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Nature And Principles Of Sentencing In Criminal Jurisprudence In Nigeria[1]

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ABSTRACT

The criminal justice system comes after the commission of a crime with the intervention of law enforcement agencies and continues to the trial and sentencing and punishment of the offender. These processes are governed by different laws and legislations. Sentencing is a broad field accommodating different ideas, approaches and theories. This paper discussed the meaning of sentencing and the different principles guiding sentencing both at the trial court and at the appeal court. This work went further to look into the discretionary powers of the courts in sentencing, the extent of these powers and to what limits the courts can go with these powers. Most importantly, this paper further discussed the different approaches, theories and ideas of sentencing. Some theories posit that deterrence and other severe punishment are the most effective means to crime control and reduction of crime in the society. Some other schools of thought on the other hand posit that the individual life of the offender should be looked into to ascertain the particular punishment to mete out and the particular rehabilitation scheme to send the offender to. It was discovered in this paper that Nigeria adopts only the deterrence theory of punishment with little or no rehabilitation approach. This paper recommends that, the reformation approach both in favour of the offender and in favour of the victim should be adopted and even codified in the laws governing sentencing in Nigeria. This paper made use of primary and secondary sources of information which include text books, journals, case laws and internet materials. The research methodology used in this paper is empirical and comparative.

Keywords: Sentencing, Nature and Principle, Criminal Jurisprudence, Nigeria

1. INTRODUCTION

The criminal justice system in Nigeria commences after the commission of a crime with subsequent intervention of the law enforcement agencies that have the power of arrest, arraignment and trial of the suspect. After the trial, the suspect is either found not guilty or guilty of the alleged charge and thereafter comes conviction and sentencing. This means that sentencing is the last phase of a criminal trial. A criminal trial involves the state, the society and the offender who commits the act. The process of

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determining whether the accused did the act or committed the omission alleged against him depends on sentencing him for the alleged act he committed or the omission. Criminal prosecution aims at the conviction of the accused person. The conviction goes with sentencing to some form of punishment or sanction pronounced by the trial court. Such sanctions could take any or a combination of many forms like imprisonment, fine, caning, haddi-lashing, corporal or capital punishment, forfeiture etc. Sentencing is one of the several ways which together comprise what is often referred to as Criminal Justice System. One of the essential functions involved in justice system is to affirm and reinforce important societal values.

The stages of Criminal Justice are as follows;[2]

i. Crime prevention and maintenance of order
ii. Detention and enforcement (including investigation)
iii. Adjudication
iv. Sentencing
v. Administration of sentences

Sentencing in Nigeria is governed by federal and state legislations such as the Criminal Code Act[3], the Penal Code, the Criminal Procedure Act, the Criminal Procedure Code, the Criminal Procedure Laws of each state, Administration of Criminal Justice Act, Administration of Criminal Justice Laws and Children and Young Persons Act which goes to protect the right of young persons in Nigeria.

Every criminal trial determines two vital issues, namely, whether the accused is guilty and if so, which of the many sanctions permitted by law needs to be applied to him to meet the ends of justice.[4] The fundamental purpose of sentencing is to contribute along with crime prevention initiatives to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions. The criminal justice system in Nigeria sees deterrence as an effective means of preventing crime in the society. The question then becomes, is deterrence the most appropriate sanction to be imposed to reduce or prevent crime in the society?

Sentencing as a sanction falls within the retributive school of thought. Retributive justice is more or less what we practice in the Nigeria. The justice system is oriented mainly toward punishing the offender, not making the victim whole again. In restorative justice, the focus is on the victim. Any penalty assessed on the offender is at least partly paid to the victim, and punishment of the accused is a secondary goal. We shall discuss in full.

In Nigeria, in as much as the different laws or codes governing the criminal code states and the penal code states are mostly the same, there are still slight differences. Furthermore, sentencing is an exercise of a discretionary power to an extent by the courts, even though they are guided by these laws, it still leaves the courts with certain discretion. As a result therefore the courts may accommodate individual inclinations or make out different sanctions for the same offence. The difference in approach has become a problem in the society when it presents the criminal justice system as inconsistent and unjust.[5]

2. Definition of Terms

Conviction: black's law dictionary defines conviction as the act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.[6] The Court of Appeal[7] also defines conviction thus 'The primary meaning of the word conviction denotes the judicial determination of a case. It is a judgment which involves two matters, a finding of guilt or the acceptance of a plea of guilt followed by the sentence'.

