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*Faith, Justice, Rural Evolution*

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The Rule Of Law And Democratic Culture  
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that here in Nigeria even under a Military Government, the law is no respecter of persons, principalities, governments or powers and that the courts stand between the citizens and the governments alert to see that the state or government is bound by the law and respects the law."

What more can I say?

### COMMUNITY SERVICE ORDER AS AN ALTERNATIVE TO PRISON SENTENCE

By PROFESSOR OLUYEMISI BAMGBOSE

#### INTRODUCTION

Throughout history, persons who violate societal norms and values have been subjected to discipline, sanction and punishment in one form or another. The average society believes in punishment for the breach of accepted rules. When a person abuses another person's property or person, it is generally believed that a penalty or punishment must be meted out. Under the traditional and modern criminal justice systems, there are different types of punishments available. Sentences in the traditional pre-colonial period in Nigeria, to an extent differ from those handed out under the modern criminal justice system. It is apt however, to state that some of the sentences from the pre-colonial period are now recognized by statute employed under the modern criminal justice system. In addition, from the range of sentences in the statutes, the underlying principles have changed drastically from settlement and restoring balance in the community and allowing peace to reign amongst the people to the principles of deterring future offences, and of punishing the offenders in a process known as retribution. Imprisonment was not widely used as a sanction during the pre-colonial period, but it was not a strange practice. The modern concept of imprisonment is a relatively new form of punishment under the modern criminal justice system in Nigeria, and it is also the most common sentence administered by the court. The result is that there is overcrowding in the prisons, therefore defeating the purpose of imprisonment. Globally, there has been a shift from imprisonment to the use of non custodial sentences for less serious offences and there has been a call for alternatives to imprisonment.

This paper briefly considers the theory and types of punishment and the concept and problems of imprisonment. Some alternatives to imprisonment are also highlighted. The crux of this paper is the discussion on community service order, the importance, modalities, challenges and successful implementation as an alternative to imprisonment.

#### AIMS /THEORIES OF PUNISHMENT

There are four primary aims of punishment. They are

1. Deterrence: This aim regards the prevention of further offence through deterrent strategy as the rationale for punishment. Jeremy Bentham (1789), the foremost

<sup>1</sup> Bamgbose, Oluyemisi... The Sentence, the Sentencer and the Sentenced: Towards Prison Reform in Nigeria. The thirteenth Inaugural Lecture series in the 2009/2010 Session at the University of Ibadan, Nigeria. Delivered on July 15 2010

<sup>2</sup> ibid

<sup>3</sup> Bamgbose Oluyemisi 2010 Ibid

<sup>4</sup> ibid

<sup>5</sup> Bamgbose Oluyemisi (2003) Privatization of the Prison System: A Panacea for Nigeria in Nigerian Law: Contemporary Issues Ed M.O Ogungbe Lagos: Vox Nigeria Limited

<sup>6</sup> Bamgbose Oluyemisi 2010 op cit

<sup>7</sup> Bamgbose Oluyemisi 2010 Op cit

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proponent of this theory, developed the notion of setting penalties at levels sufficient to outweigh the likely benefit of offending.

There are two perspectives to the theory of deterrence. The first is general deterrence where it is said that the general public will be deterred by observing punishment meted out to persons who have offended and the public will conclude that the cost of the crime outweighs its benefit.<sup>8</sup> The second is specific deterrence and it is targeted at the offender who is being convicted and sentenced. The punishment under the theory of specific deterrence is such that will deter the offender from wanting to commit a crime in the future or repeating the offence. This principle of deterrence is based on the assumption that all persons are rational and think before they act. It is argued that this theory does not account for offenders who commit crimes under the influence of alcohol, mental illness, or psychological depression.<sup>9</sup>

2. Incapacitation: This theory is based on the assumption that by removing the offender temporarily by putting him or her in a secured institution for a specified period of time or permanently by putting to death, the capacity to commit crime is removed. Under the Nigerian traditional system, incapacitation was carried out through banishment from the community.<sup>10</sup> In the early American society, where the theory was used in punishment, the offender was asked to go away or join the army.<sup>11</sup> Incapacitation has nothing to do with the behaviour of the offender nor is it linked with changing the behaviour of the offender. The theory primarily looks at predicted risks and the protection of potential victims.<sup>12</sup>

3. Retribution: The aim or theory of retribution also known as 'just dessert theory' is based on the justification that punishment is a morally appropriate response to crime. This is based on the biblical expression of "an eye for an eye, a tooth for a tooth." The principle is based on the notion that those who commit a particular crime should be punished in proportion to the gravity of the offense or to the extent to which others have been made to suffer. The severity of the sanction should fit the seriousness of the crime. Proportionality is the key concept in the just dessert theory.<sup>13</sup>

4. Rehabilitation: This theory is aimed at the restoration and reformation of the offender with the rationale of preventing further offence through the strategy of rehabilitation. The concept of rehabilitation focuses on the offender.<sup>14</sup> The proponents believe that criminal behaviour is treatable. It may involve education, therapy, counselling, family intervention, or vocational training. Reintegration into the society is aimed for under the principle of rehabilitation.

