

# **NON-CUSTODIAL SENTENCING IN NIGERIA: CONTEMPORARY INCARCERATION WITHOUT WALLS**

*Being a paper presented by Hon. Justice Bright E. Oniha<sup>1</sup> at a Capacity Building Training/ Workshop organized by The Edo State Administration of Criminal Justice Monitoring Committee (ACJMC) and the Justice Sector Reform Team (JSRT) on the 11th of July, 2025 for Magistrates and Presidents of Area Courts on Non- Custodial Sentencing Measures and its Implementation.*

## **1. Introduction**

*"Blessed be the Amending hand"*

Above is a famous quote by Edmund Plowden, a great 16th century lawyer whose bust still stands in a place of honour in the lovely hall of the Middle Temple Inn of Court in England.<sup>2</sup> This quote which was said as long ago as the Elizabethan age as a fitting tribute to law reformers through whose resolve and efforts, laws that have otherwise become archaic and crying out for reforms, are amended or reformed.

Before 2015, Criminal procedure in Nigeria was governed in the Southern States of Nigeria by the Criminal Procedure Act (CPA) (domesticated in States as the Criminal Procedure Law). Whereas in the Northern States and the Federal Capital territory (FCT), there was the Criminal Procedure Code (CPC). Lagos State has its own Administration of Criminal Justice Law (ACJL) which was first passed in 2007 and an amended version passed in 2011.

After decades of public outcry for radical reforms in the criminal justice sector in Nigeria, especially in the area of legislations, the Administration of Criminal Justice Act (ACJA) was finally signed into law in 2015. As has been alluded to, this came after Lagos State had taken the initiative earlier on. Until the introduction of the Administration of Criminal Justice Act, there was no major review of the Criminal Procedure Act or the Criminal Procedure Code.

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<sup>2</sup> Referred to with approval by Rt. Hon. Lord Denning in his preface to his book, *"The Closing Chapter"* Oxford University press, New York, at p.VI.

For our purpose today, given the marked similarity of the ACJL of States across the country, reference to ACJL in this paper shall be taken to refer to the Edo State Administration of Criminal Justice Law (ACJL), 2018 of Edo State as reflective of ACJL in other States. In addition, given also that the ACJA 2015 is *impari materia* with the Edo ACJL in the area of non custodial sentencing measures, reference to the ACJA shall also be taken as reference to same and equivalent provision in the Edo State ACJL, 2018, which was actually signed into law by the then Governor of Edo State on the 20th day of March, 2018.

Non- custodial sentencing is not a new bride in town in Nigeria, neither is it a new phenomenon in the criminal justice system of this country. As we shall soon see in the course of this paper, some aspects of non-custodial sentencing option have always been contained in our Criminal Procedure legislations. The problem has always been that the non- custodial sentencing options were limited both in scope and implementation.

The combined effect of the coming into being of ACJA in 2015 and the advent and spread of Covid -19 pandemic in 2020, marked a turning point in the more elaborate provisions of non-custodial sentencing in relevant existing legislations and its implementation. This has been accentuated and given a boost by the enactment of the Correctional Service Act, 2019 which was actually signed into law on the 14th of August, 2019.

As soon as the decibel of the drums of the Covid- 19 Virus began to beat so loudly that humanity felt seriously threatened, a deliberate policy of restrictive non-admission or limited admission of new inmates in many of our Correctional/ Custodial centres was introduced by the Correctional Service in Nigeria. This forced all relevant stake holders to take the provisions and implementation of non-custodial sentencing options seriously. Save for very serious offences, non-custodial sentencing options such as fines and

community service became popular. Suddenly, it was now as if non-custodial sentencing options was new to our Criminal justice sector.

We are therefore gathered here today to cross fertilize ideas on how the frontiers of non-custodial sentencing can be expanded, especially in the area of implementation. At the end of this training, the goal is to ensure that, through the instrumentality of non-custodial sentencing, Judges, Magistrates, Presidents and other judicial officers across Nigeria can make the creation of more prisons in Nigeria unnecessary.

The catchment areas of this paper, therefore, is for us to have proper or better understanding of existing non-custodial measures. In this regard, I shall critically examine non custodial sentencing options in the Administration of criminal Justice Act (ACJA) and other existing relevant legislations within Nigerian Justice system. In doing so, I shall look, at the meaning of non-custodial sentences, types, goals, advantages, implementation, reasons for limited extant limited implementation of existing legislations and recommendations aimed at facilitating a more robust and effective implementation regime.

## **2. DEFINITION OF TERMS**

In a presentation such as this, it is always imperative to proffer some form of definition of some key words at least for proper contextualization. Lest we unwittingly become like the proverbial needle in the Idoma Story, in the definition of what law is, referred to by Justice A.P. Anyebe in his book<sup>3</sup>. According to his Lordship, "...members of the legal profession have behaved like the needle in the Idoma story. The needle undertakes tailoring for all and sundry but itself remain naked. In this regard, let us seek look at the meaning and types of a few key law terms such as Sentencing, Custodial and Non-custodial sentencing that are relevant to this paper.

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<sup>3</sup> Anyebe A.P., *"Customary Law: The War Without Arms,"* Fourth Dimension Publisher, Enugu, 1985, at P. 3

## **2.1 Sentencing**

The meaning, essence and objective of sentencing was judicially expressed in Elizabeth V. FRN<sup>4</sup> by the Nigerian Court of Appeal as follows:

Sentencing is an important closing chapter of a criminal trial. The aim of it is retribution, deterrence, reformation and protection of society. The retributive aspect is designed to express public revulsion from the offence and to punish the offender for his wrong conduct, while deterrence is to discourage the convict from further offences as well as potential offenders from committing offences. Reformation aims on reintegrating the offender into society for honest living. Above all the protection of the society is the overriding factor.

