodial sentence to impose on an offender, depending on the circumstance. This means that the scope of non-custodial measures is not closed, and the powers of the courts to create are very elastic to ensure that many minor offenders are out of confinement.

The Nigerian Correctional Service Act 2019 imposes a duty upon the State Controller to inform appropriate authorities within one month of the custodial centre surpassing its capacity. Furthermore, the Act imposes a sanction for failure to notify <sup>[29]</sup>. The authorities to be notified are: (i) The Chief Judge of the State; (ii) the Attorney-General of the State; (iii) the Prerogative of Mercy Committee; (iv) the State Criminal Justice monitoring council; and (v) any other relevant body <sup>[30]</sup>. This provision is rarely practised.

The Controller is to consider the diversion or release of prisoners to Non-Custodial Centers. In these cases, inmates already serving their time in custodial centres are moved to serve and complete their terms in non-custodial centres. Eligible inmates for diversion are: (a) inmates sentenced to terms three years and above with six months and below remaining to complete their sentences; (b) those convicted or charged for minor or straightforward offences; (c) cases with civil undertones; and (d) any other benchmarks to be decided by Prerogative of Mercy Committee or by the chief judge <sup>[31]</sup>. Interestingly this provision is the only precise diversionary measure provided under Nigeria's criminal justice administration which is ineffective in the absence of non-custodial centres.

The NCSA empowers the President and the National Assembly to constitute and appoint a body called the National Committee on Non-Custodial Measures. The Controller-General is to set up similar committees in the various States. The state Committees shall have the same functions as the National Committee <sup>[32]</sup>.

The Controller-General is to ensure proper administration of the Parole, Probation, Community Service and Restorative Justice Measures processes.

On the *international* scale, the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) <sup>[33]</sup> set out principles and minimum safeguards to promote the use of non-custodial measures for persons subject to alternatives to imprisonment. These rules encourage Member States to develop non-custodial measures by reducing the use of confinement <sup>[34]</sup>. The rules also advocate avoiding unnecessary incarceration by using different non-custodial measures, from pre-trial to post-sentencing dispositions <sup>[35]</sup>. The rules recommend that consideration be given to dealing with offenders in the community, circumventing as much as possible reliance on formal proceedings or trial by a Court within the legal safeguards and the rule of law <sup>[36]</sup>.

#### **The Institutional Framework**

The institutional framework of non-custodial sentencing is superimposed in the institutions of the criminal justice system. It consists of the police, the courts and corrections and the directorate of public prosecution.

### The Directorate of Public Prosecution

The Directorate of Public Prosecutions (DPP) officers, popularly known as State Counsel or Law Officers, are the prosecutors in the Ministry of Justice. They represent the State in criminal matters, mainly in the superior courts. The State Counsel advises the police on criminal cases, writes legal opinions on cases and exercises discretion on whether or not to prosecute. With all these, the State Counsel has an enormous say on the fate of criminal cases. The office of the director of the public prosecution has the power to broker bargains that can lead to reduced charges, and these bargains can facilitate the use of non-custodial measures. This is contained in section 270 of ACJA 2015. Once the parties have agreed to a charge bargain, Judges may accept or reject the agreement but cannot modify it. Pursuant to sections 174 and 211 of the Constitution, the prosecution exercises prosecutorial discretion to decide what charges to file. The Nigerian Supreme Court has held in *State v. Ilori* that the exercise of prosecutorial powers is not subject to judicial review. Herein lies the largesse of the prosecutors' power to manipulate the charges towards using alternatives to imprisonment. It is important to stress that other institutions and government agencies are also empowered to conduct public prosecution. Some of these include the National Drug Law Enforcement Agency (NDLEA), the National Agency for Food Drug Administration and Control (NAFDAC), the Independent Corrupt Practices and Related Offences Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC).

The prosecutor has a role in reducing the use of pre-trial detention that magistrates Mett out while awaiting the DPP'S legal advice. Speedy legal advice delivery will facilitate a reduction in the use of pre-trial detention. The failure to proffer speedy legal advice in line with the dynamics provided in sections 294- 296 of the ACJA has contributed in no small way to the overcrowding in the correctional centres causing the awaiting trial population to be more severe than the already sentenced population<sup>[37]</sup>.

### The Police

From the colonial period, police officers of various ranks have taken up prosecution of criminal cases in Magistrates and other courts of inferior jurisdiction. This is because they derived their powers under Section 23 Police Act.