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[2] Leonard C. Opara, 'The Law And Policy In Criminal Justice System And Sentencing In Nigeria', *International Journal of Asian Social Science*,2014.
[3] CAP C38 Laws of the Federation, 2004
[4] Journal of the Indian law institute vol.30, individualization of sentencing.
[5] *NIALS Journal on Criminal Law and Justice* vol 1. 2011 p. 152
[6] Bryan A. Garner, *Black's Law Dictionary,* 8th edition p. 358
[7] *Agbi v Ogbeh* 2003 15 NWLR (Pt.844)493 532

Sentencing: this is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence. It is the pronouncement by a court upon the accused person, after his conviction in criminal trial, imposing punishment to be inflicted. Sentencing also means the prescription of a particular punishment by a court to someone convicted of a crime. Thus after an accused person has been found guilty during trial or prosecution process, the court then enters judgment of conviction and thereafter comes sentencing.[8]

3. Rationale and objectives 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 means of deterrence, elimination or rehabilitation of the offender.[9] The justification is that imposing the penalty will reduce the future incidence of such offences by preventing the offender from carrying out the act or omission again or correcting the offender so that the criminal inclination is removed and by discouraging or educating other potential offenders. The Court of Appeal per Oshintokun Oshisanya[10] in determining the essence of sentencing and punishment held as follows;

> The essence of imprisonment is to meet the legitimate expectation of society of retribution, where the society strikes back at the offenders to deter potential offenders and make the commission of the crime unattractive, protect the public and society by ensuring that dare devil criminals and recalcitrant offenders are taken out of circulation to provide interregnum for dangerous criminals to reflect pending their rehabilitation to normalcy.

The purpose of sentencing also is to contribute along with crime prevention initiatives to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following sanctions

a) To denounce unlawful conduct
b) To deter the offender and other persons from committing offences
c) To separate offenders from the society where necessary
d) To assist in rehabilitating offenders
e) To provide reparations for harm done to victims or to the community

4. Guidelines and principles of sentencing

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. Although statutes provide a variety of sentencing options for particular crimes, guidelines attempt to direct the courts to more specific actions that could be taken. The Court of Appeal per Saulawa[11] holds as follows:

> It is trite that due to the complex and rather controversial nature thereof, sentencing is arguably the most important area of justice system. Ironically it is the most incoherent. Regrettably, very often than not, sentences are passed by trial courts not on the basis of established principles and rules but in accordance sentimental disposition of judges. The main reason for the rudimentary state of sentencing law is the absence of a rationale for punishment. If we do not know why punishment is justified and what is sought to be achieved by it, there is no prospect of developing meaningful sentencing, objectives and principles.

[8] Leonard C. Opara, 'The Law And Policy In Criminal Justice System And Sentencing In Nigeria', *International Journal of Asian Social Science*,2014.

[9] A.A. Adeyemi. 'The challenge of criminology in a developing country: a case study of Nigeria', *International Annals of Criminology,* Special Number of Non Institutional Treatment of offenders, 1971 vol 10 pg 172

[10] *Ali v FRN* 2016 LPELR 40472 CA

[11] *Doripolo v state* 2012 LPELR 15415

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In this regard therefore, a court that imposes a sentence shall take into consideration the following principles governing sentencing at the trial court;

1. 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. The Court of Appeal per Ariwoola JCA[12] holds thus:

> One of the principles of sentencing is that where the counts relate to one act or set of facts, sentences should not be ordered to run consecutively. Where there are several counts on the same information, separate verdicts must be delivered in respect of the several counts. In other words, a trial court must pronounce its sentences separately on all counts of the offences in a case, otherwise the entire proceedings is certainly liable to being set aside on appeal.[13]

Where consecutive sentences are however imposed, the combined sentence should not be unduly long or harsh.'

2. A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender
3. A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances
4. An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances
5. All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of young and vulnerable offenders
6. A fine must not be too heavy for the offender to Pay.[14] Separate fines imposed on different counts at the same trial are to be cumulative but the aggregate must be within the Court's jurisdiction.[15]
7. The court must put into consideration some factors like the age of the convicted person,[16] whether the accused is a first offender,[17] the seriousness of the offence,[18] the prevalence of the particular offence,[19]the non repentant attitude of the offender and the adverse effect of the offence on the victim to determine whether sentence may be mitigated or aggravated.