## **2.2 Types of Sentencing**

For our purpose, there are two types of sentencing: Custodial and Non-Custodial sentencing.

## **2.3 Custodial Sentencing**

A Custodial sentence refers to a judicial sentence imposing a punishment of mandatory term in custody of a convict, often by way of either in prison (imprisonment) or some other institution. What a sentence of imprisonment means is that the convict shall during the specified period change his/ her residential address from the community where he/ she ordinarily resides to a new residence freely provided by the State called a prison (now called the Correctional/ custodial centre in Nigeria) where he is freely accommodated and fed. He/she shall stay there until the expiration of the term of imprisonment. This form of sentence may be with or without labour.

Similarly, the Court in Ali v. FRN<sup>5</sup>, held that:

The essence of imprisonment is to meet the legitimate expectation of society of retribution, where the society strikes back at the offender as to deter potential offenders and make the commission

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<sup>4</sup> (2021) LPELR-54632(CA), Per IKYEGH, JCA

<sup>5</sup> (2016) LPELR - 40472 (CA) per ABUBAKAR, JCA

of crime unattractive, protect the public and society by ensuring that dare devil criminals and recalcitrant offenders are taken out of circulation. (underlining supplied for emphasis).

## **2.4 Non- Custodial Sentencing**

In Black's Law Dictionary, the term, "non-custodial" simply is, "not taking place while a person is in custody..."<sup>6</sup>

In relation to sentencing, it defined a *non-custodial sentence* as, "a criminal sentence (such as probation) not requiring prison time."<sup>7</sup>

In other words, the sentence is served outside the physical facility designated as a prison. This non-custodial discourse goes to one of several sentencing options available to a Judge or Magistrate at the conclusion of criminal trial. This is where this paper got has referred to as a sentence to as, "*Incarceration without walls*" or put differently, "*imprisonment without walls*."

## **3. Global Trend of Incarceration**

The days of custodial sentences such as imposition of terms of imprisonment etc are waning and in many jurisdictions have now been limited only to very serious offences. The situation has become such that for misdemeanours, simple offences and non- life-threatening offences, the imposition of non-custodial sentencing in contemporary times, has gained world wide approval and implementation. In the Netherlands for instance, prisons are now being shut down due to declining prison population or lack of prisoners and rate of incarceration. Many of these empty prisons have now been converted to schools, hotels or cultural centres. Similar trend exists in Sweden, Germany, Liechtenstein, Bulgaria, the Czech Republic, Romania, the Baltic states and many other countries. This has however not been without some notable pushback in some countries. For instance, in 2015, Norway transferred more than 1,000 of their inmates to a jail in the Netherlands because it was seeing

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<sup>6</sup> Black's Law Dictionary, p. 1152

<sup>7</sup> Ibid, p1485

the opposite trend—there being not enough room for all its criminals in its jails.

Regrettably at a time when many of these countries are either shutting down prisons or considering doing so, precisely on the March 17th, 2023, the then President Muhammadu Buhari's assent to a Bill to amend the 1999 Constitution to move correctional centres from the Exclusive legislative list to Concurrent legislative list; so that States can create additional Correctional/ Custodial centres to accommodate more prisoners. This is in addition to a total of 241 Custodial Centres already established by the Nigeria Correctional Service as at 2023<sup>8</sup>

#### **4. Why Non-Custodial Measures**

Many reasons have been adduced for the need for courts to impose non-custodial sentences. Statutorily, some rationale for the imposition of non-custodial sentencing is contained in section 460 of the ACJA (ACJL). The section provides that in exercising of its powers to impose suspended sentence or community service; the court shall have regard for the following:

- (a) Reduce congestion in prison;
- (b) Rehabilitate prisoners by making them to undertake productive work;
- (c) Prevent convict who commit simple offences from mixing with hardened criminals<sup>9</sup>
- (d) Promotion of the ideals of reintegration, restitution, reconciliation, rehabilitation and restoration over the normal retributive justice that was prevalent in the past.
- (e) Reduction of recidivism i.e. the tendency of a convicted criminal to reoffend.

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<sup>8</sup> Nigerian Correctional Service, "Nigerian Correctional Service Integrated Service Charter" available at <https://corrections.gov.ng> accessed on 18/06/25.

<sup>9</sup> ACJA, section 460 (4)

Over the years, the government has become concerned about the issue of over-crowding in the prisons (now known as the Correctional Centres). This over-crowding comes with its attendant problems of deplorable condition of sanitation, hygiene, disease and even death, among the inmates or detainees. Something had to be done to keep the inmates alive, because only the living can stand trial or be prosecuted by the courts. For as O. OBADINA JCA, put it in *Chief Anthony Emeka Ani v State*,<sup>10</sup> *"...As it is only the living that can praise God, so it is only the living that can be tried, convicted and punished for an offence, no matter how heinous the offence may be..."*

Non- custodial sentencing options therefore, are now useful tools to decongest prisons, avoid stigmatisation, encourage rehabilitation and reintegration of the offender and a fortiori, save the governments large sums of money it would otherwise have invested in building of custodial centres.

## **5. Historical Perspective and Legal Framework of Non- Custodial Sentencing in Nigeria**

It will be informative to at this juncture to briefly look back and trace the history or origin of the non-custodial system in our *corpus juris*.