The Nigerian Constitution establishes the Nigeria Police force, and its powers and duties are outlined in the Police Act. The Act provides that the police have the responsibilities for the apprehension of offenders, the prevention and detection of crime, the protection of life and property, the preservation of law and order and the enforcement of all laws and regulations as they may be assigned. Furthermore, the Act equally empowers the personnel of the NPF to prosecute cases before any court in Nigeria. However, the NPF's efforts to carry out its functions and discharge its constitutional mandate have yet to escape criticism.

The police have a significant and strategic role to play within prosecutorial responsibilities. It is this prosecutorial power in the magistrate court that can be engaged in exploiting non-custodial sentencing. The use of Minor charges to implement non-custodial measures is within the control of the police. Instead, in practice, the police deliberately shop around for severe offences to charge, which often leads to detention. One principal area where the Nigerian Police has been criticised is the area of criminal justice. The Nigerian Police have been

criticised for errors that are sometimes deliberate. There are allegations that police arraign suspects in court before looking for evidence to prosecute them. The police have the discretion to allow bail even for bail-able severe offences. They need to send the file for legal advice without delay for capital and serious offences.

The police, at the initial stage, take individuals into detention facilities, and what it does after that essentially determines whether the cases will be disposed of speedily. Poor or shoddy investigation methods tend to prolong the incarceration of individuals. Failure to submit case files timeously to the office of the Director of Public Prosecution to decide whether to prosecute or dismiss the charges against the suspects further contributes significantly to the growing number of Pre-trial detainees. Section 35(4) of the Nigerian Constitution provides that a person arrested upon reasonable suspicion that he has committed a criminal offence should be brought before a competent court of law within a reasonable time, and if such a person is not tried within two months from the date of his arrest and detention, and in the case of a person who is in custody or is not entitled to bail, such an accused person is entitled to be released either unconditionally or upon conditions that are reasonably necessary to ensure his appearance for trial at a later date. Therefore, it does not lie in the mouth of the police prosecutor to object to the release of detainees when it failed timeously to prosecute them before a court of competent jurisdiction for trial.

Most NPF investigations extend up to six months, irrespective of the offence, contributing to individuals languishing in detention for months or even years. Furthermore, failing to complete investigations within a reasonable time results without bail contributes to the inability to utilise non-custodial measures. Indeed the role of the police is the grass root for the non-performance of non-custodial sentencing in Nigeria.

### The Courts

Since Magistrates are at the grassroots of the justice delivery system in Nigeria, they are besieged daily with loads of criminal cases. These proceedings, in turn, create considerable opportunities for making pre-trial orders. Despite this, most criminal pre-trial orders usually adversely affect the liberty of suspects who are eventually remanded in the Correctional Center.

Exploiting the statutorily available non-custodial provisions in ACJA by magistrates will tremendously reduce the congestion in the Correctional Centers. Concededly, the congestion of Correctional Service Centers is caused not only by the custodial sentences passed on offenders by the Courts but also by the summary procedure, criminal pre-trial detention Orders, and *ad hoc* procedures such as remand proceedings.

However, only minimal usage of a non-custodial pattern of sentencing has been made by magistrates in their practice as adjudicators. In addition, most magistrates fail to utilise a non-custodial pattern of adjudication when granting interlocutory and ancillary Orders arising from applications in criminal proceedings such as restrictions, conditional discharge, compensation etc. This disposition can achieve the decongestion of prisons more effectively than any other legal and judicial intervention.

The remand proceedings also come with complications. Under this procedure, any suspect arrested for an offence the Magistrate lacks jurisdiction to try shall be remanded in correctional centres. This procedure is provided for in the



ACJA. The remand process is fraught with exigencies, which produces a complication when coupled with the courts.

In practice, the remand procedure is a summary procedure in the magistrate courts. Therefore, police prosecutors are not usually disposed to returning to their police stations with the suspects, accused persons or defendants. The consequence of the above situation is that the Magistrate may not discover the trumped-up charges or the lack of nexus between the content of the Report and the charge against the suspect, to which the Magistrate has no jurisdiction to try. As soon as this happens, the next stage will be to remand the suspect for lack of jurisdiction. Suffice it to say those remand proceedings and other applications that end up in suspects' remand eliminate the opportunity for Magistrates.

### **Nigeria Corrections**

The Act empowers the President to appoint and the National Assembly to constitute a body to be known as the National Committee on Non-Custodial Measures. To monitor and propose measures for the effective operation of non-custodial measures. The Controller-General is empowered by the Act to set up similar committees at the Federal. The Act further authorises the Controller-General to administer and ensure proper administration of the processes of Parole, Probation, Community Service and Restorative Justice measures. Finally, the Act creates a Special Non-Custodial Fund to assist in adequately implementing the non-custodial measures outlined in the Act. In line with this, some practical developments were made just recently; in August, a national and State parole board was inaugurated in Abuja.