<sup>8</sup> Bamgbose Oluyemisi (2010) *Ibid*

<sup>9</sup> *Ibid*

<sup>10</sup> Bamgbose Oluyemisi (2010) *ibid*

<sup>11</sup> Cole G F and Smith C E (2001) *The American System of Criminal Justice* 9<sup>th</sup> Ed Wadsworth Thomson Learning

<sup>12</sup> Bamgbose Oluyemisi (2010) *op cit*

<sup>13</sup> Bamgbose Oluyemisi (2010) *ibid*

<sup>14</sup> Cole G F and Smith C E (2001) *op cit*

### TYPES OF PUNISHMENT

Punishment is one of the most common means by which compliance is enforced within society. Across societies be it traditional or modern, violation of laid down rules was frowned upon. In all cases of violation, due investigation was carried out. In the traditional societies, a variety of traditional detection methods were used while the police and law enforcement agents carry out investigation in the modern societies. An offender who was found to have violated the established rules was made to stand trial. Trials for offenders were fair and just and the principle of fair hearing was observed.<sup>15</sup> Due process was followed and parties in any case were given equal opportunities. In the traditional system of criminal justice, the elders adjudicated over the cases, while under the modern criminal justice system, magistrates, judges or justices of the appropriate courts adjudicated over cases.<sup>16</sup> Under the traditional and modern criminal justice systems, there are a wide range of punishments or sentences recognized and imposed on offenders. Punishments or sentences given under the traditional system included mutilation, slavery, banishment, humiliation/ridicule, excommunication, compensation, restitution, corporal punishment and death. Some of these have been outlawed under the modern system. Punishments under the modern system include fines, forfeiture, confiscation, canning, deportation, imprisonment and death.<sup>17</sup>

### IMPRISONMENT AS A PUNISHMENT

Imprisonment was not widely used as a punishment under the traditional criminal justice, but it was not a strange practice.<sup>18</sup> During that period, imprisonment was carried out in the back of the king's palace. Imprisonment as a sentence can be traced to the British colonization, when it was used to keep in close custody persons that posed political and economical threats to the British administration.<sup>19</sup> It was to guarantee a peaceful atmosphere for colonial, economic and political interests. Imprisonment is the most common type of sentence prescribed by law in Nigeria.<sup>20</sup> Certain offences have no alternative options and where there are options, the structure for their use are not in place. Imprisonment is also the gravest custodial punishment open to the judge or magistrate to impose for an offence.

Imprisonment imposes deprivation and restriction on the accused in much greater degree or kind than the type of setback against offender's interest in other non-custodial sentences.<sup>21</sup> The term of imprisonment given for an offence that has been committed must not exceed the maximum provided by law and what the court has jurisdiction to impose. It is the sentence of imprisonment and not the treatment accorded to the offender in prison that constitutes

<sup>15</sup> Bamgbose Oluyemisi (2006) *Dispute Settlement under the Yoruba Culture: Lessons for the Criminal Justice System in the Yoruba in Transition: History, Values and Modernity*. Toyin Falola and Ann Genova eds: North Carolina: Carolina Academic Press

<sup>16</sup> *Ibid*

<sup>17</sup> Bamgbose Oluyemisi (2010) *op cit*

<sup>18</sup> Bamgbose Oluyemisi (2003) *op cit*

<sup>19</sup> Ekwurike Henry (2005) *The dehumanizing conditions of Detainees in Nigerian Prisons: What Justice*

*Panorama* <http://www.tigweb.org/express/panorama/article.html?ContentID=6573> retrieved on 26 May 2010

<sup>20</sup> Bamgbose Oluyemisi. (2010) *op cit*

<sup>21</sup> Currie C (1998) *Crime and Punishment in America*. New York: Henry Holt

punishment. It is therefore the length of sentence that measures the degree of punishment and not the condition under which it is served.<sup>22</sup>

The term of imprisonment that can be imposed on an offender ranges from a couple of days to a life sentence. A sentence of imprisonment takes effect from and includes the whole of the day of the date on which it was pronounced.<sup>23</sup>

After an offender is sentenced to imprisonment, the warrant for committal to prison is issued by the magistrate or judge and the offender is taken into prison custody. Prisons cope with inmates convicted of different types of crimes from trivial to the most serious and it holds prisoners not yet sentenced, who are referred to as Awaiting Trial Persons (ATPs) and who constitute the greatest percentage of inmates in prisons worldwide. Overcrowding is an abiding problem facing prisons in countries around the world. Most prisons are operating at capacities far above their limit. The level of overcrowding in prisons has been described as an affront to civilized society.<sup>24</sup> This is because the prisoners eat in their cells and the chamber pots are in the same cells.<sup>25</sup> The conditions are deplorable and degrading. A prisoner at the Kirikiri Medium Security Prison in Lagos had this to say "there is a general cell which can contain up to 25 people. We sleep over ourselves on the cold floor with no mat. You cannot turn, you have to stand up to turn; and if you even get a place on the floor to lie on, thank God." He continued "in this cell, there is no toilet. The men defecate in buckets which are located inside the room. The windows are small and there is no ventilation"<sup>26</sup> The state of persons sentenced to prison in Nigeria is well fitted into the description given by Fitzgerald and Sims when they said that it "represents a shift from warehousing which simply involves storing people, to zoo-keeping where some limited consideration is given to the state of the stored."<sup>27</sup>

