



NON-CUSTODIAL PUNISHMENT AS ALTERNATIVE MEASURES TO CUSTODIAN PUNISHMENT IN COMBATING CRIMES

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Abstract

This paper reviews varied uses of the conception of punishment in relation to non-custodial rulings, including the constantly- made comparison between punishment and recuperation. It concludes that punishment has no stable meaning in respect of similar rulings and, when utilised, frequently results in non-custodial penalties being found wanting by comparison with imprisonment. It's suggested that all rulings should be regarded as punishment, and that the creative development of community penalties will best be achieved by working with a tripartite conceptualisation of restitution, recuperation, and incapacitation, set within applicable boundaries of proportionality. This paper gave a legal X-ray of the alternative measures to custodial punishment in combating crimes. The methodology adopted was the use of primary and secondary sources of materials. This paper recommended non-custodial punishment as a solution to the congestion in the correctional centers.

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Introduction

Custodial punishment has not served as a deterrent to the offenders as most of them when released, are always back to the correctional centres for committing another offence. Most times, offenders having mingled with hardened criminals in the prison become worse. It is in the light of the foregoing, that alternative measures to custodial punishment in combating crimes are sacrosanct because of the numerous advantages.

Meaning of Custodial Punishment

Custodial punishment is a judicial sentence, imposing a punishment consisting of mandatory custody of the convict in prison or some other closed therapeutic or educational institution. Custodial punishment is an institutional-based correction referred to as incarceration in prisons, jails, confinement, or remand homes (Juvenile Offenders).

The purpose of custodial punishment is the protection of society from dangerous criminals, reformation and rehabilitation of offenders, deterrence of crime occurrences, and incapacitation of criminal offenders.

Custodial Punishment in combating crimes has not been relatively very effective and has not served as a deterrence to offenders. The following are the disadvantages of custodial punishment:

- (a) Instead of reforming inmates, the prison system hardens them and subjects them to horrible, degrading conditions and punishment, sometimes exceeding the crimes committed.
- (b) Custodial Punishment renders inmates physically and psychologically damaged, unwanted, unloved, and abandoned in an uncaring environment where inmates are seen as condemned for life and this has led to many of the inmates becoming hardened criminals whenever they are released.
- (c) Custodial punishment can be said to contribute more destructively to inmates' behavior. (d) It has the potential of promoting homosexuality as reported in some correctional centers in Nigeria. (e) This system of punishment, also

leads to the overcrowding and congestion of correctional centers.

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According to Agbator, Statistics from the Nigerian Correctional Service as of 13th January 2020 shows that, out of the total inmate population of 72,627, the total number of convicted prisoners is 21,890 (30%) while those awaiting trial is 50,737

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(70%)². The large number of those awaiting trial has overstretched the built-in capacity of most Nigerian correctional institutions resulting in overcrowding of such prisons. This has occasioned a lot of health implications, increased tear and wear of prison facilities, and administrative challenges among others. Based on the foregoing, there is a great need for proactive measures to drastically decongest Nigerian prisons.³

(f) It is far more expensive than noncustodial correction as offenders in Institutional facilities are usually fed, housed, and clothed.

In light of these disadvantages, there are however alternative measures to custodial punishment in combating crimes in our society.

Noncustodial punishment can be referred to as a non-institutional correction which is the method of correcting offenders without them going to prison. Not all convicted offenders have to serve their sentence behind bars. Some are allowed to stay in the community subject to conditions

² Nigerian Correctional Service, 'Summary of Inmate Population By Convict and Awaiting Trial Persons as at 13th January, 2020' Available at: <http://www.corrections.gov.ng/statistics>

³ All Africa, 'Nigeria: Congestion in Nigerian Prisons' Available at: <https://allafrica.com/stories/201906260378.html>

imposed by the Government. This method offers some advantages such as the following:

1. The system is cost-effective compared to institutional corrections since offenders live at home and it helps to reduce the cost of operating prisons. Offenders, who are not in prison, fend for themselves and their families thereby making them not to be idle, since an idle hand is the devil's workshop.
2. It prevents overcrowding in jails and prisons.
3. It helps an offender not to become a hardened criminal.
4. Family members need not be victims also for the imprisonment of a member because the convict can continue to support his family, and not be far away from his children.
5. Rehabilitation will be more effective as the convict will not be exposed to hardened criminals in prisons who will only influence him to a life of crime.

It is worthy of note that the role of noncustodial or noninstitutional correction is to make the most out of human life so that it is not wasted. The problem is that some do not respond positively to the attempts to provide an alternative to their antisocial behavior.⁴

The Alternative Measures to Custodial Punishment.