### **Non-custodial sentencing in other jurisdictions**

#### **Canada**

Ten years ago, Canada's corrections experienced explosive growth, seriously exceeding its prison capacity. Today, Canada's prison population is comparatively small due to conscious efforts towards alternatives to imprisonment. Most of the Canadian criminal justice system leveraged diversion, parole and community alternatives to reduce prison populations. Many of the Canadian correctional systems also leverage a committed voluntary sector<sup>[38]</sup>. The Canadian Criminal Code, sections 717 to 742, provides a framework of non-custodial sentencing for courts to consider. These include diversion, fine, Parole, conditional sentences, suspended sentences and Probation,

#### **Diversions**

Diversions are programs that implement strategies to avoid formal processes in the criminal justice system. Police officers, prosecutors and court officials employ non-custodial protocols to exercise their discretion to divert offenders from formal processes.

#### **Pre-charge diversion-police**

A pre-charge diversion begins as early as the police investigative stage. Police identify appropriate candidates for diversion programmes. Usually, with the approval and participation of the Crown Attorney, eligible cases are identified using established criteria. One crucial criterion is that the subject must consent to a guilty plea for the offence. In addition, the police prosecutor must prove that the offence can be successfully prosecuted at trial. Once the offender consents, the charges are dropped. Pre-trial diversions are cost-effective because they are initiated so early in the process

[39].

#### **Post-Charge Diversion - Court**

Post-charge diversions are Court-based diversions coordinated by the Crown Attorney's office after charging the offender. By consent, such offenders can be diverted from the cumbersome experience of the criminal justice system. Section 717 of the *Criminal Code* provides for post-charge diversion when the offender freely admits guilt, having been advised of their right to counsel, and the Crown Attorney believes there is sufficient evidence to prosecute. On completion, the Crown Attorney enters a stay of proceedings, and the charge is dropped. Post-charge diversions provide a powerful plea-bargaining strategy<sup>[40]</sup>.

#### **Pre-Sentence Diversion – Discharge**

A pre-sentence discharge order occurs at the sentencing stage. Although there is an admission or finding of guilt, the judge decides to order the offender's discharge, and there is technically no conviction. This is not applicable if the offence has a minimum sentence or if the maximum sentence is 14 years and above<sup>[41]</sup>.

#### **Post-Sentence Diversion – Probation**

Probation is the supervised release of an offender from incarceration, subject to good behaviour. Probation is perhaps the most valuable tool to prevent offenders from being further drawn into the criminal justice formalities. A pre-sentence report by the probation officer assists the court in its decision to impose a sentence.

Post-sentence Diversion during Incarceration –(Conditional Release)

An essential purpose of imprisonment is a separation from the community of those offenders who threaten public safety. Nevertheless, where the risk is later assessed as low, and the sentence has accomplished its denunciation purpose, the correctional system's primary purpose now becomes the safe restoration of offenders into the community. To achieve these conditional release mechanisms provided in the *Corrections and Conditional Release Act (CCRA) 1992*, are used. Release decisions recommended by the Correctional Service of Canada(CSC) and the National Parole Board<sup>[42]</sup> Based on an assessment of the potential risk the offender poses to the community is the basis of such release<sup>[43]</sup>.

#### **Conditional Sentences**

conditional sentences (s. 742 *Criminal Code*) is a sentence of imprisonment (s.742.1(a)) but served within the community if the judge is convinced that it would be consistent with the purpose and principles of sentencing as provided in sections 718 to 718.2 (s742.1(b)) and is safe for the community<sup>[44]</sup>. The concept of a *prison sentence* served within the *community* has taken considerable effort by the criminal justice community to grasp. Advocates of the conditional sentence point to the unnecessary cost and ineffectiveness of imprisonment for persons of low-level threat to the community. The Supreme Court in Canada case of *R v Proulx* has helped clarify the appropriate use of conditional sentences. This case has clarified that conditional sentences should incorporate limitations of liberty that are more punitive than other community sentences<sup>[45]</sup>. Consequently, such sentences now commonly contain conditions that amount to house arrest, strict curfews, limited reasons to be out of one's

residence and restrictions of association. The use of conditional sentences has led to reduced prison populations in Canada

### **C. Restorative Justice**

Restorative justice has enormous potential for improving criminal justice practices in natural, practical and satisfying ways. In Canada, this approach has also been adopted by the Royal Canadian Mounted Police, the country's national police force. In their application of this approach, the Justice Forums engage youthful offenders, families, community members and victims in a facilitated process to seek restoration. Both victim and offender must give and remain able to withdraw their free, voluntary, informed consent to participate in the restorative justice process. As well they must be fully informed about the process and its consequences. In these programmes, enough prison-bound offenders were successfully maintained in the community, and the cost offsets can cover such programmes with some funds to spare [46].

