
NON-CUSTODIAL SANCTIONS IN NIGERIAN CRIMINAL JURISPRUDENCE AND THEIR APPLICATIONS DURING SENTENCING: A MYTH OR REALITY

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Abstract

Non-Custodial Sanction refers to a form of sanction which is apportioned outside the physical facility designated as a prison and is administered by the state or by other agency on behalf of the state. It is usually evoked in the sentencing of less violent (petty) offences such as traffic offences, victimless offences, misdemeanours, delinquencies, etc other than serious offences. As doubt has grown against the usefulness of prison-based punishment, experts have tried to establish other profitable measures to help achieve result for the victim, offender and the state at large. This is a pure shift from the modern over use of imprisonment that consumes the tax payers' resources. Prison –based punishment has shown to be counter-productive as it has fallen short of rehabilitation and reintegration of the convicted offenders back to the society, weeding out recidivism among those convicted of minor crimes due to the mixing of all manners offenders in a particular cell, as well as for certain vulnerable populations. This paper seeks to unveil if non-custodial sanctions as entrenched in Nigeria criminal justice system are applied in practice or not. The paper finds that despite the numerous provisions for non-custodial sanctions vis-à-vis probation, community service and restitution/compensation in our criminal laws, yet, they are myths in their applications due to some obvious setbacks. This study therefore recommends solutions to the x-rayed setbacks which would guarantee practicable non-custodial sanctions in the Nigerian criminal jurisprudent.

Keywords: Non-custodial Sanctions, Probation, Community Service, Restitution/compensation, Practical Applications

1. Introduction

A study especially by those who support crime control theory of criminal justice has shown that high rate of incarceration has contributed significantly to the increase of crime rate in the country. At the heart of this belief are Criminologists who have noted the negative consequences of growing population of prisoners¹; which in Nigeria criminal

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¹ LK Gaines *et al*, *Criminal Justice in Action: The Core* (Belmont California, USA: Wadsworth Publishing

Company,2001) p.325

justice system, it is more alarming. For instance, children of prisoners often suffer financial hardship, lack of supervision and discipline, and deterioration of their family structures. These factors are used to explain the fact that children of convicts are more likely to be involved in delinquent behaviour.

Whether the congestion in the Nigerian prisons is due to awaiting trials or convicts, the fact is that the prisons are harbouring far more than installed capacity. Therein lies the danger and this has no doubt contributed to increasing cases of jail break in the past. For instance, in June 2008, 280 inmates escaped in a prison break that occurred in Onitsha prison, Anambra State and only 195 were caught². In another breath, it is obviously noticeable that imprisonment as a form of punishment lacks rehabilitative culture, breeds recidivisms and leaves convicts in a highly stigmatized condition in the society at the end of their prison terms.

The development of non-custodial measures or options reflects the search in Nigeria for non-prison punishments. The desire for such punishments have been justified by arguments based on its cost-effective, reintegration, just deserts philosophy, rehabilitation mode, interest of crime victims and also head ways in the provisions of Criminal Procedure Act³ and Administration of Criminal Justice Act, 2015, which most Nigerian States have domesticated in their respective criminal laws that provide *inter alia* for probation, community service and restitution/compensation among others. The move by entrenching non-custodial sanctions in the Nigeria penal laws re-echoes the traditional African communities' informal but efficacious ways of controlling crime in the society. Therefore, it has been correctly viewed that "the basic features of African criminal justice are perceptible in non-custodial sanctions.

The object of this paper is to examine probation, community service and restitution/compensation forms of non-custodial sanctions as embedded in the Nigeria criminal justice system and see whether they are been recourse to or not during sentencing.

2. Evaluating Some Non-Custodial Sanctions in Nigeria Criminal Jurisprudence

2.1. Probation

The word 'Probation' is derived from the latin verb 'probare' which means a period of proving or trial⁴. According to Edokpayi⁵, probation is a noun, which can mean any one of the following:

² K Odeyemi, 'Nigeria: Prisons Service Blames Jail Breaks on Congestion, Delay in Justice' Leadership Newspaper of 10 June, 2008 < <http://allafrica.com/2008> > accessed on 17th August, 2019.

³ Cap. C41, LFN, 2004.

⁴ J Petersilia, 'Probation in the United States', (1997) 22, *Crime and Justice*.

⁵ Hon. Justice MI Edokpayi, Chief Judge: Edo State (Former), 'Suspended Sentence: Its Desirability in

Nigeria', <<http://nigerialawguru.com/articles/criminal%20law%20andprocedures/suspended%20sentence>,

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 insanity⁶.

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 exercise (s) supervision over the convict. The supervisory officer(s) are called probation officers whose names are mentioned in the probation order⁷.