### **5.1. Ancient Origin**

Non- Custodial sentencing is of ancient origin which is as old as mankind itself. Its footprints can easily be found in the practice of the two major religions of the world- Christianity and Islam. In the former, as early as biblical times, it is easy to discern the deployment of non-custodial sentencing measures right from the Garden of Eden which is taken as the cradle of man. This point is underscored by the notable fact that in spite of the grievousness of the sin committed by Adam and Eve, his beloved wife, all the sentences imposed by the Lord on the, "convicts" were non-custodial sentence. They include the fact that the Lord

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<sup>10</sup> (2001) LLJR -CA

banished them from the Garden of Eden into the world, imposed the scourge of painful childbirth on Eve, Adam was told that he will have to eat food though painful toil all the days of his life, access by the convicts to the tree of life was also cut etc.<sup>11</sup> God of course also imposed damning cause on the serpent. Similarly, the punishment imposed by God on Cain for killing Abel, his brother, was to banished him from his home and was forced to wander the earth for the rest of his life.<sup>12</sup> None of these involved any form of incarceration.

According Christian Answers.Net, the first occasion on which we read of a prison in the bible is in the history of Joseph in Egypt. Then Potiphar, Joseph's master, *"... took him, and put him into the prison, a place where the king's prisoners were bound"*<sup>13</sup> The Mosaic law made no provision for imprisonment as a punishment.<sup>14</sup> What was available was a cocktail of fines, compensation and restitution. For instance, in relation to protection of property and property offences

Exodus 22:1-12 provides that:

*"Whoever steals an ox or a sheep and slaughters it or sells it must pay back five head of cattle for the ox and four sheep for the sheep."*

*"Anyone who steals must certainly make restitution, but if they have nothing, they must be sold to pay for their theft. If the stolen animal is found alive in their possession—whether ox or donkey or sheep—they must pay back double."* (fine, compensation and restitution).

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<sup>11</sup> Holy Bible, Genesis 3:8-11.

<sup>12</sup> *Ibid*, Genesis 4: 13

<sup>13</sup> *Ibid*, Genesis 39:20-23). See: Christian Answers.Net, "Prisons and Jails of the Bible" available <https://christiananswers.net/dictionary/prison.html> accessed on 2/7/25

<sup>14</sup> *ibid*



"If anyone grazes their livestock in a field or vineyard and lets them stray and they graze in someone else's field, the offender must make restitution from the best of their own field or vineyard.

"If a fire breaks out and spreads into thornbushes so that it burns shocks of grain or standing grain or the whole field, the one who started the fire must make restitution."

"If anyone gives a neighbor silver or goods for safekeeping and they are stolen from the neighbor's house, the thief, if caught, must pay back double..."

Islamic law considers imprisonment as a case of last resort, and in many circumstances, imprisonment is not used as a punishment. Offenses against another person, from homicide to assault, are punishable by retaliation (*qisās*), the offender being subject to precisely the same treatment as the victim. This type of offense is regarded as a civil injury rather than a crime in the technical sense, since it is not the state but only the victim or the victim's family who has the right to prosecute and to opt for compensation or blood money (*diyah*) in place of retaliation.<sup>15</sup>

## **5.2 Non- Custodial Sentencing under the CPA And CPC**

Before the ACJA, the default setting of sentencing in Nigeria has always been custodial sentencing, which finds expression in many of our statute books mostly in form of terms of imprisonment.

However, there were also some non- custodial sentencing provisions contained in the Criminal Procedure Act (CPA)<sup>16</sup> and its counterpart in

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<sup>15</sup> Britannica, "Penal Law in Sharia, in The substance of traditional sharia law" available at <https://www.britannica.com/topic/sharia/Penal-law> Accessed on 2/7/25.

<sup>16</sup> Domesticated in Bendel State as the Criminal Procedure Law Cap. 49 Laws of defunct Bendel State 1976 (as applicable to Edo State)

the North, the Criminal Procedure Code (CPC). Section 493 of the ACJA repealed the CPA<sup>17</sup> and some other existing Criminal procedure legislations. In the area of non-custodial sentencing, the CPA, for instance made provisions for fines,<sup>18</sup> (which may be recoverable by distress), probation<sup>19</sup> and deportation.<sup>20</sup> There was also the provision for Warning, often expressed as a, "Caution and Discharge." In addition, under section 378 of the CPA, the Governor may by notice published in the State Gazette declare that no sentence of imprisonment shall be carried out on certain Chiefs named in the said gazette without the previous consent of the Governor, who may in his discretion fine the Chief in lieu of the sentence of the court.

In addition, under section 419 of the CPA, no child shall be ordered to be imprisoned. Similarly, no young person shall be ordered to be imprisoned if he can be suitably dealt with in any other way whether by probation,<sup>21</sup> fine, corporal punishment or otherwise.

## **6. Legal Framework of Non-Custodial Sentencing in Nigeria**

Domestically, the legal framework of non-custodial sentencing can be harvested in primary and secondary sources.

### **6.1. Primary Source**

The primary source of Non – custodial sentencing is contained in two extant legislations. These are: (a) the Administration of Criminal Justice Act 2015 (hereinafter referred to as ACJA) (which include the various Administration of Criminal Justice Laws (ACJL) of the 36 States as domesticated and the (b) Nigerian Correctional Services Act, 2019. It is

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<sup>17</sup> CAP. C41 Laws of Federation of Nigeria, 2004 and the Criminal repeal Procedure (Northern States) Act Cap. C42 LFN, 2004

<sup>18</sup> CPA, section 389

<sup>19</sup> Ibid, section 435

<sup>20</sup> Ibid, section 402

<sup>21</sup> See section 435 for more elaborate provisions on Probation.

therefore, practically impossible as the Law to discuss non-custodial sentencing under the ACJA independent of the Nigerian Correctional Service Act 2019. This fact shall be dwelt with in greater details shortly.