Nigerian prisons, for example, are under pressure arising from congestion and overcrowding. They are overcrowded as much as 250% of capacity. Ifeanyi reported that the Kirikiri prisons had over 2,600 inmates occupying a space built for 956 prisoners.<sup>28</sup>

Prison overcrowding all over the world has worsened in the last few years. In a 2005 study, Walmsley found out that there are more than nine million prisoners worldwide and the number keeps on increasing.<sup>29</sup>

The prison population continues to exceed available accommodation. This is resulting in prison conditions that breach the United Nations and other standards.<sup>30</sup> The space constraints in

<sup>22</sup> Patterson G (1951) "Why Prison" Chapter 1 in Patterson and Prisons (S. K. Ruck ed 1957) p 23

<sup>23</sup> Section 381 Criminal Procedure Act 2004 [cap. c41]

<sup>24</sup> Rutherford R (1984) *Prison and the Process of Justice*

<sup>25</sup> Bamgbose Oluyemisi (2010) op cit

<sup>26</sup> Adelaja Abiose (2009) *State of Nigerian prisons* Next June 12 2009

<sup>27</sup> Fitzgerald M and Sims J (1982) *British prisons* (2<sup>nd</sup> Edition. Blackwell)

<sup>28</sup> Ifeanyi Marshall (2002) Thisday Online Nigerian Prisons. What hope for inmates  
http://thisdayonline.com/archive/2002/63/02

<sup>29</sup> Walmsley R (2005) *World Prison Population list*. International Center of Prison Studies. Kings College London 2005

<sup>30</sup> www.unodc.org

prison have been attributed to long prison sentences, the high number of persons sentenced to prison and the judges and magistrates not using adequate alternatives to prison.<sup>31</sup>

Three distinct phases were recognised in the development of criminal sanctions:

Phase one; the body of the offender was used as the object of severe punishment-this approach declined by the 18th century in many countries of the world.

Phase two; the search for more refined penal measures

Phase three; the emergence of prison and other sentences in the Nineteenth (19th) century.

A fourth Phase has been suggested, which is the reaction against prison and custodial sentences.<sup>32</sup>

It is therefore important to consider the use of alternatives to Imprisonment.

#### ALTERNATIVES TO IMPRISONMENT

The discussion on the alternatives to imprisonment and the shift in some jurisdictions to these alternatives in the administration of criminal justice has become imperative and necessary, because of the ineffectiveness of the prison system and custodial institutions. The need to check the enormous problems in the prison system is immediate and pressing and only the overhauling of not only the sentencing process, but the whole criminal justice can bring about this. Considering the fact that awaiting trial persons and persons awaiting conviction are also detained in prisons, it is imperative that alternatives must be explored from the pre-trial to the pre-conviction and to the sentencing stages.

Alternatives to imprisonment have been defined as those penalties, which following conviction and sentence, allow an offender to spend part or all of his or her sentence in the community or outside the prison establishment. These alternatives are punishments that would be seen by all to present a firm and fair way of dealing with offenders whose crimes do not merit custodial sentences.<sup>33</sup>

There have been different justifications on why there should be a shift from imprisonment to other alternatives. Foremost among these is the fact that the prison population is growing at an alarming rate and facilities are not increased.<sup>34</sup> Another justification is that this problem of overcrowding in the prisons has human rights implications. It denies the prisoners their right to human dignity. The issue of cost has also been raised. The direct cost of building and administration in the prisons, coupled with the feeding, caring and medical care of the prisoners is very high. In the United Kingdom, the Home Office<sup>35</sup> stated that imprisonment costs an awful lot of money and should only be imposed for the most serious offences and only when truly necessary. It has also been pointed out that the indirect or consequential cost

<sup>31</sup> Bamgbose Oluyemisi (2010) op cit

<sup>32</sup> Ball, R., Huff, C.R., Lilly, J.R. 1988. *22 House Arrest and Correctional Policy: Doing Time at home*. London; Sage Publication

<sup>33</sup> Vassa, A. 1990. *Alternatives to Prison: Punishment, Custody and the Community*. London; Sage Publication through <http://www.prison.gov.ng>

<sup>34</sup> Eniola Akinkuotu (2012) *Prison congestion: Courts should exploit non-custodial sentencing* — Akande in Punch February 12, 2012 available at <http://www.punching.com/news/prison-congestion-courts-should-exploit-non-custodial-sentencing-akande> and retrieved on 28 May 2012