Canada has a very active voluntary sector. They offer services on a non-profit basis to both provincial and federal correctional services by providing residential, parole supervision and other services to support non-custodial programmes in the community. These voluntary organisations owe no particular allegiance to any single level or jurisdiction of the government, and their services are often shared among correctional systems. Voluntary organisations in Canada are motivated mainly by philanthropic and religious values. The Department of the Solicitor General provides essential funding to National Voluntary sector groups. An active voluntary sector with a strong partnership with government agencies is critical for mobilising the community-based programmes.

### **Probation services**

The existence of probation service is instrumental in administering orders by the court, such as restitution orders, conditional discharges, and protection orders [47] and conditional sentences. Probation services operate several support programmes for probationers, from job-finding and life-skills development to sex offender and substance abuse programmes. Probation services work with voluntary organisations to develop them and then utilise their services.

### **The National Parole Board (NPB)**

This board is the conditional release decision-maker. It is an independent administrative tribunal of government appointees who make case-by-case release decisions.

### **Kenya**

In Kenya, there exists a set of procedures to encourage the use of alternatives to imprisonment, such as diversion, alternative dispute resolution, suspended sentences, probation, early release etc. The conclusion of a recent report by Penal Reform International (PRI) states that within East Africa, the most effective use of alternative sanctions and the best-developed infrastructure for their implementation is in Kenya [48].

#### **Pre-trial detention**

Given that most of the prison population in Kenya consists of prisoners awaiting trial, reducing the number of offenders held in pre-trial detention through non-custodial measures is necessary to reduce prison overcrowding. In Kenya, there are

two aspects to pre-trial detention: Reducing the overuse and duration of pre-trial detention. Chapter 4 of the Kenyan Constitution acknowledges the rights of an arrested person to be released on bail, on reasonable conditions, pending a trial, unless there are persuasive reasons to do otherwise [49]. Article 49(2) also provides that a person is not to be remanded in custody for an offence punishable by a fine or imprisonment not exceeding six months [50]. 123. (1) provides for pre-trial bail (other than a person accused of murder, treason, robbery with violence, attempted robbery with violence or any drug-related offence). The full adherence to Art 49 1(h) and 2 of the Constitution and support for the bail information systems introduced by the KPAS are being exploited to help address the plight of pre-trial detainees and prevent the unnecessary use of pre-trial detention.

### **Suspended sentences**

According to s. 15 (1) of the CPC, where a Court passes a prison sentence of two years and below for any offence, the judge may order the sentence not to take effect unless during the period specified by the court (called the "operational period") the offender commits another offence [51].

### **Alternative dispute resolution (restorative justice)**

Chapter 10 of the Constitution specifies that the Courts and tribunals must be guided by the principle of alternative dispute resolution, which shall include traditional dispute resolution, reconciliation, and mediation promoted (Article 159(2) [52]. Such ADR mechanisms are mostly non-custodial [53].

### **Community service orders**

In Kenya, CSOs are non-custodial sentences that enable convicted non-serious offenders to perform unpaid public work in the community instead of imprisonment. Depending on the offence, the penalty may range from a few hours to three years. Considerable progress has been made in developing community service in Kenya since adopting the Law on CSOs. The objectives of CSOs are mainly to keep non-serious offenders out of prison and to reduce the inflow of offenders into prison [54]. The Community Service Orders Act, No. 10 of 1998, allows courts to issue an order requiring the offender to perform community service. This option is available for offences punishable by an imprisonment term not exceeding three years. The Act lists several examples of CSO (afforestation, environmental protection, construction and maintenance of public roads, etc.) [55]. The court decides the nature or type of public work after consultation with the National CSOs Committee.

### **Conditional release/parole**

Section 49 of the Prisons Act provides a limited form of parole. The section gives the Commissioner of Prisons power to allow prisoners serving sentences of 4 years and more to be absent from prison for a prescribed period on conditions set by the COP. However, this is only applicable when the prisoner has a balance of fewer than three months to complete the sentence. The Commissioner reserves the right to recall the parolee during the period of parole, and failure to return to prison when recalled (or when it is a condition of parole) is an offence punishable as if the parolee had escaped from prison. Non-compliance with the conditions of the parole constitutes an offence punishable by six months in custody [56].

