SENTENCING IN CRIMINAL CASES IN NIGERIA
AND THE CASE FOR PARADIGMATIC Shifts

By

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Introduction

The criminal justice system in Nigeria starts to run with the commission of a crime and straddles subsequent interventions by agencies of the system such as arrest, arraignment, trial, sentencing and punishment of the offender. Given that the country operates under a federal arrangement, the processes are governed by an array of federal and state legislations. The Criminal Code Act¹ and the Criminal Procedure Act (CPA)² as well as the Criminal Code Laws and Criminal Procedure Laws (CPLs) apply in the Southern States of Nigeria except Lagos State³ while the Penal Code (Federal Provisions) Act⁴ and the Criminal Procedure Code⁵ apply as federal legislation in the Federal Capital Territory of Abuja and the Penal Code Laws of the

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¹. Head of Department of Case Law and Civil Litigations, NIALS, University of Lagos Campus, Lagos.
². Cap C38, Laws of the Federation of Nigeria (LFN), 2004. The Criminal Code Act and the CPA are federal legislation while the Criminal Code Law and CPLs are states legislations.
⁴. The author is aware that Lagos State Government passed the Administration of Criminal Justice Law, 2007 by which it repealed the former Criminal Procedure Law (CPL) of Lagos State, 1994 and that this law radically departs from the CPA and CPL in many aspects including sentencing. The author is also aware that as at the time of writing this paper, the Lagos State House of Assembly had passed a new criminal legislation which repeals the old Criminal Code. However, the author is unaware that as at the time of writing, it has received the necessary assent of the Governor to give it force of law.
State and Criminal Procedure Codes apply as state legislation the Northern states of the country. The provisions of the codes are similar in many aspects although there are some significant variations especially as there were, at the time of their introduction, some efforts to ensure that these pieces of legislation reflected responsiveness to the religious and traditional cultures of the different peoples in the different parts of the country.

Sentencing is a very broad field accommodating different approaches and ideas. Also, sentencing is an exercise of a discretionary power that is little guided in a country such as Nigeria. Hence, the power presents sentencees with a very wide playing field and accommodates individual inclinations and approaches or solutions to the same problem. The differences in approaches, however, become a problem in society when it presents the criminal justice system as irrational, inconsistent and unjust. The relatively recent concern with sentencing practice beyond the legal provisions undergirding it has paced by other experts aside lawyers and judges who have drawn attention to the importance of questioning both sentencing legislation and sentencing practice as well the philosophies or logic upon which these rest.

We note that this article is concerned with sentencing in criminal cases only. In other words, except in so far as is

6. We say relatively recent because even though the subjection of sentencing to academic scrutiny dates back to more than fifty years now, it is relatively recent given the historicity of sentencing as a judicial practice. For long, sentencing was left unscrutinised. First, it was described as an “art” suggestive that it was something that a person who is appointed as judge developed a “natural ability” for and one which only those exercised in the discipline could understand. Second, in that it was discretionary, it was difficult to make it subject to scrutiny without generating concerns about “fettering” discretion.

tangential, it avoids a discussion of treatment of *children in conflict with the law* (sometimes described as child offenders).\(^8\) It is also noted that Lagos State Government passed the Administration of Criminal Justice Law, 2007 by which it repealed the former Criminal Procedure Law (CPL) of Lagos State, 1994 and that this law radically departs from the CPA and CPL in many aspects including sentencing. However, this work is more concerned with providing a critical overview of sentencing law and practice under criminal process in Nigeria and so it retains a focus on the more general legal frameworks provided by the jointly shared CCs, PCs, CPLs and CPCs.

To guide the discussions in this work, we attempt to clarify some of the key concepts that underpin our discussion, namely: “sentencing” and “criminal trial” and this we do in the next section.

**Conceptual Clarification**

A sentence of the court can be defined as a definite disposition order issued by a court or other competent tribunal against a person standing trial, at the conclusion of a criminal trial, subsequent to the finding of guilt against him and must be an order\(^9\) which is definite in its nature, type and quantum.\(^10\) The Criminal Code and the Penal Code as well as other offence-creating statutes\(^11\) specify the quantum of

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8. The term “children in conflict with the law” is the preferred terminology in contemporary discourse and it replaces terms such as juvenile delinquent.


sentences while the sentences themselves find their legitimacy in the Criminal Procedure legislations applicable at the states and federal levels as well as the Probation of Offenders Law\textsuperscript{12} in the case of probation orders made in the Northern States.

The quanta of the sentences are specified in the offence-creating laws, with or without judicial discretion. For example, certain sentences can be made mandatory by law, leaving no discretion to the courts as is the case of death penalty for all the offences for which it is stipulated as the sentence\textsuperscript{13} or punishable with specified single terms of imprisonment.\textsuperscript{14} Furthermore, certain sentences are provided with specification of a range in each instance of a minimum term and a maximum term of imprisonment,\textsuperscript{15} while others just specify a statutory minimum punishment\textsuperscript{16} or a statutory maximum punishment.\textsuperscript{17} Apart from the few instances in

\begin{itemize}
\item \textsuperscript{12} Cap. 101 of the Laws of Northern Nigeria, 1963, section 5.
\item \textsuperscript{13} The various offences that are punishable by death across the Federation shall be outlined in the later part of this article.
\item \textsuperscript{14} E.g. section 2(2) of the Robbery and Firearms (Special Provisions) Act which punishes attempted robbery with life imprisonment.
\item \textsuperscript{15} E.g. section 2(1) of the Robbery and Firearms (Special Provisions) Act which prescribes “imprisonment for not less than fourteen years but, not more than twenty years” for attempted robbery; see also section 10(d) of the National Drug Law Enforcement Agency Act Cap 253 Laws of the Federation of Nigeria, 1990 which prescribes “imprisonment for a term not less than fifteen years but not exceeding twenty-five for possession or use of drugs.
\item \textsuperscript{16} See section 2(1) of the Exchange Control (Anti-sabotage) Act, Cap. 114, Laws of the Federation, 1990, which specifies a minimum of five years imprisonment for an individual in paragraph (a) and in paragraph (b) for a body.
\item \textsuperscript{17} The general pattern of punishments provided for in the Penal Code is to prescribe statutory maximum. The punishment provisions generally read as follows “…shall be punished with imprisonment for a term which may
which the above-mentioned approaches are taken by the law to stipulating the sentence for an offence the general principle is the respective laws simply prescribe terms of imprisonments and/or amounts of fine which are not statutorily expressed in terms of being a mandatory, minimum or maximum. However; the Interpretation Act has stated that these prescriptions shall be regarded as the statutory maximum penalties. Again, there are some instances where the sentences particularly fines the quantum extend to …years”. Richardson commented on section 68 of the Penal Code which deals with punishment and compensation thus:

The Code provides maximum punishment and except where it prescribes a death penalty for an offence, the convicting court is left to decide the adequate punishment. A proper proportion should be maintained between the seriousness of the crime and the punishment imposed. In a limited number of sections, the court is bound to pass a sentence of imprisonment and has no power on alternative sentence – The Pakistan and Sudan Codes permitted discretion in the passing of the death sentence but the Northern Nigerian Penal Code has followed English practice in not giving such discretion. Maximum sentences for offences in the Northern Nigerian Penal Code are in many instances higher than the Pakistan or Sudan equivalents in order that penalties in the Northern Region should be equated with those imposed for similar offences under the Nigerian Criminal Code….


18. See, for example, the tariff of punishment prescribed in the Criminal Code where the punishment provision reads as follows “……is liable to imprisonment for……years or to a fine of .....Naira” although the punishment of imprisonment and fine are usually combined. Reference a particular section for an illustration to enhance clarity like you did for the PC.