<sup>35</sup> Home Office (1986)

affecting the larger society such as the spread of diseases caused by overcrowding is very high.<sup>36</sup> Another justification for alternatives is that it removes the psychological and other related consequences of imprisonment caused by separation of prisoners from members of their families. Imprisonment has serious adverse effects on the prisoners and their families. While it is believed that imprisonment does not appear to reduce crime nor does it deter the offender from committing further criminal acts, it is said that alternatives to imprisonment increases successful rehabilitation and reintegration of offenders.<sup>37</sup> There is growing international acceptance for the use of alternatives to imprisonment. In 2002, the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa called for action against overcrowding and advocated for less use of imprisonment. In 2011, the Penal Reform international in its Ten Point Plan to reduce overcrowding advocated that countries should develop and implement constructive non-custodial measures and sentences and use prison as the last resort through all stages of the criminal justice system.<sup>38</sup>

This was echoed in 2011 by the United Nations Special Rapporteur on Extreme Poverty and Human Rights which argued that States must only have recourse to detention and incarceration when it is necessary to meet a pressing and societal need and in a manner only proportionate to that need.<sup>39</sup> Some of the instruments of the United Nations on alternatives to imprisonment include the following;

The United Nations Standard Minimum Rules for Non Custodial Measures known as the Tokyo Rules.<sup>40</sup> The rules were first discussed at the Seventh congress on Crime Prevention and Criminal Justice and later adopted by the General Assembly.<sup>41</sup> It has as one of their fundamental aims the reduction of the use of imprisonment.<sup>42</sup> Another instrument is the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>43</sup> It was adopted by the UN general assembly on 29 November 1985.<sup>44</sup>

The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters is another UN instrument on alternatives to imprisonment. It was adopted by the United Nations Economic and Social Council on 24 July 2002.<sup>45</sup> It should be noted that in the discussion above on alternatives to imprisonment, it is not being proposed; neither is it suggesting abolishing imprisonment as punishment. Rather, that the most serious offences should still be

<sup>36</sup> Farrell G. and Clark K. (2004) *what does the world spend on criminal Justice.* ( HEUNI Paper No 20) The European Institution for Crime Prevention and Crime Control affiliated to the United Nations (Helsinki 2004)  
<sup>37</sup> www.unodc.org 2007 Handbook of Basic Principles and Promising Practices on Alternative to Imprisonment. Original Handbook Series. United Nation. New York 2007

<sup>38</sup> Ten-Point Plan to Reduce Prison Overcrowding (2011) www.penalreform.org/10-point-plan-address-prison-overcrowding/

<sup>39</sup> The Special Rapporteur to the Sixty-Sixth Session of the Geneva Assembly (October 2011) A/66/265. www.un.org/Docs/journal/En/2011/1022e.pdf

<sup>40</sup> United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), G.A. res. 45/110, mex. 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990) General Assembly resolution JRES/45/110. UN Doc. A.45/49 1990

Resolution 45/110 of 14 December 1990  
 Rule 1.5.

United Nations Doc A Res. 40 34

www.un.org/documents/ga/res/40p40r034.htm

http://www.pfi.org/cjr/about-cjr-un-initiatives-crosocresolution

punished by imprisonment while alternatives should be available as punishment for less serious crimes.<sup>46</sup>

#### TYPES OF ALTERNATIVE NON-CUSTODIAL SENTENCES

Non-custodial sentences as alternatives to custody have been recommended to address the problems of the ailing prison system in Nigeria. They are seen as more humane, less expensive, and more constructive than custodial methods of imprisonment. The non-custodial sentences are discussed briefly below.

1. Suspended sentence; this is the suspension of a prison sentence for a period of time, not to be enforced immediately. In a suspended sentence, imprisonment will only be enforced if a future offence is committed within a given time as stated by the court.<sup>47</sup>
2. Probation; the conditional release of the offender into the community under the supervision of correctional officials. Probationers live at home and work at regular jobs, but must report regularly to their probation officers. They are expected to abide by certain conditions, such as curfew, staying away from certain people or parts of town.<sup>48</sup>
3. Compensation; the philosophy behind compensation is to restore balance, peace and harmony to the community. The aim of compensation is to recompense the injured party in such a way as to leave him or her no worse off than he/she was before the injury caused by the offender. The sentence is borne by either the offender or the family members. It saves the victim the expense of filing a civil action to claim damages where an offender has been found guilty of inflicting harm on a victim.<sup>49</sup>
4. Restitution/ Restoration; repayment to the victim by the offender who has suffered some form of financial loss from the crime. It is reparative in that it seeks to repair the harm done.<sup>50</sup>
5. Disqualification; the rationale behind disqualification is that if a person qualified or licensed to carry out a function commits a criminal offence, such a person portrays himself/herself as unfit to carry out that task. It bars a person from holding or qualifying to hold or qualify for the performance of that task again in the future, it can be either temporary or permanent.<sup>51</sup>
6. Binding over; A bound person promises to do or refrain from doing something and undertakes to forfeit a certain sum of money if the promise is not kept. It may be given as a preventive measure or as a sentence.<sup>52</sup>