### Probation orders

The Probation of Offenders Act<sup>[57]</sup> establishes the authority of the court to make a Probation Order in certain circumstances, depending on the offender's circumstances or the nature of the offence. This may occur with or without a conviction (in diversion cases), either as a sentence or instead of a sentence. Section 4. (1) states that where a person is charged with an offence and the court thinks that the charge is proved but thinks that, having regard to any mitigating circumstances, it is pragmatic to allow the offender on probation, the court may issue a Probation Order with or without proceeding to conviction<sup>[58]</sup>. Section 5(1) states that a Probation Order is effective for six months to a period not exceeding three years from the date of the order and shall require the Probationer to be supervised by a Probation officer<sup>[59]</sup>.

### Fines

A fine is an amount fixed by law as a penalty. Section 28(1) of the Penal Code states that the fine should not be excessive. In practice, imprisonment for default (or inability) to pay a fine is quite frequent. There is no option for a non-custodial sentence for failure to pay a fine in Kenya<sup>[60]</sup>.

### Diversion

In Kenya, Police and Prosecutors have sufficient discretion to implement diversion. Kenya has ratified several international and regional instruments that support the implementation of diversion as an alternative to prosecution. The Office of the Directorate of Public Prosecutions developed a Diversion Policy. Diversion enables prosecutors to divert cases from the court through agreed structures. The Diversion Policy Guidelines and Explanatory Notes<sup>[61]</sup> in Kenya were created for Public Prosecutors. It contains practical steps that need to be used to implement the Policy, along with a sample Diversion Agreement and checklist. Through diversion, ODPP can better deal with case backlog in Kenya's judicial system and reduce prison overcrowding by allowing settlement out of court. This Diversion Policy is essential to operationalising Article 159 of the Constitution of Kenya 2010.

### Compensation

The court may order payment of compensation to a person injured by an offence. Section 175 (2) of CPC mentions that such sum as would have been recovered in a civil process can be awarded against the offender. Such an award is a defence in a subsequent civil suit and can longer be raised at any civil proceedings.

### Absolute or conditional discharge

This is an option available that is considered inexpedient to impose punishment, and a Probation Order is also unsuitable in the circumstances. The discharge may be absolute or on condition that the offender commits no offence for a term not exceeding twelve months.

Community Service Order Committee is another institution that facilitates implementing non-custodial sentencing in Kenya.

The National CSO Committee is established vide section 7(1) of the Community Service Orders Act No. 10 of 1998<sup>[62]</sup>. The committee's role includes advising the chief judge and minister on community service, Organise pieces of training for critical stakeholders, Developing practice guidelines and Conducting decongestion of prisons exercises;

### Kenya probation and aftercare service

The KPAS is the sole government administrator of community-based sanctions in Kenya. The objectives of the KPAS, amongst others, are the supervision and rehabilitation of offenders on non-custodial sanctions. The KPAS can currently count on 650 Probation Officers with university-level training in the social sciences.

The Probation and Aftercare Service uses volunteers called Assistant Probation Officers'(APOs)<sup>[63]</sup>. This initiative commenced addressing a resource gap within the KPAS. The VPOs were able to assist in the supervision of Probationers, particularly in remote communities that lack Probation Officers. There are approximately 300 VPOS. Volunteers must be at least 30 years old, reside locally, and be well-respected with good community ties<sup>[64]</sup>. The KPAS Volunteer Probation Officers Programme is considered the best practice to emulate in other countries. Given the limited resources of the KPAS and the difficulties involved in working with offenders in remote communities, the programme is now an indispensable part of the KPAS mandate.

The main challenge in Kenya, as in many other African countries, is that the population only sometimes fully appreciates or knows the benefits of alternatives to imprisonment. Therefore, the national prison decongestion strategies will only be meaningful if they include a sensitisation component that ensures that the population and the community support such measures.

### A comparative analysis of non-custodial sentencing Nigeria, Canada and Kenya

The non-custodial measure existing in the three jurisdictions will be looked at comparatively to borrow, isolate and bring into bolder relief the root cause of poor implementation of non-custodial measures in Nigeria. The comparison will be analysed under the following headings: historical underpinnings, diversionary protocols, non-custodial dispositions and institutional bodies.

Historical underpinnings: Kenya's use of non-custodial measures were initially targeted to reduce the high costs incurred by the government in running overcrowded prisons. As far back as 1963, a program called Extra Mural Penal Employment was introduced under Section 68 of the Kenya Prisons Act of 1963 to consider offenders sentenced to six months or less for conditional release. This intervention was exclusively supervised by the prison department, while the judiciary took up community service as its exclusive contribution to the criminal justice system in Kenya. The Community Service Orders was gazetted on 23rd July 1999, and it provided a platform for establishing and introducing the Community Service Orders Program in Kenya<sup>[65]</sup>.