19. Section 17 (10) , Cap. 192 LFN, 1990 ( now equivalent to section 17 Cap. 123, Laws of the Federation, 2004). Why not just use 2004 LFN to cite throughout this work.
of which are not specified, the approach is that the sentences, in each case is limited but that it shall not exceed the jurisdiction of the court imposing it and it shall not be excessive.20

A criminal trial may be defined by reference to the nature of the subject of dispute before the court or by reference to the features of the procedure employed in the hearing of the case. In other words, a criminal trial is a trial that the dispute revolves round an act or an omission that has been defined in a piece of legislation as a crime (an alternative word as may be used is “offence”).21 It is also a trial where the rules of criminal procedure as against the rules of the civil procedure apply. One such distinguishing rule relates to the standard of proof; while civil procedure rules require only that a person asserting a claim establish his case on a balance of probabilities, criminal procedure rules require that the prosecution establishes its case beyond reasonable doubt. But probably more relevant to our discussion is the requirement in a criminal trial that a court finds guilt and upon conviction, it “sentences” the offender to a punishment of one form or another. One other general feature of a criminal trial is that the complainant who prosecutes the case against the defendant is not the private individual but the state in the name of the people or the community as a whole.22 The right of the state or the people to proceed against an offender was so well-guarded that it was in fact an offence for a direct victim to negotiate the compensation of his victimization with a promise of foreclosure of reporting the crime to the

20. Section 72 of the Penal Code. See further, M.A.Owoade, op. cit. and Adeyemi, op. cit.
22. This general rule is, of course, subject to the limited opportunities permitted by law for private prosecution. In Nigeria, with the exception of Lagos State, there is no right of the private prosecution and all criminal cases must be prosecuted by the state.
police.\textsuperscript{23} This general feature is now, increasingly being affected by developments such as formalization of alternative dispute resolution which is made applicable to cases involving crimes as well and an elaboration of victim rights and remedies.

**Objectives and Principles of Sentencing**

Sentencing generally aims at the protection of the society through prevention of crime or reform of the offender which may be achieved by the means of deterrence, elimination or reformation/rehabilitation of the offender.\textsuperscript{24} The justification is that imposing the penalty will reduce the future incidence of such offences, by preventing the offender from re-offending or correcting the offender so that the criminal motivation or inclination is removed or by discouraging or educating other potential offenders. These are known as reductive justification.\textsuperscript{25}

Sentencing guidelines are designed to indicate to judges the expected sanction for particular types of offences. They are intended to limit the sentencing discretion of judges and to reduce disparity among sentences given for similar offences.\textsuperscript{26} Although statutes provide a variety of sentencing options for particular crimes, guidelines attempt to direct the Judge to more specific actions that could be taken.\textsuperscript{27}

\textsuperscript{23} The relevant offences were known as compounding a felony and misprision of a misdemeanor.


\textsuperscript{26} Hon Justice M.A.Owoade, *op. cit.* p.25.

\textsuperscript{27} *Ibid.*
The Supreme Court in Nigeria has laid down some basic principles to guide the sentencing functions of the Appellate Courts. The principles are as follows:

(1) an Appeal Court should not interfere with a sentence which is the subject of an appeal merely because the judges of the Court of Appeal might have passed a different sentence if they had tried the case in the first instance;\(^2\)\(^8\)

(2) to consider the facts of the particular case and (3) to review only a sentence that is manifestly excessive or inadequate or wrong or wrong in law.\(^2\)\(^9\)

The above principles have been analyzed as follows: The first of these principles has been said to establish that mere difference of opinion does not suffice for an Appeal Court to reverse the sentence of a lower Court. The second principle proposes a form of “individualization of treatment, namely that a Court does not necessarily have to adopt a sentencing approach that has been adopted in an earlier case. The third principle is positively operative and some of the applying factors which have been enunciated by the Courts are the nature of the offences, the character and record of the offender, the position of the offender amongst his confederates, and the rampancy of the offence.\(^3\)\(^0\)

Moreover, there are some basic rules governing sentencing:

(a) Separate offences charged together must each receive a separate sentence but if they all form part of the same criminal action, the sentence will be concurrent;\(^3\)\(^1\)

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\(^2\)\(^8\). Per Ademola, C.J.N. \textit{Adeveye & Anor v. The State} (1968) N.M.L.R. 87.

\(^2\)\(^9\). \textit{State v. Hassan Adu} (1972) 1 All N.L.R.(PT.2) 197.

\(^3\)\(^0\). Hon. Justice M.A.Owoade, \textit{op.cit.} p.25.

\(^3\)\(^1\). \textit{Anowele v. The State} (1965) All N.L.R 100.
(b) Where a term of imprisonment in default of fine is ordered, it cannot run concurrently with a sentence of imprisonment imposed at the same time or with default sentence in respect of another fine;\(^{32}\)

(c) A fine must not be too heavy for the offender to pay;\(^{33}\)

(d) Separate fines imposed on different counts at the same trial are to be cumulative. But the aggregate must be within the Court’s jurisdiction;\(^{34}\)

(e) While the age of the offender,\(^{35}\) being a first offender, pleading guilty to the charge\(^{36}\), may all sustain a plea in mitigation of sentences, conversely, the fact of previous conviction\(^{37}\), the prevalence of the offence\(^{38}\), the seriousness of the offence\(^{39}\), the non repentant attitude of the offender\(^{40}\) and the adverse effect of the offence on the victim are all factors that aggravate sentence.\(^{41}\)

**Sentences**

In this section of the paper, we briefly analyse the types of sentences that may be imposed on a convicted person in

\(^{32}\) Section 389, C.P.A and Section 73. Penal Code.


\(^{34}\) Fashusi v. Police (1953) 2 N.L.R.126.


\(^{37}\) R. v.Enahoro 12 W.A.C.A. 194


\(^{39}\) R v Okeke 1936 3 W.A.C.A 1.

\(^{40}\) Adeyeye v. The State (supra)

Nigeria. It is a universal truth that the great and first sentence known to world history was imposed by our Creator Himself. When our first parents strayed from straight and narrow path of rectitude by breaching the first law ever handed down to man, they were promptly tried, convicted and sentenced to punishment accordingly.\(^{42}\)

After an accused person is convicted of an offence, the Magistrate or Judge must pass a sentence on him. The sentence passed must be one prescribed for the offence under the statute creating it\(^{43}\). The sentences provided for under the law are death, imprisonment, fine, canning, and forfeiture. We examine some aspects of these sentences below.\(^{44}\)

**Death**

Under Nigerian criminal law various offences are punishable by death across the Federation including murder,\(^{45}\) treason,\(^{46}\) and treachery,\(^{47}\) conspiracy to commit treason,\(^{48}\) directing and controlling or presiding at an unlawful trial by ordeal which results in death\(^{49}\) and armed robbery.\(^{50}\) More recently, kidnapping has been added to the list in Abia, Imo and Akwa Ibom States\(^{51}\) and oil theft and crude oil bunkering in Rivers

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CC section 17; PC, Section 68(1). Other statutes creating offences impose sentences but is noteworthy that none of these instruments


Section 37(1) of the Criminal Code; Section 410 of the Penal Code.

Section 49A of the Criminal Code.

Section 37(2) of the Criminal Code; section 411 of the Penal Code.

Section 208 of the Criminal Code.


and Enugu States. The introduction of Sharia-based criminal law in some States in Northern Nigeria has also widened the number of capital offences to include adultery, sodomy, lesbianism and rape.\(^5\)

Where the death sentence is specified for an offence in Nigeria, it is a mandatory and not merely a permitted punishment upon a finding of guilt. The judge has no discretion in the matter, after an accused has been found guilty of a capital offence; the only sentence open to the court to impose is one of death.\(^5\) It is the highest punishment that can be passed on a convicted person for the above enumerated capital offences.

**Section 221 of the Penal Code** provides as follows:

Except in the circumstances mentioned in section 222 culpable homicide shall be punished with death:

(a) If the act by which the death is caused is done with the intention of causing death, or

If the doer of the act knew or had reason to know that death would be the probable and not a likely consequence of the act or of any bodily injury which the act was intended to cause.