There are various forms of alternative measures to custodial punishment: They are:

- a. Conditional Release/Discharge
- b. Probation
- c. Suspended sentence
- d. Community Correction Order
- e. Apprehended Violence Order
- f. Parole
- g. Bail
- h. Fines and monetary order
- i. Release on recognizance
- j. Restitution

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Conditional Release Order

A Conditional Release Order, commonly referred to as a CRO, is a sentencing option available to the Court as an alternative to imprisonment or a fine. It is one of the most lenient sentencing outcomes available. It is essentially a good behaviour bond and can be imposed with a

⁴ Local Court, 'Non-Custodial Alternatives', Available at: http://www.localcourt.justice.nsw.gov.au/Pages/sentencing_and_penalties/finalising_criminal/noncustodial_sentences.aspx

conviction or without a conviction.⁵ A conditional release order (CRO) is a type of lenient sentencing option that courts employ. This is an alternative to imprisonment, fines and penalties. We can also refer to this as good behaviour bonds. It is applicable in instances involving less serious and first time offences. Conditional Release Order (CRO), provides the court with an option to divert low-risk and less serious offenders away from the criminal justice system. It can be imposed with or without conviction and the additional conditions under CCO, also apply to this order.

Discharge

A discharge means that a person is released from court without any further action, either absolutely or conditionally. Discharges are given for the less serious offenses. The accused, in this situation, has pleaded guilty or has been found guilty by a court. It should be noted that for a discharge to be even considered by a court, a finding of guilt is necessary. There is no basis for a discharge if the accused is found to be innocent. A discharge is unlikely if the offender had a previous conviction. Another situation may be an accused person who while found guilty of a crime that caused little or no harm or threat to society finds himself significantly adversely affected by the commission of the crime and it will be in the best interest of the accused and not against the public interest. A discharge may be combined with an order for disqualification payment of compensation or court costs. The Court of Appeal in the case of *Regina v. SanchezPino*⁶ explained the meaning of the best interest of the accused:

that deterrence of the offender himself is not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation order. Nor his rehabilitation through correctional or treatment centers, except to the same extent. Normally, he will be a good person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions’.

In *R v Macfarlane*,⁷ the court said “Discharges should be used sparingly because a criminal sentence is one of the strongest deterrents to criminal activity.

⁵ Kingston Fox Lawyers. ‘What is a Conditional Release Order?’
https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.kingstonfox.com.au/articles/what-is-a-conditionalreleaseorder&ved=2ahUKewj9jPab46aIAxVt9LsIHR26N_cQFnoECBcQAw&usg=AOvVaw18YKatBnftooo1SmxLntOP

⁶ (1973) car 794

⁷ (1976)ALTAS SCAD-6 (canli)
[w.kingstonfox.com.au/articles/what-is-a-conditionalreleaseorder&ved=2ahUKewj9jPab46aIAxVt9LsIHR26N_cQFnoECBcQAw&usg=AOvVaw18YKatBnftooo1SmxLntOP](https://www.kingstonfox.com.au/articles/what-is-a-conditionalreleaseorder&ved=2ahUKewj9jPab46aIAxVt9LsIHR26N_cQFnoECBcQAw&usg=AOvVaw18YKatBnftooo1SmxLntOP)
non-custodial sentence,

Probation

Generally, a sentence is a judgment that a court formally pronounces after finding a criminal defendant guilty. It is the judicial determination of the penalty for a crime, hence the punishment imposed on a criminal wrongdoer. It is usually custodial which requires that the convict be locked up in prison thereby being legally deprived of liberty. On the other hand, there is a criminal punishment (such as probation) not requiring a prison sentence. Thus, probation is a court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison⁸.

According to Edokpayi⁹, probation is a noun, which can mean any one of the following:

A time or period of training and testing in which a person's fitness for work or in which a social group is tested to determine the person's suitability for the job or position; A fixed trial period in which a student is given time to try to improve on or redeem his bad grades or conduct; or The act of suspending sentence of a person convicted of a criminal offence and granting that person provisional freedom on the promise of good behaviour; or a discharge for a person from commitment as an insane person on condition of continued sanity and of being recommitted upon the reappearance of insanity.