## **6.2 Secondary Source**

### **6.2.1. United Nations Standard Minimum Rules for Non-Custodial Measures 1990 (The, "TOKYO RULES")**

At the global stage, non- Custodial system has its roots in the United Nations Standard Minimum Rules for Non-Custodial Measures 1990 (otherwise known as the Tokyo Rules) which was adopted by General Assembly Resolution 45/110 of 14 December 1990.

Article 1.5 of the Tokyo Rules provides that:

Member states shall develop non-custodial measures within their legal system to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observances of human rights, the requirement of social justice, and the rehabilitation needs of the offender.

This document further outlined and recommended the following non-custodial measures at Trial/Sentencing and Post Sentencing Stages.

Sentencing authorities may dispose of cases in the following ways: ( a ) Verbal sanctions, such as admonition, reprimand and warning; ( b ) Conditional discharge; ( c ) Status penalties; ( d ) Economic sanctions and monetary penalties, such as fines and day-fines; ( e ) Confiscation or an expropriation order; ( f ) Restitution to the victim or a compensation order; ( g ) Suspended or deferred sentence; ( h ) Probation and judicial supervision; ( i ) A community service order; ( j ) Referral to an attendance centre; ( k ) House arrest; ( l ) Any other mode of non-institutional treatment; ( m ) Some combination of the measures listed above.

The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure. A sentence of imprisonment may be imposed only in the absence of other suitable alternatives.<sup>22</sup>

Nigeria being a signatory to the above UN resolution, it forms part of this Country's international treaty obligations. The Tokyo Rules laid the foundation for the inclusion of additional non-custodial sentencing options in the Administration of Criminal Justice Act 2015, various Administration of Criminal Justice Laws of the States as well as the Correctional Services Act 2019.

## **7.Non-Custodial Sentencing Under the Administration of Criminal Justice Act 2015**

The deliberate provision of a more elaborate non-custodial sentencing regime is one of the very important hallmarks of the Administration of Criminal Justice Act, (ACJL) 2015. It indeed marked a paradigm shift in non- custodial criminal justice sentencing in Nigeria. The ACJA has now been finally domesticated in the entire 36 States of Nigeria.<sup>23</sup> All of which contain provisions for non-custodial sentencing by courts, as an alternative to passing a sentence of imprisonment. These legislations marked a welcome watershed in the Criminal justice system in Nigeria. Hardly have we had such legislations that have sought to bring Nigeria in line with current best global practices in Criminal Justice. The makers of these legislations would undoubtedly have earned glowing tribute from the Edmund Plowdens of our time, given the extensive innovations brought into being, some of which is the reason we are gathered here today.

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<sup>22</sup> Article14.3, Tokyo Rules.

<sup>23</sup> Partners West Africa Nigeria, "*ACJL Tracker*" available at [www.partnersnigeria.org](http://www.partnersnigeria.org) > acjl-tracker

## **7.1 Types of Non- Custodial Sentencing Measures**

As has just been alluded to, the ACJA makes provision for several non-custodial punishments. These include, Community Service, Suspended Sentence, Fines, Probation, Rehabilitation, Deportation, Cost, Compensation and Damages, Seizure, Restitution, Forfeiture and Disposition of property. Let us look at some of these more closely.

### **7.1.1 Community Service**

Section 460(2) of the ACJA, stipulates that the court may, with or without conditions, sentence the convict to perform specified service in his community or such community or place as the court may direct. What can be easily gleaned from this is that the order for community service may be conditional or unconditional. It also is not necessarily limited in geographical scope to the immediate community of the convict, given that it any other community or place as the court deem fit. However, the ACJA provides that a Community Service Sentence shall be performed as close as possible to the place where the convict ordinarily resides to ensure that the community can monitor his movement.

- (a) Offences in Respect of Which Community Service Order Can Not Be Made:

There are however some serious offences in respect of which an order for community service cannot be imposed. These are:

- (i) Offence involving the use of arms or offensive weapon;
- (ii) Sexual offences;
- (iii) Offence which the imprisonment exceeds 3 years imprisonment.<sup>24</sup>

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<sup>24</sup> **Section 460 (3) ACJA (ACJL).** Note however, that section 460 (3) of the ACJL of Edo State curiously omitted the exclusion of sexual offences from the list of offences that suspended sentence or community service orders cannot be imposed. The need for an amendment of the Edo State ACJL to bring it in line with the ACJA in this area cannot be over emphasized, especially in view of the stated goal of the Edo State Violence Against Persons (Prohibition) Law 2021

(b) Nature of Community Service:

Community Service shall be in the nature of the following:

- (i) Environmental sanitation, including grass cutting, washing drainages, cleaning the environment and washing public places;
- (ii) Assisting in the production of agricultural produce, construction, or mining; and
- (iii) 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.<sup>25</sup>

(c) Factors That the Court Should Consider in The Imposition of Community Service:

Before passing a community service order, the court shall consider the circumstances, character, antecedents of the convict and other factors (such as the age of the convict) that may be brought to its attention by the Registrar of the Community Service.<sup>26</sup>

(d) Duration of Community Service Sentence:

Under the ACJA, a Community Service Order shall be performed for a period of not more than **six months** and the convict shall not work for more than **five hours** a day.<sup>27</sup>

(e) Performance of Community Service

In the execution of a sentence of community service, the ACJA requires the following:

**(i) Appointment of a Community Service Centre**

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<sup>25</sup> ACJA, Section 461 (4)

<sup>26</sup> Ibid, Section 461 (6)

<sup>27</sup> Ibid, Section 462(1)

The Act requires that the Chief Judge shall establish **in every judicial division, a Community Service Centre** to be headed by a **Registrar**, to be assisted by suitable personnel, who shall be responsible for overseeing and supervision of the execution of a Community Service Order in that Division.<sup>28</sup>

(ii) Provision of a Guarantor:

The Act provides that upon a sentence of community service; a convict shall be required to produce a guarantor who shall undertake to produce the convict if he absconds from community service. The guarantor shall be a relation of the convict or any other responsible person of adequate means or substance. Where a guarantor fails to produce a convict when required by court, he shall be liable to a fine of N100,000.00 (One hundred thousand naira) only or more as the circumstances of each case may require.