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\(^{52}\) Kano State Sharia Penal Code 2000.

Section 319 of the Criminal Code also provides thus:
“Subject to the provisions of this section of this Code, any person who commits the offence of murder shall be sentenced to death”.

When a person is sentenced to death, the court must direct that he be hanged by the neck till he is dead. However, failure to pronounce a sentence of death in the stipulated form is a mere irregularity, which does not invalidate the judgment, provided it is clear from the record that a sentence of death was passed on conviction.

There are two exceptional instances when the general rule that death is the mandatory punishment to be imposed on an accused convicted of a capital offence may not apply. These are:

a) Where a woman found guilty of a capital offence is found in accordance with the provisions of section 376 of the Act, to be pregnant, the sentence of death shall not be passed on her, but in lieu thereof, she shall be sentenced to imprisonment for life, and

b) Where an offender who in the opinion of the court had not attained the age of 17 years at the time of the offence was committed is found guilty of a capital offence, sentence of death shall not be

55. It is manifestly clear from the above provisions that the Penal Code is more detailed than the Criminal Code. While section 221 of the Penal Code creates two distinct offences of culpable Homicide which carry the same death penalty, section 319 of the Criminal Code Act does not. Hence, a charge brought against any person under section 221 of the Penal Code must specify under which arm it is brought to avoid duplicity in the charge.
56. Section 367, CPA; CPC, s.273.
58. Section 368 (2), Cap.C41, Laws of the Federation, 2004; CPC, s.272 (1).
pronounced or recorded, but in lieu thereof, the court shall order such person to be detained during the pleasure of the President and if so ordered he shall be detained in accordance with the provisions of the Act.\textsuperscript{59} Under the CPC, the convict must be under the age of 17 at the time of committing the offence\textsuperscript{60} while under the CPA, the convict must be under the age of 17 at the time he was convicted of the offence.\textsuperscript{61} It is noted though that these positions of the law relating to minimum age of offenders sentenced to death are now significantly altered by the enactment of the Child Rights Act (2003) at the federal level and the Child Rights Laws by some states, which laws raise the age when a person may be sentenced to death to 18 years.

The court is empowered by law\textsuperscript{62} to make due inquiry into the age of a person before it so that the question of the age of the accused for the purpose of deciding whether or not capital punishment shall be passed is a question for the court to answer. There is, therefore, no burden of proof of this issue on either the prosecution or the accused.\textsuperscript{63}

When a person is ordered to be detained at the pleasure of President or Governor, he is liable to be detained in such place and under such conditions as the President may at any time be discharged by the President on licence. A licence may, at any time, be revoked, in which case the person to whom the licence relates must proceed to such place as the

\begin{itemize}
  \item Section 368(3) \textit{ibid.}
  \item CPC, s. 272(1).
  \item Section 368(3) \textit{op.cit, also, see the case of } \textit{R v. Bangaza 5 F.S.C.1.}
  \item CPA, s.208.
  \item \textit{Oladimeji v. The Queen} (1964) 1 All N.L.R.131.
\end{itemize}
President may direct, and if he fails to do so, may be arrested without warrant and taken to such place.  

An offender who is sentenced to death by the trial court may not be executed until he has exhausted all opportunities afforded by his legal rights relating to appeal against conviction and sentence. In other words, the fate of an accused sentenced to death is not finally sealed by the pronouncement of a trial court. There is, at first, the opportunity offered by appeals whereby the merits or otherwise of the conviction may be scrutinized by the higher courts. Also, where a sentence of death is passed on a convicted person, it must be confirmed by the Governor or the specified appropriate authority before it is executed. The judge who passed sentence must, as soon as practicable after sentence has been pronounced, transmit to the Attorney-General a certified copy of proceedings at the trial, together with a certificate stating that a sentence of death has been passed on the accused, and a report in writing containing any recommendations with respect to the sentenced person and with respect to the trial that he thinks fit to make.

Although the death sentence is a mandatory sentence imposed upon a finding of guilt for a capital offence, it is noted that to the extent that there is a statutory requirement of approval of the sentence, many persons sentenced to death are not, in fact, executed for a variety of reasons. There are Advisory Councils on the Prerogative of Mercy in each of the States of the Federation. In respect of federal offences, the Council of States is the body responsible for exercising the Prerogative of Mercy. The Attorney-General may recommend to the Governor after considering the report of

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64. C.P.A, s.401; C.P.C, s .294(1).
66. CPA, s. 371 ; C.P.C, s. 294(1).
the Advisory Council the commutation of any sentence. Usually, the commutation recommended for the death sentence is to imprisonment for life although nothing precludes, a recommendation that the sentence should be commuted to any specific period or that the convicted person should be otherwise pardoned or reprieved. 68

However, where the convicted person has not had his conviction overturned on appeal and he is not pardoned or reprieved, the sentence of death pronounced upon him should be carried into effect. 69 However, it would appear that, at present in Nigeria, there is an undeclared moratorium on executive approval of death sentences. It is on record that there have been few states in which official executions in furtherance of court orders have taken place in the last decade. It is notable also that in this period, there has been increased clamour for the complete abolition of the death penalty. 70

Deterrence, incapacitation, retribution and frustration are among some of the various arguments canvassed to justify the legitimacy of the death penalty in Nigeria, while others have vehemently opposed it. It is beyond the purview of this article to discuss or engage arguments extensively. However, we note that there is a wide array of information including data provided in the following tables to guide the debate on the desirability or otherwise of death penalty in Nigeria.

68. C.P.A, s.371; C.P.C s.295.
69. C.P.A, s.371F; C.P.C. s. 298.
Table 1: The Offences and Population of Prisoners on Death Row in Nigerian Prisons (1996-2005)

<table>
<thead>
<tr>
<th>Year</th>
<th>Armed Robbery</th>
<th>Robbery</th>
<th>Murder</th>
<th>Criminal Homicide</th>
<th>Treason</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>240</td>
<td>120</td>
<td>140</td>
<td>20</td>
<td>25</td>
<td>615</td>
</tr>
<tr>
<td>1997</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>1998</td>
<td>182</td>
<td>169</td>
<td>202</td>
<td>24</td>
<td>NA</td>
<td>577</td>
</tr>
<tr>
<td>1999</td>
<td>286</td>
<td>120</td>
<td>130</td>
<td>115</td>
<td>NA</td>
<td>651</td>
</tr>
<tr>
<td>2000</td>
<td>150</td>
<td>80</td>
<td>170</td>
<td>35</td>
<td>NA</td>
<td>435</td>
</tr>
<tr>
<td>2001</td>
<td>105</td>
<td>85</td>
<td>105</td>
<td>20</td>
<td>NA</td>
<td>315</td>
</tr>
<tr>
<td>2002</td>
<td>230</td>
<td>73</td>
<td>136</td>
<td>36</td>
<td>Na</td>
<td>475</td>
</tr>
<tr>
<td>2003</td>
<td>203</td>
<td>102</td>
<td>140</td>
<td>60</td>
<td>Na</td>
<td>505</td>
</tr>
<tr>
<td>2004</td>
<td>238</td>
<td>70</td>
<td>190</td>
<td>44</td>
<td>NA</td>
<td>542</td>
</tr>
<tr>
<td>2005</td>
<td>194</td>
<td>160</td>
<td>179</td>
<td>40</td>
<td>NA</td>
<td>573</td>
</tr>
</tbody>
</table>

Source: Nigerian Prison Service

Table 2: Number of Condemned Prisoners by Gender and Methods of Execution in Nigerian Prisons (1995-2005)

<table>
<thead>
<tr>
<th>Year</th>
<th>Numbers of Prisoners on Death Row Armed</th>
<th>Method of Execution</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>1995</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1996</td>
<td>593</td>
<td>22</td>
</tr>
</tbody>
</table>

Arguably, if the death penalty in fact deters, its abolition for a particular offence should result in an increase in the commission of the offence and its imposition for a previously non-capital offence should result in a decrease. Yet, available evidence does not support this contention in all the jurisdictions where the penalty has been abolished. In Canada, for instance, it was found that in 1986, 10 years after the abolition of the death penalty, the homicide rate was lower than at any time in the previous 15 years. By 2003, 27 years after abolition, the murder rate had dropped by 44%.