<sup>46</sup> Bangbose, Oluyemisi (2010) op cit

<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

7. Plea Bargaining; the prosecution and the defence counsel, may, where it is in the public interest enter into an agreement on the appropriate sentence to be imposed by the court if the defendant is convicted of the offence to which he intends to plead guilty.<sup>53</sup>
8. Fines; usually imposed on an offender in lieu of imprisonment or along with a sentence of imprisonment.<sup>54</sup>
9. Canning; This is corporal punishment which can be given to men below forty –five years of age and in certain cases children. It is never inflicted on women. This is distinguished from Sharia Law.<sup>55</sup>
10. Community Service Order; people convicted could be required to perform community service or to work for agencies in the sentencing jurisdiction either exclusively or to some extent instead of other judicial sanctions such as imprisonment or fines. This form of punishment is discussed extensively below.

#### Community Service Order

The term community service has a broad definition. It could be said to mean, donated service or an activity that is performed by someone or a group of people for the benefit of the public or its institutions. This could be for the community, the homeless, the less privileged or the elderly.

#### TYPES OF COMMUNITY SERVICE

There are two types of community service.<sup>56</sup> These are the voluntary community service and the compelled community service. The voluntary community service is a beneficial service, voluntarily carried out by a person or group of persons in a community for the benefit of the public. Examples are services carried out the Rotary Club, Lions and Lionesses Clubs and Junior Chamber International (JCI).

The compelled community service is a beneficial service by a person or group of persons carried out under compulsion in fulfillment of a laid down regulation or order. This can be further categorised into the following

1. Government compelled community service carried out as a part of citizenship requirement. A prime example of this in Nigeria is the National Youth Service Corp Programme (NYSC). This programme is intended for a category of Nigerian graduates, to strengthen their senses of civic management and community and to help them achieve their societal goal. In Nigeria, it is also a means of broadening the perception of the Nigerian youth and a way to foster unity.<sup>57</sup>

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Community Service. Everything about community service (2011) August 2 2011 available @ [www.communityaction.ca](http://www.communityaction.ca) and retrieved 28 May 2012

<sup>57</sup> Community Service (2011) Ibid

2. School Community Service. This to meet the requirement of a course, such as in the case of service learning to meet the requirement of graduation. A good illustration is the Industrial Training programme, (IT training) and in the case of the Nigerian Law School Bar qualifying Examination, the Chamber and Court attachments.<sup>58</sup>
3. Community service as a punishment or sentence of a court. This category is the crux of this paper. This is when a person convicted of a crime is required to perform community service or to work for agencies in the sentencing jurisdiction either entirely or partly in lieu of other judicial remedies and sanctions such as imprisonment or fines.

#### COMMUNITY SERVICE AS A PUNISHMENT

Pease defines a community service program as a program through which convicted offenders are placed in unpaid positions with non profit or tax supported agencies to serve a specified number of hours.<sup>59</sup> It is an Order of the court, normally used as an alternative to a prison sentence or some other penalty for offenders to be placed to perform a specific number of hours of unpaid community service work. It is a direct alternative to a prison sentence and will only be considered by the Judge if a custodial sentence has first been considered. It is participating in a useful work activity that is normally performed by volunteers and does not affect employment opportunities in the community. In the United Kingdom, community service is now officially referred to by the home office as "compulsory unpaid work" The philosophy behind community service sentence is that providing a service to the community is more beneficial to the community than punishment for its own sake. Through the community service, the community is able to see a benefit to them while saving costs associated with imprisonment of the convict and having the work carried out by paid staff. The aim of Community Service is therefore to get an offender to pay back to the community in a positive way for the damage caused by offending. In jurisdictions where it is used, thousands of unpaid hours of work are completed, benefiting the community groups or needy individuals. In the United States of America, the case of *Rv. Lawrence* established that community service is not merely an alternative to custodial sentences, but a sentence in its own right.<sup>60</sup> In other jurisdictions, Canada, USA, Europe, and Australia, Community service is an option for many criminal sentences as an alternative to imprisonment.

#### EFFECTIVENESS OF A COMMUNITY SERVICE ORDER

The effectiveness of community service as a punishment will depend on many actors in the society. There is the need for the cooperation of the government and government officers, the legislators, judicial officers, the Non-Government Organisations and the general public as a

<sup>58</sup> Community Service (2011) Ibid

<sup>59</sup> Pease Ken (1985) *Crime and Practice Vol 6* (1985) The University of Chicago Press. Pp 51