Most of the non-custodial sanctions under discourse in this work are, in fact, predicated upon probationary sentences in which the offender is ordered to abide by certain condition such as remaining free in the community. However, the court in many jurisdictions like USA, Canada, South Africa, etc. can impose probation directly, most probationers are sentenced first to confinement but then immediately have their sentences suspended and are remanded into the custody of an officer of the court - the probation officer.

It is never in doubt that probation as alternative to imprisonment has been incorporated in the Nigeria penal law particularly in the Criminal Procedure Act for ages before the emergence of ACJA. Probation in Nigeria was first introduced into the statute books in 1945 when the Criminal Procedure Act (CPA) was enacted. The CPA was the first statute to make provisions for probation of offenders both juvenile and adults by virtue of sections 413 & 435-440 (now repealed in 2004)⁸, subsequent to this Act, various states adopted the provisions of the Act when the states were first created in 1967. Apart from the provisions of the CPA, probation of juvenile offenders was also specifically provided

Its%20desirability%20nigeria.pdf> Accessed on 25/5/2019.

⁶ Ibid

⁷ Ss. 453 & 455

⁸ Cap C41, Laws of the Federation of Nigeria, 2004; s. 454 ACJA

for in the Children and Young Persons Law, in 1946. And in 2015, Administration of Criminal Justice Act (ACJA) operative in FCT, Abuja was enacted wherein probation practice was encapsulated in sections 453-459 which have been domesticated in the criminal laws of various states of Nigeria.

Section 435 (1) of CPA⁹ provides thus:

Where any person is charged before a court with an offence punishable by such court, and the court thinks that the charge is proved but if of opinion that having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence or to the extenuating circumstances, under which the offence was committed, it is inexpedient to any punishment or any other than a nominal punishment or that it is expedient to inflict any punishment to release the offender on probation the court may without proceeding to conviction make an order either:

- (a) dismissing the charge; or
- (b) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear at any time during such period not exceeding three as may be specified in the order.

Offenders who are placed on probation are set at liberty conditionally upon their being of good behaviour. They are usually required to enter into 'bond or recognizance'¹⁰, which incorporates certain conditions of their release; if they breach a condition of their bond, they may be called up by the court for re-sentencing¹¹. Supervised probation requires an offender to be placed under the supervision of a probation officer. Probation includes restrictions on their personal freedom, with opportunities and assistance for them to address problems and issues associated with their offending behaviour. It can incorporate reparation by requiring the offender to make financial amends to the victim and /or undertake to do work or service of benefit to the victim or the community¹².

⁹ Ibid

¹⁰ ACJA, s.545(2)

¹¹ CC Ani, Forging New Trends in Sentencing-Overview of UN Standard Minimum Rules for Non-Custodial Measures, and ACJL (Lagos State) 2011, *A Journal of Contemporary Legal Issues* (2nd edn), 148.

¹² Available at: <http://www.scotborder.gov.uk/criminaljustice/national/objectives/cj/standards/htm/typesofprobationorder.html>> Accessed on 24/5/2019.

Probation as a punishment, offers the opportunity of rehabilitation and reintegration into the community without the social and family disruption caused by imprisonment. This is particularly true of juvenile supervision. Statutory provisions for probationary sentences have always existed in our statutes, but regrettably, except for juveniles, our judges and magistrates hardly make use of it.

Probation arose as an alternative to imprisonment based punishment and has become the main stay form of non-custodial sanction¹³. Instead of going to prison, offenders sentenced to probation are allowed to remain in the community under the supervision of an authorized agent of the court. Barlow¹⁴ posited that the philosophy behind the development of probation consisted of two basic ideas: (1) that most criminal offenders do not pose a danger to the community if released under some form of supervision, and (2) that the community is a better place for the offenders to be than prison. Probation gives offenders a second chance and a helping hand in putting their lives in order. The expectation was that both the offender and the community would benefit from probation¹⁵. It has been discovered however, that offenders do not have the right to be considered for probation if convicted of an offence for which probation is an option. Eligibility for probation is based on the nature of the current offence which is normally a less violent offence¹⁶. It has been agreed that almost the states of Nigeria who have domesticated probation in their penal laws prohibit probation when weapons are used or the offence is murder and as well sexual offences.

Both John Augustus (Founder of probation) and an English Magistrate named Mathew Davenport Hill had recognized the risks in allowing criminals to remain in the community; and both therefore used screening programmes¹⁷. But, some people see probation in different perspective as an equivalent to allowing law breakers to run loose in the community¹⁸.