Closer to home, in a study undertaken by Professor A.A.Adeyemi, it was found that the average rate of armed robbery actually increased by 12.5% in the 16 year period 1971-1985 after the introduction of capital punishment for...
the offence.\textsuperscript{75} What these studies show is that fluctuations in crime rates depend on a wide range of other factors such as poverty, unemployment, urbanization etc beyond simply whether or not the punishment is death.\textsuperscript{76}

\textbf{Imprisonment}

Imprisonment can be defined as a term of judicial sentence available for a convicted offender of adult age, involving incarceration in prison for either life or a specified period of time. Imprisonment became the dominant form of punishment with the birth of the classical school. It replaced the cruel and unusual death sentences for most crimes of the eighteenth century Europe\textsuperscript{77}.

A term of imprisonment may be imposed with or without hard labour. Where no specific order is made, it is deemed to be with hard labour.\textsuperscript{78} The term of imprisonment imposed by the court must not exceed the maximum prescribed for the offence and, it must not exceed the maximum which the court has jurisdiction to impose. These are particularly important qualifications to the sentencing powers of the court. The court has the discretion to impose a sentence of imprisonment for less than the maximum prescribed for the offence, unless the statute creating the offence prescribes a minimum punishment for the offence. In the latter instances, the court has no discretion in the imposition of sentence. It cannot

\begin{itemize}
\item \textsuperscript{75} A.A.Adeyemi: "Death Penalty": Criminological Perspectives: The Nigerian Situation', in Revue Internationale de Droit Penal Vol. 58 nos 3 and 4 (1987) at pp. 489- 494.
\item \textsuperscript{76} Isabella Okagbue, \textit{op. cit.}
\item \textsuperscript{77} Abdul-Rahman Bello Dambazau, \textit{op. cit.} p.326.
\item \textsuperscript{78} C.P.A. s.377. There has been some questioning of whether the imprisonment with hard labour does not violate the right to human dignity and the right not to be subjected to cruel and unusual treatment or punishment. It has also been contended that the exaction of hard labour may undermine the goal of rehabilitation which is current mission of the prisons system.
\end{itemize}
impose a sentence of imprisonment lower than the minimum sentence prescribed.\textsuperscript{79} Similarly, where a court has jurisdictional limits in the sense that it has limits on its powers to sentence, which is typically the case for magistrates, it cannot exceed its jurisdictional limits in sentences. To illustrate, if an offence is punishable with 7 years imprisonment as the statutory maximum and it is tried before a magistrate with power to impose no more than 3 years imprisonment, the magistrate cannot sentence the offender to more than 3 years imprisonment even if he or she believes that the circumstances of the offence requires heavier sentence and even though the offence may be punished much more.\textsuperscript{80} The jurisdiction of a magistrate to impose sentence is as laid down in the Magistrates’ Court Laws of the various States and the magistrate must not exceed his jurisdiction to impose punishment as stated in these laws\textsuperscript{81}. The jurisdiction of a High judge to impose a sentence is, however, unlimited and such judge can imposes a sentence not exceeding the maximum prescribed for the offence.

A sentence can be passed or imposed on an accused person already serving a prison term. Such a sentence would commence at the expiration of the subsisting sentence.\textsuperscript{82} Where several sentences of imprisonment are passed, in computing the sentences, only the longest of the subsequent sentences would be served by the convict, and not the aggregate of the entire subsequent sentence.\textsuperscript{83} Section 380 of the CPA empowers the court to pass consecutive sentences of

\textsuperscript{79} Oluwatoyin Doherty, \textit{op.cit.} p.320.
\textsuperscript{80} In England, the way round the problem of jurisdictional limit is that the magistrate court that convicts may remit the case to a higher court for sentencing……
\textsuperscript{81} Oluwatoyin Doherty, \textit{op. cit.} p.322.
\textsuperscript{82} \textit{Ibid}.s.380.
\textsuperscript{83} Oluwatoyin Doherty, \textit{op.cit.}
imprisonment or to order that any sentence of imprisonment passed by it on accused should commence at the expiration of any other term to which that accused person has been previously sentenced.\textsuperscript{84} Sentences of imprisonment on separate counts of a charge are either consecutive or concurrent where if they are ordered to be served simultaneously. If the offences charged in the separate counts arose out of the same transaction,\textsuperscript{85} the sentences of imprisonment be consecutive and not concurrent\textsuperscript{86}

A sentence of imprisonment cannot be imposed on any person less than fourteen years of age. Section 69 of the Penal Code provides:

No sentence of imprisonment shall be passed on any person who in the opinion of the court is under fourteen years of age.

Some offences attract prison terms only while some other attract imprisonment with the sentencing court having the power to impose a fine in addition.\textsuperscript{87} Other offences attract terms of imprisonment but with an option of fine in lieu. In the latter case, the court may not use the penalty of imprisonment but opt to use the fine instead.

A court may sentence a person convicted of an offence to a term of years of imprisonment or to life imprisonment. When a person is sentenced to life imprisonment, in practice, the sentence is equivalent to a sentence of imprisonment for 20 years.\textsuperscript{88} A sentence of imprisonment takes effect from and

\begin{itemize}
  \item \textsuperscript{84} \textit{R. v. Salvage} (1952) 20 NLR 55.
  \item \textsuperscript{85} See C.P.A. Sections 158 or 160.
  \item \textsuperscript{86} \textit{Runsewe v. Police} (1968) NMLR 112.
  \item \textsuperscript{87} Examples of this class of offences are Rape and Criminal Breach of Trust.
  \item \textsuperscript{88} P.C. s. 70; \textit{Ozuloke v. The State} (1965) NMLR 125.
\end{itemize}
includes the whole of the day of the date on which it was pronounced.  

Where a sentence of imprisonment is passed on a convict, the court must issue a warrant of commitment, committing him to prison. A term of imprisonment imposed by a court must be served in an officially designated prison or other place of safe custody.

The Purposes of Imprisonment

According to Nigel Walker, imprisonment is used for 9 purposes:

a. To hold people until they can be tried, sentenced or taken to the place to which they have been sentenced, or until they can be extradited or deported;

b. To coerce people into compliance with the orders of the court. The commonest example is its use for non-payment of fines;

c. As a sentence, to protect members of the public from offenders by ‘taking them out of circulation;

d. As a sentence, to securely keep a person long enough to make possible a prolonged course of treatment;

e. As a sentence, to act as an individual deterrent: that is, in the hope that the memory of the experience will discourage the ex-prisoner from risking another sentence;

89. C.P.A. ss. 381 and 395.
90. See definition of prison in ... Prisons Act, Cap P....
91. C.P.A. s. 239. Such other place of safe custody would be the Borstal Institution. See....
93. This is not imprisonment as a sentence of court. In this sense, imprisonment is used as a term to describe the holding of a person in a place designated a prison without reference to the reason for the holding.
f. As a sentence, to act as a general deterrent: that is, to discourage others who might break the law in similar ways;
g. As a sentence, to symbolize degrees of disapproval of the offence;
h. As a sentence, to inflict retributive punishment and
i. In exceptional cases, to protect a very unpopular offender against retaliation by victims or sympathizers of victims. It is noted though that not all such prisoners, however, are safe inside the prison. It is not unknown that some types of offenders, e.g. child sex-offenders, are more vulnerable to attacks by fellow-inmates.