(iv) Appointment of Supervising Officer

The convict on community service shall be under the supervision of a supervising officer or officers or Non- Governmental Organization as may be designated by the Community Service Centre.

### **7.1.2 Suspended Sentence**

As the term suggests, this happens when a sentence that is imposed on a convict is ordered to be suspended. The United Nations Office on Drugs and Crime (UNODC) defines 'suspended or deferred sentence' as a situation *'where the sentence of imprisonment is pronounced, but its*

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<sup>28</sup> ACJA, section 461(1)

*implementation suspended for a period on a condition or conditions set by the court*<sup>29</sup>

The question of the existence or otherwise of suspended sentence in our criminal justice system was considered by the court as far back as 1972. In *State v. Audu*,<sup>30</sup> an appeal arose by the State against the decision of M. Muhammed, J., of the High Court at Sokoto. The trial Court had convicted Hassan Audu, aged 39 years, of rape committed against Inno Garba, then aged 9 years, contrary to Section 283 of the Penal Code, and sentenced him to a term of imprisonment for 3 years which he said should be suspended for the same period.

The apex Court, per Elias, C.J.N. (as he then was) at Pp. 4-5, paras. F-B, while allowing the appeal, held that the principle of suspended sentence does not apply to criminal law and practice in Nigeria. According to His Lordship:

...Of the various types of punishment provided for in Section 68 of the Penal Code, there is none for a suspended sentence of imprisonment, although there is provision for imprisonment simpliciter. The Penal Code itself provides in Section 283 for imprisonment for life or any less term on conviction for rape; the convicted person may suffer a fine in addition...

The rationale of the trial judge in suspending the sentence was mere sentiments as stated by His Lordship when he said:

The learned trial Judge would appear, however, to have been moved by sentiment to proceed thereafter to suspend the sentence, for he said, "However, on the evidence, I am more inclined to believe that the sexual intercourse in question came about more from the deep love which the accused has for Inno and which love is unmistakably reciprocated by her. For in spite of the damage caused her by the accused through that intercourse,

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<sup>29</sup> UNODC 'Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment' Available at

[https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_of\\_basic\\_principles\\_and\\_promising\\_practices](https://www.unodc.org/pdf/criminal_justice/Handbook_of_basic_principles_and_promising_practices)

<sup>30</sup> (1972) LPELR-SC106/1972; (1972) All NLR 636; (1972) 5 SC



she did not mince her words in declaring in open court that she was prepared to marry him if she would be allowed to do so.

Interestingly, the Supreme Court was moved by the Respondent's expressed desire to marry the girl as soon as her parents would permit. The Court after restoring the 3 years sentence imposed on the respondent went ahead to make a recommendation to mercy for consideration by the appropriate authorities provided, as he asserted before us, the respondent takes immediate steps towards marrying Inno Garba.

In *Nya v. Edem*,<sup>31</sup> the Court of Appeal, while stating that, "In criminal law, suspended sentence means in effect that the defendant is not required at the time sentence is imposed to serve the sentence" also held that suspended sentence is not part of Nigerian law, and has no application whatsoever under Nigeria's criminal justice system.

This position of the law has since changed because the ACJA now provides that:

Notwithstanding the provision of any other law creating an offence, where the court sees reason, the court may order that the sentence it imposed on the convict be, with or without conditions, suspended. In which case, the convict shall not be required to serve the sentence in accordance with the conditions of the suspension.

### **(a) Offences For Which Suspended Sentence Order Can Not Be Made**

As in the case of community service, there are some offences that are excluded over which an order of suspended service cannot be made under the law. These are:

- (a) Offence involving the use of arms or offensive weapon;

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<sup>31</sup> (2005) 4 NWLR (Pt. 915) 345,

- (b) Sexual offences;
- (c) Offence which the imprisonment exceeds 3 years imprisonment

### **7.1.3 Probation**

This is provided for under section 454 of the ACJA (which is virtually *impari materia* with section 435 of the repealed CPA). Probation is a court-imposed period of correctional supervision which entails the release of an offender back to the community under certain conditions instead of incarceration as a way of decongesting the prison. In some cases, a period of probation may come after the offender has served a specific period in prison. It is however noteworthy that the ACJA actually envisages a situation where a probation order may be made **even without conviction**. This can be gleaned from the wording of section 454 (1) of the ACJA, which provides that:

Where a defendant is charged before a court with an offence punishable by law and the court thinks that the charge is proved but is of the opinion that having regard to:

- (a) The character, antecedents, age, health or mental condition, of the defendant charged;
- (b) The trivial nature of the offence; or
- (c) The extenuating circumstances under which the offence was committed:

It is inexpedient to inflict a punishment or any order than a nominal punishment or that it is expedient to release the defendant on probation, the court may, **without proceeding to conviction**, make an order specified in subsection 2 of this section. (under lining supplied for emphasis).

The orders referred to are, (a) an order dismissing the charge or (b) discharging the defendant conditionally on his entering into a recognisance with or without surety to be of good behaviour and to appear at any time during such period not exceeding three years as may be specified in that order.