Probation means an accused person who is serving a sentence but not within a custodial facility. An offender can be placed on probation on the basis of serving a community service sentence or being released from a custodial facility on license or parole. A probation order is usually given to an offender not below 10 years of age and such offender is supervised by a probation officer within the community for a certain duration. While on probation, an offender is mandated by the court to do one of the following: (i) undertake unpaid work (ii) complete an education or training course (iii) undertake rehabilitation for drug or alcohol abuse (iv) periodic meet with his supervisory officer to ascertain progress made in behavioural change. Supervision lasts between six months and three years. If the offender defaults in relation to any of the prescribed order by the court, such an individual could be asked to pay a fine, serve another sentence or be remanded within a custodial facility.¹⁰

Under the Administration of Criminal Justice Act, 2015 (ACJA), probation has been defined as a type of recognizance ordered by a competent court of justice to be entered by a convict containing several conditions, chiefly, that the convict should be under supervision of a person(s) who are of the same sex with the convict but with the consent of the person(s) who

⁸ Non-Custodial Sentence as a Means of Prison Decongestion in Nigeria January 17, 2020 Augustus Ian Agbator.

⁹ Hon. Justice MI Edokpayi, Chief Judge: Edo State (Former), 'Suspended Sentence: Its Desirability Nigeria', <<http://nigerialawguru.com/articles/criminal%20law%20andprocedures/suspended%20sentence,Its%20desirability%20nigeria.pdf>> Accessed on 2/9/2024

¹⁰ Non-Custodial Measures. <https://www.prawa.org/wpcontent/uploads/2020/06/ENEWS-2.pdf> ¹¹ Ss. 453 & 455

exercise (s) supervision over the convict. The supervisory officer(s) are called probation officers whose names are mentioned in the probation order.¹¹

Suspended Sentence

Custodial punishment can also be in the form of a suspended sentence. Suspended sentence is a sentence postponed so that the 105

convicted criminal is not required to serve any term unless he or she commits another crime or violates some other court-imposed conditions. A suspended sentence, in effect, is a form of probation. It is also known as a withheld sentence. For non-custodial sentencing to be effective, the legal and regulatory framework will be necessary. But this was the old law as it then was. Such legal framework is seen in the Nigerian Correctional Service Act 2019 which established the Nigerian Non-Custodial Service under part II providing for its functions, power to make regulations and guidelines, and allowing for parole, probation, community service, restorative justice measures, and any other non-custodial measure assigned to the Correctional Service by a court of competent jurisdiction¹¹. Under the Act, Non-Custodial Service is defined as an aspect of the Nigerian Correctional Service that serves as an alternative to going to a custodial center¹².

In *Gloria Nya v Bassey Edem*,¹³ the Court of Appeal held that Suspended sentence,

... in criminal law means in effect that the defendant is not required at the time sentence is imposed to serve the sentence.

In the said case, a Cross River State High Court, in a contempt proceeding, convicted the appellant and in doing so, imposed a suspended sentence. Prior to this time, the court had granted an interim injunction which the appellant was said to be in disobedience of. On the issue of whether suspended sentence was known to Nigerian law, the court of Appeal held that, Suspended sentence is not part of Nigerian law and has no application whatsoever under Nigeria's criminal justice system.

The need and prospect for non-custodial sentencing was reiterated by former Chief Judge of Lagos State, Hon. Justice Opeyemi Oke (rtd.) who said that;

Today in Nigeria, we have seen countless cases where defendants are arrested for minor offenses 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

¹¹ Section 37, Nigerian Correctional Service Act, 2019

¹² Section 46, Nigerian Correctional Service Act, 2019

¹³ (2005) 4 NWLR (Pt. 915) 345 (CA, Calabar Division)

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.

In addition, the Judge said

Petty offenders will be diverted to the Practice Directions centers where noncustodial sentences, including fines, restitution orders, and community service orders would be used as long as they are willing to take responsibility for their actions. Thus, petty offenders will no longer get prison sentences effective from 3rd June 2019.

In essence, the foregoing is highly commended as it will greatly reduce the population of awaiting trial inmates who were arrested for allegedly committing minor offenses. Therefore, such measures should be adopted in all other states of the Federation including the FCT.

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Community Correction Order

Community Correction Order (CCO) which prescribes standard conditions such as stating that an offender must not commit any offense and additional conditions including supervision, community service work, curfews, alcohol and drug abstinence, nonassociation, place restriction, programs, and treatment. The community correction order (CCO) is a flexible sentencing order that an offender serves in the community. A court can impose a community correction order on its own or in addition to imprisonment or a fine.¹⁴

Restitution Orders

According to this theory of punishment, the object of punishment must not be merely to prevent further crimes but also to compensate the victims of the crimes. The theory further believes that the main spring of criminality is great and if the offender is made to return the ill-gotten benefits of the crime, the spring of criminality would be dried up¹⁵. It posits that sentences should move away from the notion of just punishment of the offender on behalf of the state towards just restitution aimed at compensation for the harm done to the victim and the community. It has increasingly been recognized as an aim of the criminal law, through restitution orders as alternatives to fines and the establishment of criminal compensation tribunals.