<sup>60</sup> (1982) 4 CAR 69



whole. The need for political interest is important. It is the role of the legislators to see that the courts have a satisfactory range of sentencing options open to them.<sup>61</sup> They can narrow or expand the choices of punishments available to them. For example, the 2007 Laws on Criminal Justice Administration in the High Courts and Magistrates Courts of Lagos State expanded the options open to the courts by introducing new sentences. There is no point in putting pressure on the courts, if there are no laws allowing such punishments or sentences or administrative structures to implement them. A magistrate or judge is only allowed and has discretion to hand out a sentence within the prescribed sentence allowed by law.<sup>62</sup> This was emphasized in *Enahoro v. Queen*.<sup>63</sup> On the part of the government, when the sentences are passed on the offender, especially in the case of imprisonment and community service order, it is the function of the government to ensure that there are suitable accommodations and facilities for the prisoner, and there are structures in place for effective monitoring of the offender respectively. Before passing a sentence, the magistrate or judge must consider certain facts, circumstances and peculiarities of the offender. This may include the antecedent of the offender, the character of the offender and previous conviction, the criminal records of the offender if any, the age of the offender, domestic and family circumstances, educational background, family background, work record, details of income of the offender and medical history of the offender. In *R v. Ball*,<sup>64</sup> these conditions were well-explained. These factors will help them come to a decision on the appropriate sentence to give to the offender and to determine if the sentence will be aimed at rehabilitation, retribution, deterrence, or reformation. They must know and understand the punishment that is appropriate and just. This according to Harding and Hoffman<sup>65</sup> is the essence of their discretion. They have the freedom to use this discretion, but do not have the discretion to misuse it. They must be humane in applying the principles and pronouncing a punishment.<sup>66</sup> As stated by Finlay C. J. in *DPP v. Tierman* "there is little in the way of legislative or judicial ruling on the decision which must be made by the sentencing judge. However, a few approaches adopted by the court can be deciphered from some judicial decisions. The effect is that sentence must not only be appropriate to the particular circumstance but also to the particular offender."<sup>67</sup>

It is the responsibility of the government officers, be it social welfare officer/ community service officer or probation officer to gather the above information for the judicial officer. Non-governmental Organisations also have a role to play in ensuring that certain issues are put on the political agenda and also when this is achieved, they are effectively implemented. With regards to the introduction of community service as a punishment in Oyo State, Justice and Peace Development Commission (JDPC) a non-governmental-organisation is in the forefront of ensuring the promulgation of the law. JDPC organised several stakeholders'

<sup>61</sup> Bamgbose, Oluyemisi (2010) op cit

<sup>62</sup> Ibid

<sup>63</sup> *Enahoro versus Queen* (1965) A N L R

<sup>64</sup> *R versus Ball* (1951) 36 CAR 164

<sup>65</sup> Harding C. and Koffman L. 1993 *Sentencing and the Penal System: Text and Materials* 2<sup>nd</sup> ed London: Sweet and Maxwell p 125.

<sup>66</sup> Bamgbose Oluyemisi (2010) op cit

<sup>67</sup> *DPP v. Tierman* (1988) 1 R 250

workshops for the community/religious leaders, prison officials, law enforcement agents, social welfare officers, judicial officers, media and legislators. The members of the society must be educated and enlightened on community service as a punishment so that it will be accepted and the society will be involved in the effective monitoring.

In giving an offender a community service order, there are steps the court and some other personnel must take

#### PROCEDURE INVOLVED AND FACTORS TO CONSIDER IN A COMMUNITY SERVICE ORDER

For a community service order to be effective, there are certain factors to be considered and certain procedures to follow.

The factors to consider include

- Suitability of the offender to be given a community service order. The assessment is done by the community service officer on the orders of the judge or magistrate. An offender must not be a risk to the community or a particular work environment and the work place must not be a risk to the offender.
- The duration of the punishment. This is to be decided by the judge.
- The number of hours the offender will do the unpaid work which the judge decides based on the assessment report from the social/community service worker. On 33 April 2012, Premier League footballer David Goodwillie was given a Community Service order for assaulting a man on November 3 2010. The order stated that Goodwillie will carry out 80 hours of unpaid work in the community. The Premier League footballer was given a community service order for assaulting a man in a city centre on November 3 2010<sup>68</sup>
- The day on which the punishment is to be carried out, is decided by the social/community worker after meeting with the offender to ensure that regular work or schooling is not jeopardized
- The period and place where the unpaid work will be carried out, is decided by the social/community worker.
- The type of work placement. After assessment of the offender by a community service officer, taking into account the history of the offender and personal circumstances, a work placement will be identified.

<sup>68</sup> UK OnlineNigeria (2012) Blackburn's David Goodwillie dodges jail despite SECOND assault in less than a year April 30 2012 available @ <http://uk.onlinenigeria.com/sports/25684-blackburn-s-david-goodwillie-dodges-jail-despite-second-assault-in-less-than-a-year.htm>. Retrieved 28 May 2012.

- The skills or talents of the offenders. This would be beneficial in work placement, especially trainings that could be beneficial to particular members of the community.
- The health and safety of the offender. This is a very important factor in deciding on the type of work the offender will be given.
- The religion of the offender which must not be compromised. This must be taken into consideration in deciding the days of work.
- Work schedule/schooling of the offender must be taken into account.
- Penalty of the offender for failure to carry out or complete the order of the court. It is the responsibility of the community service officer to bring the case back to court for any failure to complete the order

**PROCEDURE TO FOLLOW**

In ensuring that the order of the court is effective, the procedure discussed below must be followed.