Fine
The word fine originated from the Latin word, finem facere, meaning ‘to put an end to’. Fine as a form of punishment in the modern criminal justice system originated in England in 1275, when the English courts began to permit convicts to be released from prison upon the payment of a required amount of money. By definition therefore, fine is a payment of money ordered by a court from a person who has been found guilty of violating law. It may be specified as the a punishment for an offence, usually a minor offence, but could also be specified and used as an option to imprisonment for major crimes or a complement to other punishments specified for such crimes. The offences for which the fine only is imposed as sentence under the Criminal Code are:

(a) Advertising a reward for the return of stolen or lost property;
(b) Uttering defaced coin;

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95 CC, s.129.
96 Ibid, s.160.
(c) Unlawful franking of letters\textsuperscript{97};
(d) Obstructing mails\textsuperscript{98};
(e) Loitering and carelessness in delivery of mails\textsuperscript{99};
(f) Fraudulently removing stamps\textsuperscript{100};
(g) Fraudulent evasion of postal laws\textsuperscript{101};
(h) Carrying letters otherwise than by post\textsuperscript{102};
(i) Illegally making postal envelopes\textsuperscript{103}; etc.

Some of the offences for which only fine is prescribed as sentence under the Penal Code include selling food or drink not corresponding to description;\textsuperscript{104} offences relating to ships;\textsuperscript{105} fraudulent evasion of postal laws;\textsuperscript{106} illegally setting up a post office;\textsuperscript{107} damaging a post office;\textsuperscript{108} etc.

The sentence prescribed for an offence may be a fine, or imprisonment or both.\textsuperscript{109} The courts may also impose a sentence of a fine in lieu of imprisonment, where a sentence of imprisonment is prescribed for the offence.\textsuperscript{110} Where only a sentence of fine is prescribed for an offence, it is imperative that that is the sentence imposed by the court for the offence.

In imposing a sentence of fine, the court is to be guided by the following:

\textsuperscript{97} Ibid, s.169.
\textsuperscript{98} Ibid, s. 172.
\textsuperscript{99} Ibid, s. 173.
\textsuperscript{100} Ibid, s. 174.
\textsuperscript{101} Ibid, s. 175.
\textsuperscript{102} Ibid, s. 176.
\textsuperscript{103} Ibid, s.177.
\textsuperscript{104} P.C., s.185.
\textsuperscript{105} Ibid, s. 429.
\textsuperscript{106} Ibid, s.461.
\textsuperscript{107} Ibid, s.464.
\textsuperscript{108} Ibid, s.465.
\textsuperscript{109} C.P.A, s.389; P.C., s.74.
\textsuperscript{110} C.P.A, s.382(1); CPC, s.23(1).
1. It should take into consideration the financial means of the convicted person.\(^{111}\) A heavy fine should not be imposed on a man of low or modest income. If a heavy fine is imposed on a convicted person of low income, the imposition of the fine is illusory because his inability to pay the fine will lead to default and if he defaults in the payment of the fine, he would have to serve a term of imprisonment.\(^{112}\)

2. It must not exceed the maximum fine prescribed for the offence. When a convicted person sentenced to a fine is unable to pay the fine immediately, the court may allow him time for the payment of the fine or it may direct that the fine be paid instalmentally. The court may also direct that the convicted person be at liberty to give to the satisfaction of the court, security, either with or without a surety or sureties for the payment of the fine or any installments of it.\(^{113}\) Also, where a convicted person fails to pay the fine imposed on him, and the fine is not recoverable in full by distress, the court can impose a sentence of imprisonment in default of payment of a fine.\(^{114}\) Where a part of the fine has been recovered by distress, the period of imprisonment ordered to be suffered in default of recovery of the whole fine is reduced accordingly and should bear the same proportion to the full period as the amount recovered bears to the total amount ordered to be recovered.\(^{115}\) A convicted person cannot be sentenced to imprisonment for over two years for default in payment of a fine, except where the law under which the conviction was based allows a longer period.\(^{116}\)

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111. C.P.A., s. 391, P.C. s. 72.
113. C.P.A.,s. 392(1);C.P.C. s.306(1) and (2).
114. Ibid, s. 390(1); ibid, s.73.
115. Ibid, s. 400.
116. Ibid, s. 390(3).
lieu of imprisonment in accordance with s. 382(1) of the CPA, in default of payment of such fine, the convicted person may be sentenced to imprisonment by a High Court to a term not exceeding two years, and by a Magistrates’ Court to a term of imprisonment equivalent to the fine on the scale specified in s. 390(2) of the CPA. The scales of imprisonment which may be awarded for non-payment of fines as laid down by section 390(2) of the CPA are as follows:

Where the fine:
The period of imprisonment shall not exceed:

<table>
<thead>
<tr>
<th>Where the fine:</th>
<th>Period of Imprisonment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not exceed one naira</td>
<td>seven days;</td>
</tr>
<tr>
<td>Exceeds one naira and does not exceed two naira</td>
<td>fourteen days;</td>
</tr>
<tr>
<td>Exceeds two naira and does not exceed twenty naira</td>
<td>one month;</td>
</tr>
<tr>
<td>Exceeds twenty naira and does not exceed sixty naira</td>
<td>two months;</td>
</tr>
<tr>
<td>Exceeds sixty naira and does not exceed one hundred naira</td>
<td>four months;</td>
</tr>
<tr>
<td>Exceeds one hundred naira and does not exceed two hundred naira</td>
<td>six months;</td>
</tr>
<tr>
<td>Exceeds two hundred naira and does not exceed four hundred naira</td>
<td>one year;</td>
</tr>
<tr>
<td>Exceeds four hundred naira</td>
<td>two years.</td>
</tr>
</tbody>
</table>

In England, the period of imprisonment is on the amount of the fine. Thus, the maximum periods permitted for default by Schedule 4 of the Magistrates Courts Act 80 as amended are:

For an amount not exceeding

Period
Section 75 of the Penal Code provides that where a fine or any part of the fine remains unpaid the offender is not discharged from liability to pay the fine or the unpaid part of it, notwithstanding that he has served a term of imprisonment in default of payment of a fine. Therefore, under the Penal Code, default in payment of a fine is regarded as a contempt of court. The convicted person who serves a term of imprisonment in default of payment of the fine is still expected to purge himself of the contempt by paying the fine imposed upon him. Therefore, the imprisonment in default of payment of a fine is not an alternative to the payment of the fine under the Penal Code as it is under the CPA. In the United Kingdom, as soon as the Magistrate Court imposes a fine it becomes due for payment; and some offenders pay their fines before leaving the court. In some cases magistrates who suspect that the offender will evade payment use their power to order a search of his person. However, in certain circumstances a Magistrates’ Court can issue a warrant of commitment to prison for default as soon as it has convicted the offender, so that he is under immediate threat of imprisonment unless he pays.¹¹⁷ This is permissible in the case of an imprisonable offence if he appears to the court to have sufficient means to pay.¹¹⁸

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¹¹⁷. Section 82 of the Magistrates’ Court Act.
Fine as a means of punishment is economical, both in terms of the costs of its enforcement. It requires much less funds and human resources for its enforcement when compared to alternative forms of punishment. Another advantage of it is that it does minimal social damage to the offender and his family, because it mostly does not interrupt his job, leisure or family ties. However, some critical observations have been made in respect of the imposition and administration of fine. These include that:

(i) Unless fines are closely related to the means of those ordered to pay them, they are unjust as between individuals, and the injustice increases with the scale of fines;
(ii) Fines are not always practical alternatives; because the offender may not be able to pay, therefore, end up in prison;
(iii) Some people may regard fines as no more than occupational risks, virtually giving them the licences to carry on with their illegal activities, since it is minor tax for huge profits;
(iv) Enforcement is all too often haphazard and the prompt identification and pursuit of defaulters is a more critical element in enforcement than the particular measures, which are employed;
(v) Recourse to imprisonment is neither necessary nor inevitable, and manifestly unjust in its consequences.