The proponents of probationary sanction rejected the above views by the critics¹⁹ of the non-custodial sanctions and discredited the said views as not only shortsighted, but also contradictory to the aims of the correctional system. They maintained that a very small percentage of all convicted offenders have committed crimes that warrant capital

¹³ HD Barlow, *Criminal Justice in America* (Upper Saddle River, New Jersey: prentice Hall, 2000) P.638

¹⁴ Ibid

¹⁵ Ibid

¹⁶ National Institute of Corrections, *State and Local Probation System in the United States: A Survey of Correct*

Practice (Washington DC, USA: Department of Justice, 1993) P.37

¹⁷ Ibid

¹⁸ LJ Edward & HE Allen, *Correction in the Community*, (Cincinnati, Ohio: Anderson, 1997) p.110

¹⁹ Ibid

punishment or life imprisonment-most, meanwhile, after some time such offenders will still return to the community²⁰. Consequently, one group of experts also argued and stated that:

The task of corrections system includes building or rebuilding solid ties between the offender and the community, integrating or reintegrating the offender into community life - restoring family ties, obtaining employment and an education, securing in the larger sense a place for the offender in the routine functioning of society²¹.

Some studies have shown higher recidivism rate for offenders who are subjected to prison culture. A frequent justification of non-custodial sanctions is that they attempt to rehabilitate, reintegrate the offender into society and as well cut high costs of expenditure on the prison-based system of punishment²². Reintegration has a strong theoretical basis in rehabilitative theories of non-custodial sanction. An offender is generally considered to be rehabilitated when he or she no longer represents a threat to other members of the community and therefore is believed to be fit to live in that community. It will be helpful to see reintegration as a process through which correction officers such as probation officers provide the offender with incentives to follow the rules of society²³.

Little wonder Honourable Justice Oke, Chief Judge of Lagos State has said that petty offenders will no longer be sentenced to prison terms. Justice Oke stated this while speaking at the presentation of two practice directions, the ACJL Practice Direction and Restorative Justice Practice Direction, held as part of the efforts to ensure an effective justice system²⁴. She further stated that once the Practice Directions come into operation on June 3, 2019, minor offenders will be diverted to probation and community service centres, and restorative justice system would be applied to ensure that persons who commit minor offences will no longer end up in jail so long as they are prepared to take responsibility for their actions and the harm they have caused to the society. In her words, she stated that:

The magistrate courts, which would use the practice direction, would focus on reconciliation with the victim and the community at

²⁰ LK Gaines *et al*, *Criminal Justice in Action: the Core* (USA: Wadsworth Publishing Company, 2001) p. 285

²¹ Corrections Task Force of the President's Commission on Law Enforcement and Administration of Justice (1997) In LK Gaines *et al*, *Op .Cit.*

²² *Ibid*

²³ *Ibid*

²⁴ Sahara Reporters, 'Petty Offenders Will No Longer Be Imprisoned Says Lagos Chief Judge', < Saharareporters.com/2019/05/07 > accessed on 19th May, 2019

large, rehabilitation, restitution, and repair of the harm done and would as much as possible, under the law, impose non-custodial sentences to wit: fines, restitution order, community service orders and so on²⁵.

It has been argued that non-custodial sanction is aimed at decongesting prisons where countless cases of offenders convicted for minor offences such as burglary, wandering, affray and so on are being confined with hardened criminals and by the time they come out; they would have turned to recidivists and will be ready to spread terror and death incidence in the society²⁶.

It is the considered opinion of most correctional authorities as well; that probation is one of the most effective and economical tools that is available for the care, treatment and rehabilitation of certain adult and juvenile offenders against the law²⁷.

2.2. Community Service (CS)

Community Service as a type of non-custodial sentence imposed mostly in other jurisdiction such as Britain and United States of America²⁸. 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 2007²⁹ and subsequently formed part of the provisions in the ACJA, 2015³⁰.

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 prison³¹. It is a criminal sentence which orders the offender to carry out some specified work or service to the community for a determined period of time. A community service condition requires the offender to provide a specified number of hours of free labour in some public service, such as street cleaning, repair of run-down housing or hospital volunteer work, public toilet, collection of trash in the park. The penal laws in Nigeria make comprehensive provisions for non custodial sanctions as forms of punishment for minor offences and misdemeanor³².

²⁵ Sahara Reporters, *Ibid*.

²⁶ The Cable News, 'No more prison Declares'

<<https://www.theCable.ng/no-more-prison-sentences-for-petty-crime-lagos-cj-declares/2019/05/08>>
accessed

on 19th May, 2019.

²⁷ J Petersilia, Probation in the United States (1997) 22, *Crime and Justice*, 150., EA Cruz *et al*, The Probation

Law (1997) 52, *Philippine Law Journal*, 96.

²⁸ UJ Idem & NE Udofia, *Op. Cit*.

²⁹ S 345(1) ACJL (now section 347(3) ACJL, 2011, Lagos State), CC Ani, *Op. Cit*, P. 152.