In Nigeria, although some form of alternative to imprisonment has existed since 1945 in the form of probation, it only took natural effect in 2015 when ACJA was established. This reveals that Kenya was more intentional than Nigeria in introducing the EMPE Act as far back as 1963.

On 11th August 1899, the *Canadian* Parliament enacted The Ticket of Leave Act. The Act was designed for 'young men of good character, who may have committed a crime in a moment of passion, or perhaps have fallen victim to bad example, or the influence of unworthy friends'. This statement reflected the growing concern about the effects of imprisonment on young and first offenders. Penitentiaries were believed to be schools of crime where the (relatively)

innocent should not be kept. It was also cheaper to release some inmates early than maintain them in prison at \$254 a year<sup>[66]</sup>. Unmistakably, the financial burden of maintaining prisons and its attendant consequences is a universal reason for developing non-custodial measures in all jurisdictions.

**Diversion:** Kenya and Canada are similar in exploiting diversion to control the prison population. Under Section 171 of the Canadian criminal code, there are provisions for diversion at every stage of the formal criminal procedure. Diversion is applicable at the pre-trial, post-charge, pre-sentence and post-sentence stages. In Kenya, the diversionary protocol has a standardised guideline. The public prosecutor's office uses a diversion policy guideline and explanatory note to implement the Policy and give life to article 159 of the Kenya constitution. Unlike Canada, Kenya's diversion has only two stages. The pre-charge and post-charge stages. The post-incarceration and pre-sentence diversion are not available in Kenya. In Nigeria, diversion has yet to be discovered. However, pre-sentence diversion can be gleaned from the plea bargain provision under section 76 of the ACJA. Kenya and Nigeria are similar in that an agreement between the victim, the Attorney General and the defendant is executed. In Kenya, it is called a memorandum of understanding.

**The Institutions:** Nigeria, Canada and Kenya have a robust institutional framework that breathes life into the non-custodial measures. Canada leverages strongly on a voluntary sector to support its non-custodial structure, most of which are philanthropic and religious bodies. There is a strong partnership between these bodies and the judicial system. Interestingly, the solicitor general's office provides financial support to these voluntary sectors. The Canada probation service works with these voluntary sectors and trains, develop and utilises them. Kenya's probation and aftercare service also engage volunteers called Assistant Probation Officers to address the resource gap in implementing alternatives to imprisonment. In Nigeria, the voluntary sector is unstructured and informal, and there needs to be formal synergy with the judicial sector. The voluntary sector support is without any collaboration or systemic plan with the relevant institutions. Two cases in mind are PRAWA (Prison Rehabilitation Welfare Action) and CAPIO (Carmelite prisoners interest organisation). They usually depend on international organisations to fund their prison reform advocacy and programs instead of the Nigerian government.

**Non-custodial dispositions:** S.49 Kenya Prison Act authorises the Commissioner Of Prisons (COP) to release a person serving a sentence of 4 years and above who has a period of three months and less to complete their sentence, to be absent from prison for a prescribed period. The COP may recall the prisoner at any time. In Nigeria, by section 453, a conditional sentence is aligned with probation. It is often used for minor or extenuating age or mental illness cases. There is no restriction on cases eligible for conditional release as in Kenya. To this extent, Nigeria bears some resemblance to Canada. In *Canada*, a conditional release is usually served within the community and is not limited to minor offences, as a rule. Instead, it includes some form of limitation of liberty within the community in house arrest, curfews, etc.

*Restorative justice* has been part of Canada's criminal justice for 40 years and is supported by legislation with over 27 restorative justice links<sup>[67]</sup>. The provisions of the criminal

code and the youth criminal justice act support its use<sup>[68]</sup>. In Nigeria, restorative justice is also provided under section 43 of the CSA, which provides that Restorative justice services may occur at all stages, even post-imprisonment. In May 2022, Lagos state launched its restorative justice centre to implement prison decongestion. Voluntary sectors such as ROLAC have collaborated with police officers and prosecutors to implement it. Kenya also has active statutory backing for restorative justice primarily because of the cultural undertone of the African customary system. Sections 66 and 67 of the Kenya prison Act and the borstal institution act are all frameworks for restorative justice. Though legislation backs up restorative justice in Kenya, it frameworks a flexible window by some states to apply it informally.