In Nigeria, this theory has found its way into the *Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015*, the Act¹⁶ provides thus:

¹⁴ Community Correction Order.

<https://www.sentencingcouncil.vic.gov.au/aboutsentencing/communitycorrection-order>

¹⁵ Ogaga Ayemo Obaro, op.cit.264

¹⁶ Section 65 (1)

A trafficked person, irrespective of his immigration status is entitled to compensation, restitution, and recovery for economic, physical, and psychological damages which shall be assessed and paid out of forfeited assets of the convicted trafficker.

Sub-section (2) of the section, gives the court the discretion to order the offender to pay compensation to the victim in addition to any other punishment ordered by the court.

In addition, the influence of the theory of restitution can be seen in the *Advance Fee Fraud and Other Fraud Related Offences Act*.¹⁷ The Act¹⁸ provides inter alia:

11(1) In addition to any other penalty prescribed under this Act, the High Court shall order a person convicted of an offense under this Act to make restitution to the victim of the pretense or fraud in directing that person :

- a. Where the property involved is money, to pay to the victim an amount equivalent to the loss sustained by the victim. In any case:
 - i. To return the property to the victim or a person designated by him or
 - ii. To pay an amount equal to the value of the property where the return of the property is impossible or impracticable.

It is worthy of note that restitution is one of the objectives that should determine sentencing by the court under the Administration of Criminal Justice Act, LFN. 2015¹⁹.

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The Economic and Financial Crimes Commission (EFCC) has applied restitution in the case of the former Governor of Edo State, Chief Lucky Nosakhare Igbinedion. The Ex-Governor agreed that he embezzled public funds while he served as governor in Edo State between 1999 and 2007²⁰. He agreed to return the funds to the covers of the Edo State Government.

Fines or Monetary Orders

Fines are money specified by law which an offender is required by law to pay to the state as a penalty for the offence committed.²¹ Fines or monetary orders, which require that certain

¹⁷ Laws of the Federation of Nigeria (LFN), 2006.

¹⁸ Section 11

¹⁹ Part 38. Section 401 (2)(g)

²⁰ In Chief Lucky Igbinedion's case, the approach was described as "plea bargain"

²¹ B.E. Oniha. 'Effective Implementation Of Non-Custodial Sentencing Provisions In Administration Of Criminal Justice Law Of Edo State: Need For Synergy Amongst

totalities of money be paid. Monetary orders include court costs, substantiation charges, witness expenses, and compensation²². The Penal Code and the Violence Against Person (Prohibition) Act 2015 [VAPP Act]²³, provide for financial compensation and professional costs. It is worth noting that under our criminal laws, various options of fines have been elevated either solely or jointly with prison sentences²⁴. Therefore, consequent to such provisions, for example, the Criminal Code, the Penal Code,²⁵ and the VAPP Act, the courts have imposed orders for payment of fines in addition to imprisonment judgment upon conviction.

Community Service Orders

Community Service is rare sentence in our criminal justice system in Nigeria. It made its first entry with the Administration of Criminal Justice Law, Lagos State in 2007²⁶ and subsequently formed part of the provisions in the ACJA, 2015²⁷. This form of non-custodial sentencing really gained traction in Nigeria during the height of the global Covid-19 pandemic. Community Service Order is an order from the court whereby an offender is given the chance of compensating society for the crime committed by performing work for the benefit of the community, instead of being put in prison. This form of punishment also seeks to deplore community shaming to its full advantage. Community Service Orders includes; environmental sanitation, including cutting of grasses, washing drainages, cleaning the environment and washing public places; assisting in the production of agricultural produce, construction, or mining; and any other type of service which in the opinion of the court would have a beneficial and reformatory effect on the character of the convict. In the cases of *COP v Ayoola Yusuf*, *COP v Olamide Kolade*, *COP v Abiodun Tijani* and *COP v Adewale Dayo*,²⁸ the accused were upon conviction, Ikeja Magistrate court sent them to community services like cleaning the court premises, sweeping the court, helping in any prescribed work, etc.

Community service sentences can be given for crimes such as damaging property, fraud, and assault. However, certain conditions must be in place to warrant a community service sentence. The court will ascertain if the accused person is a first-time offender, whether the accused

Stakeholders' <https://edojudiciary.gov.ng/wp-content/uploads/2023/11/HURISLAWEFFECTIVEIMPLEMENTATION-OF-NON-CUSTODIAL-SENTENCING.pdf>

²² Section 78 of the Penal code

²³ Section 1(3) and 2(5)

²⁴ Section 17 of the Criminal Code

²⁵ Section 72

²⁶ S 345(1) ACJL (now section 347(3) ACJL, 2011, Lagos State), CC Ani, Op .Cit, P. 152.