³⁰ Ss. 460-466.

³¹ *Ibid*

³² ACJA, 2015, Section 460.

Professor Umezuike³³ observes that community service is a non-custodial measure under which convicted offenders are sentenced to carry out unpaid work for the community such as sweeping court premises, care homes etc. Little wonder, on 9th May 2014, the International Press widely reported that Silvio Berlusconi, former Italian Prime Minister started his one year community service at a Milan Care Home for the elderly and dementia sufferers after he was convicted for tax fraud³⁴. In the cases of *COP v Ayoola Yusuf*, *COP v Olamide Kolade*, *COP v Abiodun Tijani* and *COP v Adewale Dayo and*³⁵ 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.

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.

Meanwhile, it should be noted that court most often engages in symbolic analogous sentences thereby prescribing some types of community services which share similar features with the offender's crime. For example, a delinquent convicted for the crime of destroying public lawns can be sentenced to one and half years of trimming and tending of lawns in specified government quarters. The sentence could be that he should work in the determined sentence for five hours every day under the supervision of Community Service Officer/Administrator in the same office whose lawn is tended. Also, a vagabond or loiterer can be used to beef up neighbourhood security by sentencing him to join the community vigilante group in the night to keep watch over the neighbourhood.

Community service gives the victims of offenders the chance to make suggestions on the nature of community service they would like the offenders to do for the community³⁶. These recommendations by community people could be services that would be beneficial to the victim's project. Apart from the Lagos success story, Nigeria can borrow much

³³ IA Umezulike, *Op. Cit.*

³⁴ UJ Idem & NE Udofia, *Ibid.*

³⁵ MIK/E/108/15 (Unreported), MIK/E/109/15 (Unreported), MIK/E/10/15 (Unreported), MIK/E/155/15 (Unreported).

³⁶ <<http://www.nij.gov/topics/courts/restorative-justice/promising-practices/pages/community-service.asp>> accessed on 13th June, 2019.

from the Zimbabwe where community service is an integral part of the criminal justice system and to which the reduction in the population is attributed³⁷. Another jurisdiction that has demonstrated the effectiveness of CS system with success is Malawi. As a way of decongesting her overcrowded prison, Malawi instituted a CS order plan in 2000. By late September 2004, Malawi had placed 5,225 offenders on CS orders. They performed 838,000 hours of work, and completed 87 percent of the tasks assigned, for offenders who completed their CS obligation, the rate of re-offending fell to 0.25 percent, or just one out of every 400 offenders. In addition, the Malawi government saved \$227,717 by using community service rather than imprisonment³⁸.

Thus, the benefits of community service to the society are outlined below:

1. The behavioural quality of humility is cultivated in the process of undertaking community work.
2. It holds the offenders accountable for the harm they have caused to the community.
3. It facilitates a mechanism for skill acquisition to offenders.
4. It encourages the community people to become aware and involved in the justice system.
5. It provides a pool of human resources for the community for various services in the community.
6. It is a platform for reintegration of offenders into the society since the offenders are in the community and not isolated in prison confinements.

Community service is often used as an alternative to imprisonment, with the intent to connect offenders to the victims or society in order to make them realize how their actions affect others in the society³⁹. CS is more beneficial to the society unlike prison-based punishment that is exclusively punitive in nature. In the case of offenders who are professionals, they will invest their skills to supply societal needs⁴⁰. It exists in variety of work recommended or ordered by the court which may include cleaning parks, cutting lawns, repairing house, sweeping markets, pruning flowers, sweeping recreational centers, cleaning of drainages, construction of culverts, filling of pot holes on our roads, landscaping of public places etc. Community service therefore reduces the high incidence of recidivism recorded in ex-convicts released after serving prison term.

³⁷ E Nawatiseb, 'Namibia: Community Service – A Look at Zimbabwe's Scheme', < allafrica.com/stories/200507051800.html > Accessed on 3rd March, 2020.

³⁸ UNODC Handbook of Basic Principles on Alternative to Imprisonment (Justice Handbook Series) p. 73

³⁹ F Akinpelu, 'Prison Congestion: Community Service as an Alternative' Nigerian Tribune Newspaper of August 31st, 2017 < <https://www.tribuneonline.com> > accessed on 13th June, 2019.

⁴⁰ S Writer, 'Community Service as a form of Punishment in Nigeria' < <http://connectnigeria.com/articles/2012/04/04-Community-service-as-a-form-of-punishment-in-Nigeria> > accessed on 13th June, 2019.