*Fines* in Canada, fines can be used as a sentence and in default, an acceptable option programme is made available where he can work to discharge the fine owed to the court under section 776 of the CCC. Such fines are deducted from the source. In Nigeria, fines have long been statutorily available since the CPA was a disposition. Under section 327 of the ACJA, the court may order imprisonment in default of payment of a fine. The judge may choose to release the convict by giving security by means of a bond. If he cannot fulfil the terms of the bond, he goes to prison. Kenya is similar to Nigeria because there is no good option programme as in Canada. In both Kenya and Nigeria, there is imprisonment in default of payment. However, in Kenya, a warrant is levied on the defendant's property instead of a security bond.

Parole in Canada, parole works alongside conditional sentence and the parole board is the release decision maker. Similarly, in Kenya, conditional release and parole are practised interchangeably only to the extent that the defendant has served some part of his sentence. This is provided under section 49 of the KPA. There is a provision for a parole board in Nigeria and Canada. In Nigeria, parole is only provided for those with less than fifteen years of sentence length.

These comparisons are not closed. However, the above areas have essential features that may be fit for legislative borrowing.

### **Gaps in the legal an institutional framework of non-custodial measures in Nigeria**

The NCSA introduces innovations that should improve and breathe life into the provisions of the ACJA, 2015, on non-custodial sentencing. However, there are noticeable gaps in the Act.

- A vast lacuna is seen in section 12(8) of the Act, which empowers the State Controller of Correctional Service in conjunction with the Correctional Centre Superintendent to reject intakes of convicted persons where it exceeds the capacity of a Correctional Centre without stating where these rejected convicts should be kept. This conspicuous gap has led to agitation about the unstructured release of such convicts into society without any corrections. This shows that there are no plans to exploit non-custodial provisions.
- The efficacy of applying non-custodial measures in Nigeria is also caused by poor attitude toward record-keeping and the absence of a structure for tracing absconding persons. The ability to trace defendants on alternative sentences is an inescapable aspect of non-custodial sentencing. This concern still needs to be



addressed by the NCS Act 2019.

- The practical implementation of the NCS Act in the absence of proper funding could be better. The many innovative provisions can only be actualised with funding. Funding is required to build new structures and develop personnel such as probation officers, parole officers, etc. The Act also establishes the Special Non-Custodial Fund to be administered by the National Committee on Non-Custodial Measures into which there shall be paid sums as provided by either the Government of the Federation or State; Such sums may be paid by way of contribution according to the requirement of the Act or any other Law and all funds accruing to Non-custodial Service by way of donations and gifts from philanthropic persons or organisations or testamentary dispositions <sup>[69]</sup>. However, there need to be guidelines for accountability or a foolproof plan for failure.
- The correctional service Act is silent on a suspended sentence, though it is provided by section 460 of the ACJA. When a court sentences an offender to a suspended sentence, this gap will come glaring.
- There appear to be significant contradictions between the NCA and the ACJA in the following areas:
- Under the NCA, the correctional Service is responsible for administering Parole, Community Services and Probation. Administration includes the power to appoint probation officers and supervisors of community service. However, under the ACJA, the power to appoint probation officers is assigned to the Chief Judge of the Federal High Court or the High Court of the Federal Capital Territory or National Industrial Court, who shall make regulations for the appointment of Probation Officers. There is also the Community Service Centre to be established by the Chief Judge to be run by the Registrar to be assisted by suitable personnel to supervise the Community service, which is at variance with the provisions of the CSA. There appears to be conflicting duplication <sup>[70]</sup>.
- Under the CSA, the Controller General must administer the parole and appoint Parole Board members. However, section 468 of the ACJA provides that the Comptroller General may recommend that a prisoner be released on parole and, if the court considers it reasonable, may release the prisoner to parole. It appears that ACJA did not contemplate the parole board of the controller general; hence it constituted the court into a Board. The power under the NCSA empowering the Controller-General to appoint a parole Board attempts to strip the courts of this role. It should be resolved which law to apply.

### Conclusion and recommendations

In the bid to solve the problem of prison overcrowding, we have found that most of the overcrowding nationwide is mainly a result of weak compliance or non-compliance with the legal and constitutional provisions of pre-trial detainees. With the economic downturn in Nigeria, the crime rate is increasing. The criminal justice system is unable to cope with the inflow of awaiting trial inmates. The speed at which Cases of poverty-related crimes like street trading, prostitution, alms begging and other petty crimes are being treated with detention is appalling. In April 2020, the NCS reported that over 51,983 out of the total 73,726 inmates in Correctional facilities were awaiting trial inmates <sup>[71]</sup>. This is 70% of

correctional facilities' total number of nationwide inmates. The awaiting trial population is far more severe than the already sentenced population <sup>[72]</sup>. The failure of the police, courts, and DPP to proffer legal advice in line with the dynamics provided in sections 294- 296 of the ACJL has contributed in no small way to the prison population. The magistrates and judges are also reluctant to give effect to the provisions of the AJCL.