Other conditions which the court can impose may be in respect of residence or abstention from intoxicating substance and any other matters as the court may consider necessary for preventing a repetition of the same offence or commission of other offences.

An offender will only subsequently be convicted and sentenced of his original offence, where he fails to observe any of the conditions of his recognizance<sup>32</sup>

### **(a) Probation Officer**

Section 455 further provides that such a recognizance, where the court so orders, shall contain a condition that the defendant be under the supervision of such person or persons of the same sex, called *a probation officer*. This clearly means that a probation officer is court appointed as his/her appointed shall be part of the conditions imposed by the court in its probation order. However, the discretion of the court in the appointment of a probation officer is subject to section 457(2) of ACJA. The section provides that, *"... the Chief Judge of the Federal High Court, or of the High court of the Federal Capital Territory, Abuja or the President of the National Industrial Court (in the case of the Edo State ACJL, the Chief Judge of Edo State) **shall make regulations** with respect to the appointment of probation officers, including designation of persons of good character as probation officers from which list, a*

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<sup>32</sup> ACJA (ACJL), Section 459 (5)

*court within the district or division of the probation officer resides may make its appointment under section 455."*

#### **7.1.4. PAROLE**

The word parole, derives from the French, "*parol*" meaning "word of honour" and references prisoners of war promising not to take up arms in current conflict if released. Parole is a post-sentencing measure which makes it possible for a prisoner to be released before the completion of his prison term.

The ACJA also makes provision for parole. It provides under section 468 that:

Where the Comptroller- General of Prisons makes a report to the Court recommending a prisoner:

- (a) Sentenced and serving his sentence in prison is of good behaviour; and
- (b) Has served at least one third of his prison term, if he is sentenced to imprisonment for a term of at least fifteen years or where he is sentenced to life imprisonment, the court may, after hearing the prosecution and the prisoner or his legal representative, order that the remaining term of his imprisonment be suspended, with or without conditions, as the court considers fit and the prisoner shall be released from prison on the order.

A prisoner released under this provision shall undergo a rehabilitation programme in a government facility or any other appropriate facility to enable him to be properly reintegrated to society. While the Comptroller General of prisons is enjoined to make adequate arrangement, including budgetary provision, for the facility. However, under the Correctional

Service Act, the Comptroller General has been given increased powers to administer the parole process, including the appointment of the Parole Board, supervision and rehabilitation of parolee, administration of designated parole facilities and taking any other step for the proper implementation of the parole and other non-custodial measures.

There was a turning point in Nigeria's non-custodial regime on 25 August 2022, with the inauguration of the National Parole Board for the Nigerian Correctional Service (NCOS) made pursuant to the Correctional Service Act, 2019. The Board was launched by the NCOS Controller General, Haliru Nababa, at the organisation's headquarters in Abuja.<sup>33</sup> Edo State presently has the Edo State Parole Board headed by Hon. Justice Alero Edodo- Eruaga (rtd).

As we shall soon see, many aspects of this section of the ACJA, like many others in this area, significantly overlap with related non-custodial provisions in this area in the Nigerian Correctional Service Act, 2019. Some of these apparent contradictions will be discussed shortly. However, both laws require the prisoner, after his release, to undergo a rehabilitation programme for proper reintegration to the society.

#### **7.1.5 Fines**

As has already been highlighted the imposition of fines as a non-custodial sentencing option on a convict is not new in Nigeria. It may be imposed on its own or imposed in lieu of a term of imprisonment. Section 420 of the ACJA, gives courts discretionary powers to impose fine in lieu of imprisonment where it has authority to do so under the law creating the offence. In which case, the law has always been that its imposition must not be excessive. The position of the law is that where the statute or section of

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<sup>33</sup> Justice, conflict and security in Nigeria "Nigerian Correctional Service inaugurates National Parole Board available" at <https://www.justice-security.ng/nigeria-correctional-service-inaugurates-national-parole-board> accessed on 25/6/25

the law creating or defining the offence expressly prescribes that there is no option of fine, the court cannot impose fine. Where, however, the statute is silent, even if it only mentions imprisonment and is silent on the fine, the courts have a discretion to impose a fine in lieu of imprisonment<sup>34</sup>

### **7.1.6 Cost, Compensation, Damages and Restitution**

Under the ACJA (ACJL), at the end of criminal trials, a convict may now be ordered by the Court to pay costs, compensation, damages and to make restitution to the victim or victims of the crime as an alternative to imprisonment or in addition.<sup>35</sup> Unlike in the past, this monetary compensation is now paid directly to the victim of the offence, and not the State. There is a Scale of Imprisonment in the Fourth Schedule to the Law for non-payment of money ordered to be paid. A person to whom compensation is awarded may refuse to accept the compensation. Where the person receives the compensation or where the convict, having been ordered to pay compensation, suffers imprisonment for non-payment, the receipt of the compensation, or the undergoing of the imprisonment, as the case maybe, shall act as a bar to any further action for the same injury.

### **7.1.7 Deportation**

This is the legal expulsion or removal from Nigeria of a person not being a citizen of Nigeria to his country. As a non custodial measure, rather than incarcerate a non citizen, a court may, in instances, set out in Part 42 of the ACJA, recommend to the Minister of Interior that such convict be deported to his country of origin in the interest of

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<sup>34</sup> See: *Apamadari v. State* (1997) 3 NWLR (Pt. 493) 289

<sup>35</sup> ACJA, section 321

peace, order and good governance. The circumstances and procedure for bringing this about is well spelt out in this Part.