Under the Administration of Criminal Justice Act⁴¹, 2015, there are provisions for community service as a form of punishment for minor offences and misdemeanor. It is not every offender that can be sentenced to CS. Offenders that committed offences that involve the use of arms, offensive weapon, sexual offences or any offence which punishment exceed imprisonment for a term of three years cannot be sentenced to community service⁴². The court is enjoined by the law, in exercising its power in relation to community service to have regard to the need to:

- (i) Decongesting the prison
- (ii) Effect rehabilitation of prisoners through exposure to productive work or making them to undertake productive work.
- (iii) Ensure that convicts who commit simple offences do not mix with harden criminals⁴³.

Rehabilitation of less offenders and harden criminals is extremely important force in sentencing policies of every criminal justice system. Effective and effectual rehabilitation will extremely decongest the prisons and leads to less recidivism rate in the society. Avoiding mixing of less serious offenders with heinous criminals is a beneficial policy to avert criminal contagion.

It is provided that the community service should be ordered to be performed close to the residential location of the convict so that the community can easily monitor him and his movement⁴⁴. For instance, under the relevant sections of Lagos State Law⁴⁵ on this subject, Magistrates Courts can sentence a convict to community service of certain hours. In the unreported cases of *COP v Abiodun Adebayo*, *COP v Taiwo Aminu*, *COP v Emeka Wisdom*, *COP v Bbarinde Ezikel* and *COP v Nelly Osa*⁴⁶ in Ikeja Magistrate Court, Lagos State, all the accused were sentenced to various Community Service ranging between one hour to twenty-four hours to be performed within the premises of the court.

The Registrar of the court is mandated by the law to submit a report of facts with respect to the character, antecedents of the convict and any other facts concerning the convict upon which the court will base its order at the community service⁴⁷

The Community Service Order is performed for a period not more than six (6) months and a convict is not allowed to work for more than five (5) hours a day⁴⁸. The convict is

⁴¹ s. 460(1) &(2)

⁴² s. 460(3)

⁴³ ACJA, s. 460 (4) (a-c)

⁴⁴ ACJA, s. 461(5)

⁴⁵ Criminal Justice Law of Lagos State, 2011.

⁴⁶ MIK/E/106/15, MIK/E/277/15, MIK/E/121/15, MIK/E/110/15, MIK/E/112/15.

⁴⁷ ACJA, s. 461 (6)

⁴⁸ ACJA, s. 462(1)

always under the supervision of a supervising officer or officers or Non-Governmental Organizations as may be designated by the Community Service Centre⁴⁹.

The Community Service Order contains such directives as the court may consider necessary for the supervision of the conduct⁵⁰, while the registrar of the court making the community service order shall forward to the registrar of the community service centre a copy of the order together with any other documents and information relating to the case⁵¹.

In ensuring that convict under community service does not escape justice, upon sentence to community service, a guarantor must undertake to produce the convict if he abandons / runs away from the community service⁵².

If at any time during the community service period, the registrar of the community service centre informs the court of the default of the convict in complying with the directives of the Community Service Order; the court will issue a summons requiring the convict to appear before it⁵³. If the convict fails, refuses or neglects to appear in obedience to the summons, the court will issue a warrant of arrest⁵⁴ and where it is proved to the satisfaction of the court that the convict has failed to comply with any of the requirements of the Community Service Order, the court will vary the order to suit the circumstances of the case or impose on the convict a fine not exceeding One Hundred Thousand Naira (100,000) or cancel the order; and sentence the convict to any punishment which could have been imposed in respect of the offence, but the period of the community service already performed may count in the reduction of the sentence⁵⁵.

However, where the convict could not found upon the issuance of warrant of arrest by the court, the guarantor to the convict will be held responsible to produce the convict before the court, failing which he will pay N100, 000 or more to the court⁵⁶.

2.3. Restitution/Compensation

The idea of restitution⁵⁷ and compensation⁵⁸ is that the victim of a property offence should as far as possible be put back in the position he enjoyed before the offence⁵⁹.

⁴⁹ ACJA, s. 462(2)

⁵⁰ ACJA, s. 462(3)

⁵¹ ACJA, s. 462(4)

⁵² ACJA, s. 461(8)

⁵³ ACJA, s. 463(1)

⁵⁴ ACJA, s. 463(2)

⁵⁵ ACJA, s.463(3)

⁵⁶ ACJA, s. 461(9)

⁵⁷ CPA, s.435(3)

⁵⁸ CPA, s.435(2)

⁵⁹ A Milner, *The Nigerian Penal System*, (London: Sweet & Maxwell, 1972) P. 127.

Restitution refers to the return of movable property dishonestly acquired or taken without authority. Under our criminal procedure laws, restitution relates to the return or restoration of movable property either stolen or otherwise dishonestly acquired⁶⁰ ; or taken without permission⁶¹. Offenders who do not have financial capacity to make/ pay restitution money are provided with work to earn the money. Restitution achieves rehabilitative goals of the society and ensures accountability on offenders.