The government must ensure

- Proper training of judicial officers on the effective implementation of Community Service Orders. The Lagos State Government planned a one day capacity building workshop for magistrates in the State.<sup>69</sup>
- Appointment of trained and qualified community service officers. The responsibilities of these officers include sensitizing and educating communities on community service orders as an alternative to imprisonment or as punishment, identifying possible work places for offenders, assisting the courts in work placement of offenders, giving regular report on offenders, working with law enforcement agencies, supervising and monitoring offenders at work place.
- Proper sensitization and acceptability of community service order as a punishment within the environment or community of work placement

The offender

- must attend and work as given according to the community service order
- must be punctual;
- must report to the designated supervising/community service officer
- must work to an acceptable standard

<sup>69</sup> www.lagosstate.gov.ng

- must inform community service worker of any change of address or employment condition
- may be given another non-custodial punishment in addition to the community service order. This may be necessary where the judge is of the opinion that the community service order is insufficient and that a fine had not deterred the offender in the past. In the case of the Premier League footballer David Goodwillie, the judge in imposing the sentence stated that the offender had been convicted of an assault charge less than 12 months before the Queen Street incident and that he did not seem deterred by a fine and compensation order given to him. In addition to the community service order, he was given a 12 month probation order with a condition that he must be of good behaviour and supervised by a supervising officer.<sup>70</sup>
- must not leave the workplace without the permission of the community service worker.
- Must be disciplined. The offender should not be under the influence of alcohol, nor be allowed to smoke or make phone calls during work hours. Absenteeism without proper documentation must not be tolerated.
- Must be trained and given instructions on attendance, expected work performance, standards of behaviour, disciplinary procedure.

**THE BENEFITS OF COMMUNITY SERVICE ORDER AS AN ALTERNATIVE TO IMPRISONMENT.**

The benefits of community service are numerous. Some of these are highlighted below

- **Family bonding;** Community service seeks to keep offenders in the community by building ties to the family and other normal sources of stability and success. Imprisonment is more destructive to both the offender and the society: In addition to the pains of imprisonment and the harmful effects of prison life, imprisonment adds to the suffering of family members, particularly children who grow up without parental guidance and may in most instances take to a life of crime on maturity.
- **Cost-** community service is cheaper than imprisonment
- **Reducing Recidivism-**the rates of returning to crime for those under community supervision are no higher than for those who go to prison.
- **Reproductive rights;** Women who are imprisoned are unable to take care of young babies and their families (where they have one). Community service also to an extent

<sup>70</sup> UK OnlineNigeria.(2012) Op cit

keeps the family together thus encouraging spousal support and reducing sexual indiscretion.

- **Least restrictive Alternative;** Community Service is based on the goal of finding the "least restrictive alternative" - punishing the offender only as severely as needed to protect the community and to satisfy the public.
- **Prison decongestion;** community service ensures that the offender performs his sentence outside the prisons, thereby reducing congestion and overcrowding in the prisons.
- **Meeting social responsibilities;** the offender is able to meet up to his social/family responsibilities, for example paying tax, paying school fees.
- **Easy reintegration into society;** the offender is able easily integrate into the society because he has been a part of the society while serving out his sentence.
- **Good disposition method for child offenders.** It is a good disposition order for child offenders.
- It helps the offenders remain in the community, retain their jobs in certain instances and teaches them to be self reliant and responsible.
- **Socially productive penalty.** Through supervised activities, offenders can contribute to their own well-being, as well as to that of the community. It is suggested that for less serious offences, a temporary custody is not the most effective punishment.
- **Corrective in nature.** Offenders have an opportunity to repay their debt to society through a means other than incarceration. Imprisonment restricts the offender's liberty, but it also reduces his or her responsibility. In imprisonment, the offenders do not have the opportunity to face up to what they have done wrong, see the effect on the victim(s), or make amends with the victim, land or the general public.
- If not imprisoned, offenders are more likely to be able to compensate the victims and make reparation to the community through useful unpaid work.
- It can also be seen as a way to enlighten offenders on what the society perceives as acceptable and unacceptable behaviour. In this way, their liberty can be restricted without putting them behind prison walls.
- If offenders are removed in prison from the responsibility, problems and temptation of everyday life, they are less likely to acquire the self-discipline and self reliance that will prevent future criminal activity.
- They gain work experience and learn their work can be useful and appreciated.
- Demand for costly institutional space is reduced.
- Participation of the community in the Criminal Justice System is facilitated.

#### SUGGESTED COMMUNITY SERVICE WORKS IN NIGERIA

- **Menial work**— This may involve sweeping and cleaning of public streets and facilities, tree planting, construction of community projects, such as schools, hospitals, recreation centers and collection and disposal of waste.
- **Professional/Skilled work:** Offenders who have special skills may be involved in projects that involve their skills such as carpentry, sewing, brick laying/ making, sewing, and other works as teaching, training and first aid.
- **Working with voluntary organizations or in government projects** involving building, painting, decorating, gardening, landscaping and environmental projects which may include cleaning and clearing of refuse.