**Caning or Whipping**

Caning is another form of punishment which the courts are empowered to impose although it is important to note here that as a form of sentence, it has generally fallen into disuse.

Caning may be considered for use as a punishment, or it may be in lieu of any punishment or it may be in addition to other punishment. The courts may pass a sentence of caning of up to twelve (12) strokes.\textsuperscript{121} Where a person is convicted of one or more offences at one trial, the total number of strokes awarded must not exceed 12.\textsuperscript{122} The number of strokes passed must be specified in the sentence.\textsuperscript{123} Females and old men are excluded from this type of punishment especially in the Eastern part of Nigeria.

Caning is applied with a light rod or cane or both\textsuperscript{124} and should be inflicted in the presence of an administrative or person prescribed by the Secretary to the Local Government\textsuperscript{125}. No sentence of caning can be executed in instalments.\textsuperscript{126} If before the execution of sentence of caning, it appears to the administrative officer that the convict is not in a state of health to undergo the sentence, he can stay the execution, and the court which passed the sentence may either, after taking a medical opinion, again order the execution of the sentence or substitute for it any other sentence which it could have passed at the trial\textsuperscript{127}. If during the execution of a sentence of caning, it appears to the administrative officer that the convict is not in a state of health to undergo the remainder of the sentence, the caning can be stopped immediately and the remainder of the sentence remitted.\textsuperscript{128}

A sentence of caning should be carried out as soon as practicable, unless the person convicted gives notice of appeal of his intention to apply for leave to appeal, as the

\begin{footnotesize}
\begin{enumerate}
\item[121.] C.P.A., s. 386(1); P.C., s.77.
\item[122.] Ibid, s. 386(2).
\item[123.] C.P.A., s.386 (1).
\item[124.] Ibid, s. 386(1); C.P.C. s. 308(5).
\item[125.] CPC, s. 308(2).
\item[126.] Ibid, s. 308(3).
\item[127.] Ibid, s. 309(1).
\item[128.] Ibid, s.309 (2).
\end{enumerate}
\end{footnotesize}
case may be, in which case such punishment must not be carried out until the determination of the appeal or of the application for leave to appeal\textsuperscript{129}. The convict may be released on bail or kept in custody pending the determination or of the leave to appeal\textsuperscript{130}. Where the sentence is affirmed or varied on appeal, the sentence as confirmed or varied should be carried out as soon as practicable\textsuperscript{131}.

**Forfeiture**

Forfeiture may be more in the nature of an ancillary order made after conviction than a substantive sentence. It is usually imposed in the case of offences involving bribe, where the property which has changed hands in the course of commission of such an offence may be ordered to be forfeited to the state\textsuperscript{132}. It is further provided thus:

> Where any person is convicted of an offence under sections 98, 99, 112, 114, 115, 116, 117, 126, 128 or 494, the court may in addition to, or in lieu of, any penalty which may be imposed order the forfeiture to the State of any property which has passed in connection with the commission of the offence or if such property cannot be forfeited or cannot be found, of such sum as the court shall assess as the value of such property, and any property or sum so forfeited shall be dealt with in such manner as the Attorney-General may direct. Payment of any sum so ordered to be forfeited may be enforced in the same manner and

\textsuperscript{129} Oluwatoyin Doherty, *op. cit.* p. 326.
\textsuperscript{130} CPA, s.388 (1); CPC, s. 310(2) and (3).
\textsuperscript{131} CPA, s. 388(2).
\textsuperscript{132} Fidelis Nwadialo, SAN, *op.cit.* p. 231.
subject to the same incidents as in the case of the payment of fine. 133

Some of the offences for which forfeiture is prescribed as a sentence under the Criminal Code are as follows:

(a) Importation of prohibited publication; 134
(b) Unlawful society; 135
(c) Going armed so as to cause fear; 136
(d) Possession of instruments and materials for forgery; 137
and
(e) corruption 138

Similarly, some of the offences for which forfeiture as a sentence is prescribed under the Penal Code are as follows:

(a) wearing and carrying of emblem or flag contrary to any law 139;
(b) sale of obscene books 140;
(c) adulteration of food and drink 141;
(d) sale of noxious food and drink 142;
(e) adulteration of drugs 143; and
(f) sale of adulterated drugs 144

The Economic and Financial Crimes Commission (Establishment) Act 145, provides for forfeiture 146 after

133. CC, s. 19.
134. CC, s. 58(1).
135. Ibid, s.68.
136. Ibid, s. 88.
137. Ibid, s.480.
138. Ibid, s. 19.
139. PC, s 111.
141. Ibid, s. 186.
142. Ibid, 187.
143. Ibid, s. 188.
144. Ibid, s.189.
conviction in certain cases of the proceeds acquired from illegal act to the Federal Government.

**Theories of Punishment-The Justification of Punishment**

The question is why do offenders get punished? In order to satisfactorily answer the question, four main theories of punishment will be briefly discussed. They are:

1. Deterrence
2. Incapacitation
3. Rehabilitation and
4. Restitution.

**Deterrence**

Bentham felicific calculus posits that every person…conducts himself, albeit unknowingly, according to a well or ill-made calculus of pleasures and pains. Should he foresee that a pain would be the consequence of an act which pleases him; this would act with a certain force so as to divert him from that action. If compared to the total value of the pleasure, the repulsive force is greater, the act would not occur.\(^{147}\) This is simply the thrust of the deterrence theory. The deterrence theory, unlike retributive theory, is concerned with the consequences of punishment. Its aim is to reduce further crime by the threat or example of punishment.

Deterrence is both specific or individual or special and general. This distinction recognizes two classes of potential offenders who may refrain from crime because they fear punitive sanctions. The first group consists of those who have directly experienced punishment for a crime or crimes they

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146. Sections 17 and 19, and 20, *ibid*.
committed in the past-specific deterrence. It is this that is known as individual or specific deterrence. The second group consists of those who have not experienced punishment but who are deterred from crime by the threat of punishment contained in the law or their knowledge of someone else’s experience of punishment after a court sentence. The latter is known as general deterrence.\textsuperscript{148} The distinction is important because the effect of experienced punishments may be quite different from that of threatened punishments.\textsuperscript{149} However, not all authors agree with the conventional distinction between specific and general deterrence and many contend that the two forms in no way exhausts typological possibilities.\textsuperscript{150}

Whatever may be the appeal of the deterrent theory, there is little, if any, scientific evidence in support of it efficacy. The fact of recidivism, which is known to be quite high amongst some classes of offenders and in some contexts, suggests that there are equally, if not more, important factors than threat of punishment that go into decision-making concerning offending. The deterrent effect of sentences, no doubt, becomes weaker with each subsequent conviction.\textsuperscript{151}

In fairness to Bentham, it needs to be acknowledged that his thesis on deterrence was not as simplistic as it is usually presented. According to him, there are a number of measures which must give the system of punishment its effectiveness in accordance with the general element of certainty:

\begin{itemize}
  \item 151. M. Foucault and D. Farrington and G. Tucker: “Reconviction Rates of Adult Males after Different Sentences” (1981) \textit{21 British J. Criminal}, 357-359 revealed rates as high as 88 percent, for men with five or more previous convictions.
\end{itemize}
(a) The laws that define the crime and lay down the penalties must be perfectly clear;
(b) The laws must be published so that everyone has access to them;
(c) The monarch must renounce his right of pardon so that the force that is present in the idea of punishment is not attenuated by the hope of intervention;
(d) The laws must be inexorable, and those who execute them inflexible; and
(e) No crime committed must escape the gaze of those whose task is to dispense justice.\textsuperscript{152}

In the absence of these measures, neither the threat of punishment in the law or the example of one punished under the law will be effective to serve as punishment.