Restitution/Compensation is provided under sections 269 to 270 and 435(2) & (3) of the Criminal Procedure Act, 2004. This mode of sentencing is also given boost by virtue of section 14(2) of the Economic and Financial Crime Commission (EFCC) Act, 2004⁶² which states that the commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.

Another beautiful legislation that underscores restitution is found in section 11 of Advanced Fees Fraud and Other Related Offences Act⁶³.

Sections 11(1) & (2) provide that:

In addition to any other penalty prescribed under this Act, the High Court shall order a person convicted of an offence under this Act to make restitution to the victim of the false pretense or fraud by directing that person- (a)Where the property involved is money, to pay the victim an amount equivalent to the loss sustained by the victim; (b)In any other case-(i) To return the property to the victim or to a person designated by him; or (ii)To pay an amount equal to the value of the property⁶⁴, where the return of the property is impossible.

An order of restitution may be enforced by the victim or by the prosecutor on behalf of the victim in the same manner as a judgment in a civil action⁶⁵.

It must be pointed out here that restitution and compensation is compatible with our indigenous African culture. It presents all trappings of cohesion with our African

⁶⁰ CPA, Cap. C41, LFN, 2004, s.270 (1).

⁶¹ Criminal Procedure Code, Cap. C30, Laws of Northern Nigeria, 1963, s. 357(1).

⁶² Cap. E1, LFN, 2004.

⁶³ Cap. A6, LFN, 2004.

⁶⁴ Ibid

⁶⁵ Ibid

predictions in criminal justice administration. According to Eboh⁶⁶ while discussing the concept of crime and punishment in the legal system of indigenous Africa, commented that the function of justice was to award penalty to vindicate the victim, give protection to his right and also restrict the convict to pay compensation to the victim. The compensation was not only limited to effect restitution but also functioned as a token of apology and atonement by the offender to the victimized person and the entire community at large.

It is pertinent that the provisions of the Criminal Procedure Act, 2004 which make more comprehensive provisions on restitution base punishment is stated.

The Act by virtue of section 269 states that:

Where upon the apprehension of a person charged with an offence, any property, other than that used in the commission of the offence, is taken from him, the court before which he is charged, may order-

- (a) That the property or a part thereof be restored to the person who appears to the Court to be entitled thereto, and, if he be the person as he may direct; or it be restored either to him or to such other person as he may direct; or
- (b) That the property or a part thereof be applied to the payment of any costs or compensation directed to be paid by the person charged.

The second leg to the Order of Restitution under the Criminal Procedure Act appears as follow:

Where any person is convicted of having stolen or having received stolen property, the court convicting him may order that such property or a part thereof be restored to the person who appears to it to be the owner thereof, either on payment or without payment by the owner to the person in whose possession such property or a part thereof is, of any sum named in such order⁶⁷.

The Act, however, exempted the application of the Order of Restitution in either of the following circumstances:

1. Any valuable security which has been *bona fide* paid or discharged by any person liable to pay or discharged the same, or

⁶⁶ NJU Eboh, 'Crime and Punishment in African Indigenous Law in Legal Pluralism in Africa: Compendium of African Customary Law' In E Azinge & A Awah (ed), (2012), *Nigerian Institute of Advanced Legal Studies*, 429- 438.

⁶⁷ s. 270(1).

2. Any negotiable instrument which shall have been *bona fide* received by transfer or delivery by any person for a just and valuable consideration without notice or without any reasonable cause to suspect that it had been stolen⁶⁸.

Section 268 of the CPA makes provisions for another class of victims. This time, it is not the person who suffered the initial direct impact of the crime, but the innocent person who bought the stolen property from the offender without knowing or having reason to believe that such property was stolen. It provides that upon application of the innocent purchaser and the restitution of the property to the person entitled to possession, the court should order that out of the offender's possession on his arrest, an amount not exceeding the price paid by such purchaser should be delivered to him. However, there is no provision as to what happens where the amount is not enough to compensate the innocent purchaser. It is suggested that the courts should in such circumstance award further compensation⁶⁹.

Interestingly, under ACJA, 2015⁷⁰, the court is empowered after conviction to order restitution in favour of the victim of an offence against the convict. The section which is well couched leaves the court with the choice either to order restitution in an addition to any other penalty or in lieu of any other punishment. Depending on the circumstances of a case, judges are required to justly recourse to imposing restitution order in lieu of other punishments where it is most appropriate and safe. The value of non-custodial programmes will be improved should the provisions be followed practically with diverse understanding.