The legal framework of non-custodial measures in Nigeria is somewhat satisfactory. However, some States still need to put in place the institutions crucial for giving effects to the non-custodial measures in the law. Such as statutory Administration of Criminal Justice Monitoring Committees/Councils, the parole board, rehabilitation and Community Service Centres to be established by the Chief Judge etc.

Corrections are contained in the Exclusive Legislative List No. 48 of the Constitution of the Federal Republic of Nigeria 1999 as Amended. Therefore only the federal government can legislate on prison matters. Accordingly, states are not obliged to execute responsibilities such as building mandatory rehabilitation facilities and halfway houses required to give effect to some of the non-custodial measures provided under section 467 of ACJA. However, this law empowers the court to order that a defendant/convict be confined in a government-established rehabilitation Centre established instead of imprisonment.

A diversion from the formalities and challenges in the criminal justice system is needed. Canada and Kenya have been prosperous in creating a robust diversionary protocol that engages all the stakeholders at each stage in the criminal justice administration process. In Kenya, The Office of the DPP has also developed a Diversion Policy <sup>[73]</sup> to enable prosecutors to divert cases from the judicial process to facilitate and reduce overcrowding in Kenya prisons

The only provision similar to diversion in Nigeria is the plea bargain provision under section 270 of ACJA, which is a pre-sentence diversion. In Canada, however, diversion is available at all stages of the criminal justice procedure in the form of Pre-charge, post-charge, pre-sentence, and post-sentence diversion <sup>[74]</sup>.

From the above analysis, it is recommended that the following:

- a. The Federal Government is charged with giving effect to the provisions of the Nigerian Correctional Service Act 2015, which requires the creation of bodies to implement the non-custodial measures in the Act. These relevant bodies include parole boards, rehabilitation centres for diversions, and the statutory Administration of Criminal Justice Monitoring Council Committees. Very crucial is the AJMC, which is the life-wire for the administration of criminal justice in Nigeria. States are enjoined to create theirs.
- b. The courts have a critical role in the effectiveness of the non-custodial regime. However, judges and magistrates are often reluctant to give effect to the NCSA and ACJA provisions on non-custodial measures. Therefore, the ACJMC should compel states to hold quarterly training on non-custodial measures for the judges and magistrates since they are critical in implementing the measures.
- c. There is a need to move corrections to the Concurrent Legislative List of the Constitution to enable the States to bear some responsibility for compulsory statutory imputes into necessary institutions, such as assisting in

- building rehabilitation and halfway facilities as an adjunct for non-custodial measures. States should also share the burden of decongesting custodial facilities by building holding centres. To provide easier accessibility of pre-trial inmates for any suitable diversion where appropriate.
- d. Diversionary measures should target awaiting trial inmates whose matters are unprogressive. It is suggested that after three years without trial, such inmates should be entitled to choose to take a guilty plea in return for a diversionary non-custodial measure, even for capital and violent offences. A legal framework for diversion is required in Nigeria, as in Canada or Kenya. Vulnerable offenders such as the mentally ill, very elderly, juveniles, and terminally ill may be diverted from the formalities of the criminal justice process and prisons.
  - e. Engaging the support of voluntary sector participation and collaboration is germane. This is the primary source of success in Canada's alternative sentencing system, where there is synergy between the Solicitor General's Office and several voluntary sectors. For example, in Nigeria, religious bodies already offer support to the inmates through palliatives, free legal services and other charitable overtures. As well, these religious bodies can be persuaded to collaborate with the correctional Service for community service supervision and provision of rehabilitation centres for non-custodial sentencing. These bodies could also be invited to offer more structured and controlled rehabilitative support in collaboration with the criminal justice system.
  - f. For an effective non-custodial sentencing protocol, further research is needed on using non-custodial sentencing for industrialisation. Government-owned Food producing factories and farmland settlements similar to the Elele prison settlement in Rivers state should be made a compulsory regimen for all states. Soap-making, clothes-making, and other production skills should be exploited. There is a need to leverage the experiences of countries that have enjoyed the benefits of this kind of labour. It is rehabilitative and economically beneficial to the correctional Service, the defendant and the nation at large because it generates much-needed income currently unavailable to service these prison alternatives.

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