**Incapacitation**

The idea of incapacitation is to prevent or reduce the possibility of future crimes by those convicted of crimes. An individual can be incapacitated temporarily or permanently. In contemporary times, incapacitation is usually realized by the use of imprisonment whether for a long or relatively shorter period of time. In Sargent\textsuperscript{153} Lawton, L.J. acknowledged that:

\begin{quote}
there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only
\end{quote}

\textsuperscript{153} (1975) 60 Crim.App.R.74.
protection which the public has is that such persons should be locked up for a long period.

And the question that arises is, “Does this type of incapacitation prevent the offender from committing crime even while in the prison? While it may protect the rest of the public from the offender, it offers no guarantee of disablement of the convicted offender from other wrong doing against fellow inmates in prison or warders. It is no secret that crimes take place within the prison wall.

Some other forms of punishment permitted by the Sharia based criminal law now in force in some states of Nigeria such as amputation of the limbs also rest on the rationale of incapacitation. It is also not unknown that some people demand that sex offenders such as rapists should be castrated resting the justification for such extreme forms of punishment on incapacitation. The questions that we must however ask are: Whether we should permit our self to resort to the barbaric forms of punishment such as amputation of hands or wrists for thieves as witnessed in some parts of Northern Nigeria, castration of thieves in the name of seeking to make it impossible for them to re-offend? Do the costs of managing certain forms of punishment justified on the premise of incapacitation not outweigh the benefit to be derived? For example, while the costs of management of life imprisonment for violent offenders may be readily justifiable, the same may not easily be said for chronic or habitual minor offenders, such as petty thieves? If their arms are cut of as Sharia law prescribes, then there is the social cost of increasing the number of people with disability and managing disability in society. Indeed, there are formidable
humanitarian arguments against such irreversible measures.\textsuperscript{154}

**Rehabilitation**

According to Packer, rehabilitation theory posits that “…we must treat each offender as an individual whose special needs and problems must be known...in order to enable us deal effectively with him.”\textsuperscript{155} Like deterrence, rehabilitation is a method of achieving the prevention of crime. Analyzing rehabilitation as a justification for punishment, Packer further noted that the rehabilitative ideal may be used to prevent crime by changing the personality of the offender; that punishment in the theory is forward-looking; that the inquiry is not into how dangerous the offender is but rather into how amenable to treatment he is.\textsuperscript{156}

The aim is to secure conformity, not through fear (which is the more limited object of deterrence) but through some inner positive motivation on the part of the individual.\textsuperscript{157} The process has been described as:

improving (the offender’s) ….character so that he is less often inclined to commit offences again even when he can do so without fear of penalty.\textsuperscript{158}

Where rehabilitation is subscribed to, it is proclaimed that the principal rationale of sentencing is to achieve

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{154} M.A.Owoade, \textit{op. cit.} p. 8.
\item \textsuperscript{156} Abdul-Rahman Bello Dambazau, \textit{op. cit.} p.310.
\item \textsuperscript{158} N.Walker: “Punishing Denouncing or Reducing Crime” in P. Glaze Brook (ed) \textit{Reshaping the Criminal Law}, 1978, p. 393.
\end{enumerate}
\end{footnotesize}
rehabilitation of the offender and it becomes the duty of the court to identify a type of punishment suited to that end. Rehabilitation of offenders underlie sentences such as probation and to some extent, imprisonment. It is noteworthy that from the second half of the 20th century, prisons systems globally have insisted on a paradigmatic shift in the idea of prisons as sites of punishment and imprisonment as punishment of offender to prisons as places of rehabilitation even if this was realized at the theoretical level only. This call for a paradigmatic shift has not come without its own challenges as we see the pendulum swing between courts “preserving” imprisonment for serious offenders given its nature as the next most severe punishment after death penalty and prisons system espousing the goal of rehabilitation.

Rehabilitative ideals have been criticised as having, in reality, the tendency to screen the actual conditions and activities in correctional institutions. Rather than being therapeutic in character, the rehabilitative ideal, it has been argued, tends to be incapacitative and amenable to abuse to the extent that a prisoner might be kept for as long as is ‘necessary’ (an open-ended incarceration) until he is completely rehabilitated. Studies have shown that subscription to the ideal led to increased severity of penal measures, especially with juvenile justice. An act which would ordinarily be overlooked when it is committed by an adult or otherwise punished lightly is viewed strictly as the goal of rehabilitation which custodial institutions held out as their main mission readily justified the use of custodial measures, especially long terms of incarceration, in the disposition of such offences. The situation was worsened as the rehabilitative ideal also provided justification for

indeterminate confinement of the offenders for a long period.\textsuperscript{161} Also, it has been argued that there was:

compelling evidence that the individualized treatment model, the ideal towards which reformers have been urging us for century, is theoretically faulty, systematically discriminatory in application, and inconsistent with some of our basic concepts of justice.\textsuperscript{162}

**Restitution**
This is synonymous with reparation or indemnity. It is a constructive act, which is creative and unlimited, guided by self-determined behaviour, and it has a group-interest basis.\textsuperscript{163} It may involve the imposition of a financial obligation that is limited, determined by the court and based on an individual act.\textsuperscript{164} It, however, does not always involve the payment of money and may involve also the provision of services. The first major concern of restitution therefore is the damage done as a result of the crime committed and the victim, an attempt to make the situation better than before the crime was committed.\textsuperscript{165} Restitution is hardly viewed as a form of punishment for while the focus of punishment is the infliction of pain or discomfort, restitution is constructive to the extent that the offender provides something for himself and also compensates the victim. Under the Nigerian law, where any person is convicted of having stolen or having

\begin{itemize}
\item \textsuperscript{161} Ibid.
\item \textsuperscript{162} American Friends Service Committee’s *Struggle for Justice*, 1971, p. 12.
\item \textsuperscript{164} Ibid.
\item \textsuperscript{165} Abdul-Rahman Bello Dambzau, *op. cit.* pp311-312.
\end{itemize}
received stolen property, the court convicting him may order that such property be returned to the owner, either on payment or without payment by the owner to the person in whose possession such property or part thereof then is, of any sum named in such order.\textsuperscript{166} The property must be identified at the trial before a restitution order can be made.\textsuperscript{167} Given that ordinarily the victim is not a party in a criminal trial, the burden rests on the prosecution to introduce evidence to prove the identity of that property.\textsuperscript{168} A restitution order cannot be made in respect of the property into or for which the one which is the subject matter of the offence has been converted or exchanged.\textsuperscript{169} In the case of cash, no such order can be made once the cash has passed into circulation.\textsuperscript{170}

**The Need for Restorative Justice**

The inadequacies of these theories or rationalizations of punishment and in particular, the failure of sentencing to respond to the needs of the victim of crimes can be said to have contributed in no small measure to the emergence of the notion of restorative justice. The theories of punishment reviewed above respond to either the justice needs of society which acquires the “victim” status or the needs of the offender. Unfortunately also, the preference for custodial measures by courts has come with the effect of alienating offenders from society and posing serious challenges to their reintegration upon release. Against this backdrop, it has been compelling to review of the direction in which the criminal justice system is geared to go. Such re-examinations, engaging experts from more diverse disciplinary

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\textsuperscript{166} S. 270(1) CC.  
\textsuperscript{167} Akosa v. R (1950) 13 WACA 43.  
\textsuperscript{168} Ibid.  
\textsuperscript{169} R v. Akinloye (1931) 10 NLR 98.  
\textsuperscript{170} Ibid.
backgrounds than was done in the past including criminologists, psychologists, sociologists, etc. have permitted the traditional perspectives in criminal justice administration to derive lessons from other forms of dispute resolution.