It is worthy to note that ACJA, 2015 categorically makes provisions for an order of restitution under section 321. The said section states that a court after conviction may adjourn proceedings to consider and determine sentence appropriate for each convict:

In addition to or in lieu of any other penalty authorized by law, order the convict to make restitution or pay compensation to any victim of the crime for which the offender was convicted, or to the victim's estate; or (b) order for the restitution or compensation for the loss or destruction of the victim's property and in so doing the court may direct the convict: (i) to return the property to the owner or to a person designated by the owner, (ii) where the return of the property is impossible or impracticable, to pay an amount equal to the value of the property; or (iii) where the property to be returned is

⁶⁸ s. 270(2).

⁶⁹ CC Ani, 'Extending the Frontiers of Remedies for Crime Victims in Nigeria', (2009) 1, *NJI Law Journal*, 109.

⁷⁰ Ss.319 & 321.

inadequate or insufficient, to pay an amount equal to the property calculated on the basis of what is fair and just.

A strong case for incorporation of restitution/compensation in all our states' criminal laws and Federal Criminal Law receives mammoth support in view of increasing corrupt practices in our different level of political and economic leadership. It is to be observed (even if only for purposes of legal argument), that restitution/compensation, no matter how complete it may be in satisfaction of the pecuniary loss on the part of the owner of the stolen property, does not amount to and is, at law, quite different from a fine. This is because fine is normally a revenue to the treasury of the state, whereas restitution is always in favour of the victim of the crime.

2.4. Applications of Non-Custodial Sanctions in Nigeria Criminal Jurisprudence: A myth or Reality?

The response to the above poser is neither in affirmative nor negative. In theory, non-custodial sanction do exist only to the fact that the ink which the provisions relating to them were penciled down in the CPA, ACJA, EFCC Act, Advance Fee Fraud Act, Child Right Act and Laws of some States in Nigeria⁷¹.

The expansive sections of the CPA⁷² are in tandem with the philosophies and practices of probation, restitution/compensation as they are obtainable in other jurisdictions. The legal framework for probation, community service and restitution/compensation as non-custodial measures were created in a number of statutes. Apart from the CPA which applies all over Nigeria, and ACJA applicable in the FCT, Abuja, every state of the federation has her own counterpart Criminal Procedure Law and as well as Administration of Criminal Justice Law which contain similar provisions with those in the CPA and ACJA. Other laws in Nigeria like the Child Right Act, 2003 and Probation of Offenders Law (applicable in the Northern States) empower courts to release an accused person on probation.

In practice however, probation, community service and restitution/compensation are largely myths in Nigeria criminal justice system. Except cases dealing with juvenile offenders, the courts universally perceive probation as a programme that concerns juvenile offenders alone. Of all the non-custodial measures, the courts appear to favour imposition of fines with passion. In the majority of cases, the closest to probation the courts choose when dealing with minor offences (particularly with first offenders) is binding-over and conditional discharges⁷³. This is lamentable for our criminal justice

⁷¹ ACJA, Ss 453- 458, CPA, Ss 435, 269, 270, EFCC Act, s14, Advance Fee Fraud Act, s11, etc.

⁷² Ss.435(1) & 436(1-3).

⁷³ MA Owoade, 'Reform of Sentencing in Nigeria –A Note on Compensation, Restitution and Probation' In S Adetiba (ed), *Op .Cit*, Pp.123-124.

system considering that judges and magistrates in Nigeria have a wide discretion in the area of sentencing, however, in exercising their wide discretionary powers, they usually have the tendency of adopting punitive and retributive approach notwithstanding the extant legal provisions that encourage resorts to non-custodial measures herein appraised.

3. Setbacks of Non-Custodial Sanctions in Nigeria

One of the setbacks associating non-custodial sanctions such as probation and community service work is high caseload on the officers. In this sense, both probation and community service treatment consist of three phases. The first phase is the prediction of an offender's expected future behaviour. The second phase of the treatment process is the classification of probationer and the third phase of the process is the treatment modality which is actually used for probationers. These combined with limited training and time constraints forced by administrative and other demands, wind up temporary supervisory measures.

In non - custodial sanctions programmes such as probation and community service, their officers are generally assigned to small agencies serving at limited geographic areas and under the leadership of one or two chief probation officers. Unless retirement or death claims a supervisor, there is little chance for other officers to advance. It is understandable that Nigeria unlike some other countries such as USA, Europe, Malawi, etc. lacks strong understanding of the practice and therefore barren of the essential mental readiness and trained personnel to commence on the process of non- custodial sanctions whose main focus and potent impact is noticeably rehabilitative or reformation of offenders.

Currently, non – custodial sanctions' programmes such as probation and community services are not effectively exercised in Nigeria since the appropriate facilities and logistics to maintain and monitor them are not available. The probation and community service orders in Nigeria lies on supervision and other obstacles like lack of vehicles to move around, uncoordinated link among court, police and the probation officers, hence the implementation of probation and community service as types of sentence may continue to be elusive in Nigeria criminal justice system.