²⁷ Ss. 460-466.

²⁸ MIK/E/108/15 (Unreported), MIK/E/109/15 (Unreported), MIK/E/10/15 (Unreported), MIK/E/155/15 (Unreported).

person is more likely to stop committing crime if awarded a community service sentence as opposed to if 111

they go to prison and if the accused person has mental health conditions capable of influencing behaviour. In a community service order, an offender must do unpaid work within the community as specified by the judge. The offender must be aged 16 years and above and must consent to the order. The order must be for at least 40 hours, not more than 240 hours and must be completed within one year. Hours worked must be as instructed failing which the offender may be returned to court.²⁹

The rationale for community service is that prisons are expensive to maintain considering the enormous tax payers fund spent on feeding, housing and caring for prisoners. Another justification for community service is that many of the people in the various prisons are not violent or dangerous criminals that would require protection of the society from them. Many of the prison population are people of poor background who committed simple offences like environmental offences, traffic offences, affray, assault etc. By sending such offenders to community service, the community benefits positively and the population of the already congested prisons is not increased.

Apprehended Violence Orders

Apprehended Violence Orders (AVO) prohibit certain behavior(s) for some time. Such orders include not to assault, kill, harass, or intimidate a protected person, not to contact a protected person, or not to attend premises where a protected person lives or works. Such orders are likened to protection orders provided for under the Violence Against Person (Prohibition) Act 2015 which is accompanied by a warrant of arrest³⁰. The consequence of violating an AVO includes arrest and charging to court with an offense.

It is worthy of note that some of the above alternatives have been implemented in other jurisdictions and they have been effective. Therefore, adopting and adapting the same in our criminal justice system will bring with it enormous rewards and prospects. In this tone, the Nigerian Correctional Service Act, 2019, has established the non-custodial service which has been defined as an alternative to a custodial center; empowered same and created non-custodial centers which are designated centers in the community for the administration of non-custodial measures (community service, probation, parole, etc.). This should be explored because of the various advantages attached to it one of which is that it is an effective means of prison decongestion in Nigeria.

²⁹ Non-Custodial Measures.

<https://www.prawa.org/wpcontent/uploads/2020/06/ENEWS-2.pdf>

³⁰ Section 28 - 36

Conclusion and Recommendations

Non-custodial punishment prevents overcrowding in jail and prison and most importantly it helps an offender not to become a hardened criminal. The government should not always pursue punishment but rather explore other alternatives to custodial punishment in combating crimes in society.

However, for these alternative measures to operate effectively in prison decongestion, they must be prioritized in addition to proactive implementation of the Nigerian Correctional Service Act, 2019. There should be:

- a) Efficient record-keeping system of the data of convicts preferably a digital system;
- b) Effective, adequate, and skilled probation officers and their equipping and funding;
- c) Effective location of convicts' places of abode or domicile; and 113
- d) Prompt and efficient reporting system.

In the course of this study, the researcher perceived that further combined efforts are required for a quality and improvement of non-custodial punishment in the Nigerian criminal system and thereby recommends the following:

1. Nigeria should adopt splint from the adaptable non- custodial practices current in America, UK and Canada, and the most lately legislated Administration of Criminal Justice Act, 2015 be completely espoused by all the countries of the Federation in addition to other correctional laws as it concerns non-custodial measures.
2. Government should cultivate a political will towards non – custodial measures by making sure that the needed coffers demanded are provided thereof for the effective handling of the non-custodial programmes.
3. There should be full bloated enforcement of non-custodial warrants as rooted in our correctional laws that focuses further on recuperation and reformation of the malefactors rather than employing captivity- grounded discipline that has failed to meet up with the asked result over the times.
4. Government should make available all coffers needed to maintain a practicable community service and exploration system which would clearly involve social institutions like corrective services departments, community development centres etc. manned and operated in well- trained officers.
5. Stricter guidelines should be given and must be adhered by judges and adjudicators who give the judgment so that the desirable large scale use of non-custodial sentencing will be achieved.

6. Judges and Magistrates with the help of capability defence, executing counsel and exploration officers, should constitute important tools in making non-custodial warrants that fit not only the crime, but the felonious, the victim and the community.
7. As a matter of public urgency, the bar should encourage Judges and Adjudicators to make lesser use of available noncustodial warrants in the correctional bills for malefactors condemned of non-violent and minor crimes.