As has already been alluded to, it will now virtually impossible to discuss non-custodial sentencing measures in Nigeria without generous reference to the Nigerian Correctional Service Act, 2019. This is because, the Nigerian Correctional Service Act has greatly encroached on many of the non- custodial provisions of the ACJA. Let us therefore, look at some of the non- custodial provisions of the Nigerian Correctional Service Act with a view to highlighting some of these areas.

### **8. Nigerian Correctional Service Act (NCSA), 2019 And Non-Custodial Measures.**

Sometime ago, Nigeria enacted the Nigerian Correctional Service Act, 2019 which repealed the Prisons Act, 2004<sup>36</sup>. The repealed Prisons Act had been in force since 1972, spanning a period of forty-seven years and consequently, had become outmoded in very many areas. The repealed Act did not contemplate non-custodial sentencing options such as probation, parole, community services and suspended sentence (now contained in the Administration of Criminal Justice Act, 2015 (ACJA)). The Act came into being because of factors, such as over congestion of existing prison facilities. Hence it seeks to address these issues. Section 1 of the Act which establishes the Nigerian Correctional Service now provides that:

The Nigeria Correctional Service shall consist of:

- (a) Custodial Service; and
- (b) Non-Custodial Service

The Nigerian Correctional Service Act therefore, effectively divides the Nigeria Correctional Service into two. Part I of the Act establishes the,

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<sup>36</sup> The Prisons Act Cap P.29 LFN, 2004.

**“Custodial Service”** and runs from sections 9 -36, while Part II, creates the, **“Nigerian Non- Custodial Service”** which runs from sections 37 – 47.

Part of the stated objections contained in Section 2 of the Act includes inter alia, the provision of, “... *a platform for the implementation of non-custodial measures...*”

With broad mandate to provide custodial and non-custodial services. 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 centre (section 46).

The duties of the Nigerian Non-Custodial Service under Part II, section 37 (1) of the Act are: (a) to be responsible for the *administration* of non-custodial sentences passed by courts. They include: (a) community service; (b) probation; (c) parole; (d) restorative justice measures; and (e) any other non-custodial measure assigned to the Correctional Service by a court of competent jurisdiction.

For the effective implementation of this part of the Act, the Nigerian Correctional Service Act established the **National Committee on Non-Custodial Measures** to,<sup>37</sup>

(a) coordinate the implementation of non-custodial measures with the Judiciary and other relevant agencies;

(b) monitor and propose measures for effective operation of non-custodial measures;

(c) receive and consider any complaint or view from the offenders, victims and affected communities, and make recommendations, where possible, on the nature of non- custodial measures; and

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<sup>37</sup> Nigerian Correctional Service Act 2019, section 37 (2).



(d) perform any other function required for the proper implementation of this Act.

The National Committee on Non-Custodial Measures shall establish the **Technical Committee** on: (a) Parole; (b) Probation; (c) Community Service; (d) Restorative Justice Measures; and (e) any other thing as may be determined by the

While The Controller-General shall, in consultation with State and Federal Capital Territory and with the approval of the National Committee on Non-Custodial Measures, appoint **State Committees on Non-Custodial Measures** at the State level.

## **8.1 Contradictions or Overlap Between the ACJA and The Nigerian Correctional Services Act on Non- Custodial Sentencing**

According to Prof. Vearumun Vitalis Tarhule, in an Article<sup>38</sup>, some major contradictions between the Act and the ACJA are in the following areas:

### **(a) Appointment and Regulation of Probation and other Supervisory Officers.**

Under the Correctional Service Act, the Non-Custodial Service is responsible for the administration of probation, Parole and Community services. Administration includes the power to appoint probation officers, supervisors of community service and so.

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<sup>38</sup> Tarhule V.V, "Synoptic Appraisal of the Nigerian Correctional Service ACT, 2019" Benue State University Law Journal, 2019/2020, P. 29 available at [www.bsum.edu.ng/journals](http://www.bsum.edu.ng/journals), Accessed on 18/6/25

However, under the ACJA, the power to appoint probation officers is assigned to courts and the Chief Judge of the Federal High Court or the High Court of the Federal Capital Territory or National Industrial Court shall make regulations for the appointment of Probation Officers. Whereas section 39 of the Correctional Service Act empowers the Controller – General to make regulations prescribing the duties of the supervising officer for each of the non-custodial measures stated in section 37 thereof.

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 Correctional Service Act which under section 42 empowers the Controller- General to appoint supervisors to monitor those sentenced to community service.

**(b) Appointment of Members of Parole Board Under the Act:**

Under the Act, it is the responsibility of the Controller General to administer Parole and to appoint members of the Parole Board. By contrast, section 468 of the ACJA dealing with parole, provides that the Comptroller-General may *recommend* to the Court that a prisoner be admitted to parole and if the court sees reason in that behalf, may admit the prisoner to parole after a hearing. Clearly, the ACJA did not contemplate a parole board hence it constituted the court into a Board. The power under the Act empowering the Controller-General to appoint a Parole Board, therefore, stripes the courts of this role; for there cannot

be two parole hearings, one by the court and the other by the Parole Board.

## **8.2. WHICH LAW SHOULD PREVAIL?**

The question to be resolved is which law to apply? It is tempting to answer this question in favour of the Act for two reasons, first, the Act is a substantive law whereas, the ACJA is an adjectival law, and secondly, the Correctional Service is better equipped to handle supervision of persons sentenced to either probation or community service, and additionally constitute a Parole Board. This is the practice worldwide. Whatever be the case, it would be neater and better if these conflicts are resolved vide amendment of either or both laws.<sup>39</sup> This is one of the major factors militating against effective implementation of the non-custodial measures of the legislations.