Undoubtedly, studies have shown that there are avalanche provisions with respect to non-custodial punishments in Nigerian Penal Laws particularly as it concern probation, community service and restitution/compensation but the government pretend to lack the political will to put them into practice. Aside from cases dealing with delinquent offenders, our courts generally view probation and community service sentence with respect to adult offenders as suspension. It is quite disheartening that of all the non-institutional disposition methods, our courts seem to prefer the imposition of imprisonment and fines with passion. In the majority of cases, the closest to probation and community service the courts employ when dealing with minor offence (especially

with first offenders) is binding-over and conditional discharge⁷⁴. This is a bad commentary for our criminal justice system considering that judges and magistrates in Nigeria have wide discretions in the area of sentencing. It is observed that a good number of our judges and magistrates do not as a matter of rule exercise that discretion in the best interest of the accused, the victim and the public. While using their discretionary powers, Nigerian judges tend to adopt a clearly punitive and retributive approach despite existing statutory provisions that give nod to the use of probation and other non-custodial measures. The courts, following the ideology of retributive have emphasized deterrence rather than the ideology of rehabilitation or reformation in our criminal polices. But from all indications, fine and imprisonment have not yielded much fruits; rather, Nigeria has had to battle with unending congestion in the prisons and inability of the offenders to pay fines for decades now.

4. Conclusion

This paper evaluated certain non-custodial sanctions in Nigeria which have been seen to be among the best considerable punishment options for the treatment of convicts who committed certain offences such as minor offences, victimless offences, non-violent offences, delinquencies etc rather than prison-based punishment. The point is that certain categories of offenders need not be subjected to prison-based punishment unlike in the draconian laws of around 621 BC enacted by Draco the ruler of ancient Athens which made every crime punishable with death penalty; even minor offence like stealing a cabbage was punishable with death penalty⁷⁵. History has adequate information affirming that crime did not stop due to draconian graveness of the laws of Ruler Draco⁷⁶. The idea of entrenching non-custodial sanctions in the Nigerian penal laws has been that they promote rehabilitation and social reintegration of an offender, have regard to community interests as the prevention of crime, respect for the law, and the interest of the victims. But it is disheartening and regrettable that certain non-custodial sanctions as discussed in this paper are not obtainable in practice during sentencing except probation with respect to juvenile.

5. Recommendations

In the course of this study, the researcher perceived that more concerted efforts are needed for a quality and enhancement of non-custodial sanction in the Nigerian criminal jurisprudence and thereby recommends the following:

1. Nigeria should borrow leaf from the adaptable non- custodial practices prevalent in America, UK and Canada, and the most recently enacted Administration of

⁷⁴ MA Owoade, *Op .Cit.*

⁷⁵ K Debra, 'Ancient Punishments that Did not Fit the Crime',
< <https://listverse.com/2014/02/03/10-ancient-punishments-that-didn't-fit-the-crime>>
Accessed on 22/06/2019

⁷⁶ Ibid

- Criminal Justice Act, 2015 be fully adopted by all the states of the Federation in addition to other penal laws as it concern non-custodial measures.
2. The offenders who committed less-violent crimes should not, in the first instance, be incarcerated but should be subjected to non-custodial punishment of any type depending on the nature of the offence.
 3. Government should cultivate a political will towards non –custodial measures by ensuring that the required resources needed are adequately provided thereof for the efficient running of the non-custodial programmes.
 4. Various penal laws of the various states of the federation should be reviewed. The reviewed penal laws should, in the main, make a definite classification of offences based on the seriousness or intensity of the violence of offences. Less-violent offences whether committed by a minor or by an adult offender should be punished in particular way based on the nature of such offence while offenders culpable of violent offences shall be treated differently as against incarceration which joins all categories of offenders together irrespective of the nature of their offences.
 5. There should be full blown enforcement of non-custodial sanctions as entrenched in our penal laws that focuses more on rehabilitation and reformation of the offenders rather than employing prison-based punishment that has failed to meet up with the desired result over the years.
 6. Government should make available all resources required to maintain a practicable community service and probation system which would certainly involve social welfare institutions like correctional services departments, welfare services, community development centres etc. manned and operated by well-trained officers.
 7. Stricter guidelines should be given and must be obeyed by judges and magistrates who give the sentence so that the desirable large scale use of non-custodial sentencing will be achieved.
 8. Insightful judges and magistrates with the help of competence defence, prosecuting counsel and probation officers, should constitute powerful tools in making non-custodial sanctions that fit not only the crime, but the criminal, the victim and the community.
 9. As a matter of national urgency, the judiciary should encourage Judges and Magistrates to make greater use of available non-custodial sanctions in the penal statutes for offenders convicted of non-violent and minor crimes.