In particular, the idea of restorative justice has gained wide prominence and has been adopted as an ideal of the criminal justice system in a number of countries. The idea of restorative justice calls a significant shift from the primal focus given the criminal trial within the criminal justice system and calls also for a radical shift within the system that enables the focus to shift from sentencing and punishment to restoration balance to all parties affected by the commission of the crime. It has been acknowledged that the idea of restorative justice offers a very different way of thinking about traditional notions, such as deterrence, rehabilitation, incapacitation and crime prevention and offers also transformed foundations for our criminal jurisprudence and for our notions of freedom, democracy and community.\(^{171}\)

Restorative justice has been defined as a term which has recently emerged to refer to a range of informal justice practices designed to require offenders to take responsibility for their wrongdoings and to meet the needs of affected victims and communities. It refers to restoration of victims, offenders and communities.\(^{172}\) British criminologist Tony Marshal has also defined restorative justice as:

\[\text{....a process whereby all the parties with a stake in a particular offence come together}\]

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to resolve collectively how to deal with the aftermath of the offence and its implications for the future.\(^{173}\)

The appeal of restorative justice lies in its particular responsiveness to the needs for all parties to a crime for justice. Justice, it has been said, is a 3-way traffic entailing justice for the Victim, for the Accused and for the Society.\(^{174}\) Therefore, restorative justice is about restoring the wellbeing of the victim, the offender and the community.

One of the most visible outcomes of restorative justice ideal is its contribution of the idea of alternative dispute resolution (ADR) to the criminal justice system. The various methods of ADR involve the offender and the victim of the crime. The most notable has been the Victim-Offender mediation programmes introduced in jurisdictions such as Canada, Australia and the United States whereby the state provides structures for bringing the offender and the victim(s) of a crime together in mediation. The aim is to help the offender to appreciate the trauma caused to the victim by his action and sometimes the victim better appreciates the circumstances that led the offender into crime. The punishment to be served by the offender is then agreed upon and in most of the cases it is not a term of imprisonment.

**Conclusion**

The punishments prescribed in the Criminal Code and the Penal Code sufficiently suggest a tendency towards deterrence and retribution as the rationalizing basis of punishment rather than the reformative theories, at least in respect of adult criminals. Generally, the sentence which is


attached to the offence is determined by its nature and gravity and its effect on the political and economic fortunes of the society.\textsuperscript{175} It is for this reason that offences against the state which threaten the political entity, such as treason, treasonable felonies are severely punished by death or imprisonment.\textsuperscript{176}

Yet, it is obvious that our present system focuses more on punishment for the offenders, and possibly, the need to satisfy the society that the wrong doer has been punished. The assumption is that his punishment should serve as deterrence to other members of the society. However, given that much of these assumptions do not derive from any empirical evidence, it has been suggested that much more needs to be done to debrief sentencers of erroneous beliefs about the validity or efficacy of some of the measures that have been adopted hitherto. In this regard, it has been suggested that sentencing will be more rational and articulate if some of the following measures are adopted:\textsuperscript{177}

(a) Sentencers should be familiar with conditions in our prisons and should visit them from time to time. This will give them firsthand knowledge of what a sentence of imprisonment involves. It is not impossible that there are magistrates or judges tasked with sentencing who have never been to a prison. In the context of Nigeria, it is notable that the formal legal education curricula that provides the requisite qualification for appointment as a magistrate or judge is not designed

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\textsuperscript{176} C.C.s3 37-40
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(b) An effective Borstal system should be instituted and other non-custodial sentences such as community service orders and suspended sentence should be introduced. These will widen the sentencing options and facilitate choice of appropriate sentence for offenders.

(c) Specialised sentencing trainings are critically important. There is little of no training to equip a lawyer appointed to the bench with sentencing knowledge or skills. Continuing education programmes such as seminars should be organized from time to time for magistrates and judges to deliberate on sentencing practices.

(d) More information than is presently the case should be obtained about offenders before sentence is passed.

(e) Statistics of reports of after-effects of particular sentences should be kept. This may form the basis of useful discussions at sentencing seminars.

(f) Penology should be taught in all Law Schools.

It has been said and rightly so that the present Nigerian criminal justice system has no provision to cater for the needs of the victim. The victim of crime, of course, reserves the right to institute civil action against the offender, where damages can be ordered to compensate for the loss suffered by the victim. The question however is, “how many victims can pursue civil suits they bring on their own in court? How many offenders can afford to compensate the victims?” ¹⁷⁸ These considerations have led to the establishment of victim compensation schemes in many jurisdictions.

The recognition of the importance of acknowledging victims of crimes led the United Nations Congress on the Prevention of Crime and the Treatment of Offenders to unanimously adopt the resolution on “The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” in 1985. The Declaration recommended measures to be taken at the international and regional levels to improve access to justice and fair treatment, restitution, compensation and social assistance for victims of crime. It was in view of these developments that in 1988, Prince Bola Ajibola, SAN, the then Federal Attorney-General and Minister for Justice announced a Federal Government proposal on victims’ compensation and convened a National Conference on Criminal Justice, Restitution, Compensation and Remedies for Victims of Crimes. The Conference recommended as follows:

1. Nigeria’s Criminal Justice System should no longer focus its attention entirely on the punishment of offenders, but should also consider the rights of victims of crimes.
2. At present, the provisions of our penal laws and procedure codes on compensation and restitution for victims of crime are grossly inadequate and these should now be modernized and updated taking into consideration the principles and practices of our traditional criminal systems on compensation and restitution for victims of crime.
3. A national policy on compensation, restitution, and remedies for victims of crime should be formulated without further delay.

(4) For purposes of restitution, the term “victim” should not only apply to a person who suffers injury directly from the commission of a crime but also to the dependants of such a person or those who stand in filial, parental, spousal, or other relationship to such person and who suffer as a result of the crime.

(5) The State should provide and promote special medical and welfare services for certain categories of victims of crimes such as victims of sexual assault, drug addicts and of acts of domestic violence. Victims of fake and expired drugs should also be compensated by the State. Where it can be proved that the drug was manufactured or distributed or sold by a known company which may be a local company or multinational company or its agents, the compensation should be paid by that company.

(6) A Criminal Injuries Compensation Board should be established in each of the States of the Federation and Abuja, and the Board should be funded Federal, States and Local Government subventions, fines, and proceeds of sale of assets seized from offenders.

(7) Criminal Courts, in addition to their criminal jurisdiction should be empowered to take evidence for purpose of compensation, restitution and other remedies, and to apply existing modalities of enforcement used in Civil Causes.

(8) For organized Crimes, offences involving corruption, embezzlement of public funds, and other economic crimes in addition to seizure of assets, offenders should also be sentenced to terms of imprisonment without option of fines after due trial.
(9) For minor offences within a community, elders and other respected residents should be involved in deciding the nature and quantum of compensation and restitution.

(10) Communities which are victims of environmental pollution should be assisted in terms of physical development and should not merely be given monetary compensation. In addition, industries which have potential hazardous effluents should be compelled by law to take out compulsory insurance for purpose of compensating victims.

(11) Insurance companies should play a more effective and supportive role in the compensation of victims of crimes.

(12) A National Crimes Control Commission under the aegis of the Federal Ministry of Justice should be set up for purposes of formulating a coherent national criminal and penological policy.

It is hoped that the acceptance of the above proposal will be the beginning of better thinking in the not only the immediate needs for better and adequate compensation provisions but also on the ramifications of the practical significance of victimology as a distinct course of scientific enquiry and for policy proposals.\textsuperscript{181}

In addition, restitution should be made an entrenched part of our criminal justice system and should generally take the forms of restitution and restoration, compensation, and compounding of criminal offences\textsuperscript{182}. Sentencing can be

\textsuperscript{181} M.A.Owoade, \textit{op. cit}, p. 128.

\textsuperscript{182} M.A.Owoade: “Reform of Sentencing in Nigeria- A Note on Compensation, Restitution and Probation” in Sade Adetiba(ed:}
affected by what is known as ‘plea bargaining’. When this takes the form of an agreement between defence lawyers and the prosecution it is not regarded as objectionable. It involves the accused agreeing to plead guilty to a less serious charge based on similar evidence. Plea bargaining where successful will no doubt contribute to prison decongestion.