## **9. IMPLEMENTATION OF NON-CUSTODIAL MEASURES IN NIGERIA**

Presently, not much has been achieved in the area of the implementation of the non-custodial measures in Nigeria. At the end of trial, most courts still limit imposition of criminal sentencing to terms of imprisonment with or without options of fine. Which is precisely what it has always been under the repealed CPA. In very few cases, Community Service orders are made. Apart from these, given the fact that the machinery for implementation of other no-custodial options is either not in place or not yet fully functional, especially for orders such as probation, parole etc which are hardly now being imposed by courts in Edo State.

### **9.1 The Role of the Administration of Criminal Justice Monitoring Committee (ACJMC) in the Implementation of the ACJA**

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<sup>39</sup> Ibid, P.30

Section 469 of the ACJA establishes the Administration of Criminal Justice Monitoring Committee (ACJMC). The committee is charged with the responsibility of ensuring effective and efficient application of the Act by relevant criminal justice sector agencies.<sup>40</sup>

Membership of this Committee under the ACJA consist of: The Chief Judge of the FCT, who shall be Chairman, the Attorney General of the Federation, a Judge of the Federal High Court, the Inspector General of Police or his representative not below the rank of Commissioner of Police, the Comptroller- General of the Nigerian Prisons Service or his representative not below the rank of Comptroller of Prisons, the Executive Secretary of the National Human Rights Commission or representative, not below the rank of a Director, the Chairman of any of the local branch of the Nigerian Bar Association in the FCT to serve for two years only, the Director – General of the Legal Aid Council of Nigeria or representative not below the rank of Director and a representative of the Civil Society working on human rights and access to justice or women rights to be appointed by the Committee to serve for a period of two years only.<sup>41</sup>

## **9.2 Factors Militating against effective implementation of non-custodial measures in Nigeria**

In spite of the innovations introduced in ACJA 2015, several of its provisions remain unimplemented or poorly implemented due to several factors. These include:

- (a) Statutory contradictions: Several obvious contradictions between the ACJA and the NCSA in relation to non-custodial

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<sup>40</sup> ACJA(ACJL), section 470 (1)

<sup>41</sup> Section 469(2) of the Edo State ACJL, added as member, the Executive Director of the office of the Public Defender in Edo State or his representative not below the rank of Director.

measures have already been identified and discussed extensively, above.

- (b) Lack of adequate funding, infrastructure, logistical support and trained personnel;
- (c) Lack of awareness of critical stake holders and the general public
- (d) Lack of adequate collaboration and synergy by stakeholders in the justice sector
- (e) Corruption.

### **9.3 RECOMMENDATIONS**

In the light of the above limitations the following recommendations are proffered.

1. The ACJA and the NCSA should be urgently amended aimed at resolving the various contradictory provisions and reconciling both legislations to facilitate seamless operation of the non-custodial measures. In doing so, it is suggested that the Judiciary should concern itself with sentencing while the Correctional Service focuses on the execution of the custodial and non custodial sentencing of courts.
2. To facilitate the implementation of the lofty provisions of the Act, adequate funding must be made available to support of the implementation of existing legislations which must include logistical support, rehabilitation and training of supervisory officers such as probation officers etc. Section 472 of ACJA, allows funding to be sourced for the operation of the ACJMC for instance, through budgetary allocation to it through the office of the Attorney General and such monies as may, from time to time, be provided by any public, private or international organizations by way of grant, support or assistance on

such terms that are consistent with its functions. Regrettably, out of this large pool of sources of finance, actual funding is grossly inadequate to drive its functionality.

3. Aggressive enlightenment, advocacy and sensitization should be carried out by relevant governmental and non- governmental bodies aimed at bringing the existence, availability and benefits of non custodial options to public knowledge. Robust/ Intensive Capacity building programmes, such as this, for relevant Stakeholders including Judges Magistrates, officers of the Nigerian Correctional Service, Security Agencies and lawyers on the implementation of the Law must be organized and sustained. Also in this regard, it behoves relevant Non-Governmental Organizations and Civil Society groups to monitor compliance and bring serious pressure to bear on government aimed at getting governments at all levels to accord much desired seriousness to the implementation of the non- custodial provisions of existing legislations and to provide adequate funding.

4. Provision of efficient and adequate data, database, record keeping, monitoring and tracking system of convicts which should preferably be done digitally as well as prompt and efficient reporting system. This will greatly enhance effective monitoring of offenders who are for instance on probation or parole to ensure compliance with stipulated conditions of non-custodial orders.

5. Adequate collaboration and synergy by critical stake holders in the justice sector in the administration of criminal justice is vital for an effective implementation of the ACJL. To this end, the ACJMC around the country, as the monitoring and implementation arm of the ACJA (ACJL) must be strengthened and adequately funded not just by

government but other non-governmental bodies and even the private sector as has already been alluded to above.

## **10. CONCLUSION**

This paper has appraised non-custodial sentencing in Nigeria. It has presented a general overview of sentencing (custodial and non custodial), In doing so, declining global trend of incarceration was underscored. The historical perspective, legal framework, types and advantages of non-custodial sentence have also been highlighted. This paper notes in particular, the subdivision of the Nigerian Correctional Service into two; Custodial and Non-Custodial. Equally underscored is the contradictions btw the non-custodial provisions of the ACJA and the Nigerian Correctional Services Act. Finally, the paper brings to the fore present low level of implementation of these provisions, identifies some factors responsible for this and presents some recommendations aimed at obviating this problem of inadequate implementation. To this end the time has now come for vigorous implementation of all noncustodial sentencing measures in the criminal justice system of our dear country and State.

I thank you for your patience in listening. God Bless us all.

**Hon. Justice Bright E. Oniha**, Ph.D.

Edo State High Court (Criminal Division).