#### ENSURING COMPLIANCE/EFFECTIVENESS OF COMMUNITY SERVICE ORDER

To ensure that this alternative to imprisonment is effective and achieves the purpose for which it is given, some laid down rules and regulations must be in place and enforced.

Failure to perform the community service as ordered, should lead to cancellation of the sentence and a fine or a prison sentence may be imposed in place of the remaining days for which the community service was to be performed.

If the community service order is contravened (violated), the order should be taken back to the court where the order was made, The court can then do any of the following

- Rescind the order and impose a fine
- Add extra time(hours) to the original work
- Rescind(cancel) the order and impose any penalty that is available in the first instance, which could be the original sentence of imprisonment.
- Subject the offender to appropriate tests; psychological or medical

#### CHALLENGES

There are challenges that may arise in implementing a community service order. The fears were expressed by participants during the sensitization programs organized by the Justice Development Peace Commission in Ibadan, Oyo State in 2011. The challenges include

- Proper supervision of offenders
- Inadequate number of personnel-probation officers, social workers
- Public perception of community service as insufficient punishment.
- The effect of absentism.

#### ENSURING COMPLIANCE WITHIN THE NIGERIAN CONTEXT

In ensuring compliance of a community service order, the offender may be required to report to or submit himself or herself to the supervision of:

- A collaborating Non Governmental Organisation (NGO)
- Family/ community head
- Religious bodies
- Social welfare

### CONCLUSION

At the international level, there are ongoing major reforms in the administration of justice sector. The shift from custodial to non custodial penalties is notable among the reforms. The problem of overcrowding, which is a global problem is being addressed by major stakeholders with a massive overhauling of the Prison system.<sup>71</sup> The cardinal reform of the 'Jonathan' administration is ongoing. However urgent steps must be taken to ensure the passing into Law, a Bill sponsored by a member of the House of Assembly which is "The Bill for an Act to provide for and Regulate Community Service for Offenders in Certain Cases and to Provide for Related Matters 2011" that is before the National Assembly.<sup>72</sup> This will make more sentencing options available for the judicial officers. Many state governments in Nigeria are rigorously making effort to introduce community service order as a sentence. The success of the ongoing reforms in the criminal justice system especially in the prison sector will require the support of all actors.

<sup>71</sup> Olaolu Olusina (2012) Nigerian Prisons: Death Traps or Reform Centres? 13 May 2012 reported in Thisdaylive. Available @<http://www.thisdaylive.com/articles/nigerian-prisons-death-traps-or-reform-centres-115669/> and retrieved on 28 May 2012

<sup>72</sup> [www.nassnig.org/nass2/legislation.php?id=1422](http://www.nassnig.org/nass2/legislation.php?id=1422) retrieved on 28 May 2012

## USING EXISTING INSOLVENCY FRAMEWORK TO DRIVE BUSINESS RECOVERY IN NIGERIA: THE ROLE OF THE JUDGES<sup>1</sup>

BY ANTHONY IDIGBE SAN<sup>2</sup>

### INTRODUCTION

The principal focus of modern insolvency legislation is no longer the liquidation and elimination of insolvent entities but the remodeling of the financial and organizational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business. In other words the focus is on business restructuring. The modern approach is to separate the business from the company and if the business can be saved then there should be procedure to save the business. By so doing employment may be saved and the business would continue to contribute to society through taxation, CSR, dividend payout, etc. The company on the other hand once separated from the business may be put under special administration, wound up or liquidated or allowed to continue without the business which may have been transferred to new managers or new company. In jurisdictions which have not caught the bug of restructuring and turnaround now prevalent internationally, the traditional approach to insolvency still favours clear bias towards liquidation of the business together with the company through collective and non-collective proceedings supported by a civil and criminal mechanism for collection or contribution against directors/officers of the company where fraud/recklessness or even negligence can be established in their carrying on with the business of the company<sup>3</sup> particularly in the twilight zone of the company.

In other jurisdictions where the insolvency regime has been reasonably modernized, like the United Kingdom or the United States, the business may continue under a declared protective arrangement while alternative options to achieve recovery are worked out. The protective arrangement may provide for a certain period of time or moratorium period for the debtor to be in possession or control of the assets under the supervision of the court and following a plan for turn around of the business (USA) or put in place a professional insolvency practitioner to administer the failing business beneficially and avert an avoidable winding up where there are clear prospects that the business itself remains viable and the insolvency may have been as a result of several factors including improper governance, mismanagement, act of God, force majeure, sudden adverse regulatory change of policy; intervention, etc (UK). Increasingly, modern insolvency laws have favoured the alternative debt resolution mechanisms that would save the business -and by extension the company- rather than kill it.

<sup>1</sup> Being paper presented at 2011 Federal High Court Judges Conference held at Sankuru Hotel Sokoto on 11<sup>th</sup> October 2011

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<sup>3</sup> See for instance in Nigeria Ss. 502. to 508 CAMA