Principles guiding the sentencing functions of appellate courts

The Supreme Court has laid down some basic principles guiding the sentencing functions of appellate courts in Nigeria. Some of these principles are as follows:

1. An Appellate 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.[20] This establishes that mere difference of opinion does not suffice for an Appeal Court to reverse the sentence of a lower Court.

   However there are circumstances under which an appellate Court will interfere with the sentence imposed by the trial Court. The trial court has discretion in matters of sentencing which cannot be disputed and it is also settled that an appellate court will not readily interfere with the sentence

[12] *Garba v COP* (2007) ALL FWLR (Pt 384) p.260 at 283
[13] *Ikenso v state* 2016 LPELR 41041
[14] *Akite Gbila v C.O.P*(1965) N.N.L.R 67
[15] *Fashusi v. Police*(1953) 2 N.L.R.126
[16] *Odidika v. State* (1977) 2 S.C.1
[17] *R. v.Enahoro* 12 W.A.C.A. 194
[18] *R.v Okeke* 1936 3 W.A.C.A 1
[19] *Ali v FRN* 2016 LPELR 40472 CA
[20] *Adeyeye & Anor v The State* (1968) 1 ALL NLR 239

imposed by the trial judge unless it is manifestly excessive[21] or wrong in principle.[22] The Court of Appeal per Nimpar JCA[23] in quoting Ademola CJN (of blessed memory) in Adeyeye v The State held as follows;

> It is trite that ordinarily, an appellate Court will not interfere with the sentence imposed by a trial court unless it is manifestly excessive in the circumstances or wrong in principle. It is only when a sentence appears to err in the principle that this court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this court that when it was passed there was a failure to observe the right principles, then this court will intervene. The appellant therefore has a duty to establish necessary conditions to warrant interference.

2. The courts need to consider the facts of a particular case. This principle proposes that a Court does not necessarily have to adopt a sentencing approach that has been adopted in an earlier case. This principle falls partially within the Individualization of sentencing school of Thought.[24]
This school of thought believes that the result of the hasty sentencing by the courts is that most of the offenders punished return to society to indulge in criminality with greater fury and finesse. This inefficacy of punishments to serve the purpose of either deterrence or reformation indicated that they do not fit the individual needs of offenders but only the requirements of judicial precedents or demands of prosecution for punishment. Therefore, if punishments awarded by courts are to be meaningful and serve any useful purpose, they will have to be geared to such individual needs in accordance with a rational sentencing policy.[25] Individualization of sentencing therefore proposes the following;
   i. That the courts make individual case studies of every offender based on formation covering his family, social background, physical and mental conditions, antecedents, character and above all the chances of reform.
   ii. The courts should select the most appropriate sentencing and social measures that will serve the interest of both society and the offender. It presupposes not only knowledge on the part of the judges of the existence of correctional measures in relation to different categories of criminals but also their effectiveness and suitability for the individual needs of offenders. Thus individualization of punishment demands that judges should look more to the criminal than to the crime. Secondly, treat every offender according to his individual need rather than apply punishments on a tariff system and thirdly be guided not by hunches, guesses or intuitions but by scientific investigations and evaluations of those personal and social stresses which are the contributing factors in the commission of crime.

5. Types of Sentences

We shall consider the different types of sentences which are obtainable in our Nigerian Courts, where they are applicable and the different courts which have jurisdiction to pronounce them. Some of the sentences include; death sentence, imprisonment, fine, caning, forfeiture, haddi-lashing, deportation.

Death Sentence

This is a mandatory sentence for a capital offence and leaves the judge with no discretion.[26] It is only the High Court that can pass such a sentence as capital offences are only triable by Magistrate's Courts. The

[21] *Ali v FRN* 2016 LPELR 40472 CA
[22] *Ilyasu Sumaila v The State*
[23] *Karumi v FRN* 2016 LPELR 40473 CA
[24] Peter A. Anyebe, 'Sentencing in Criminal Cases in Nigeria and the Case for Paradigmatic Shifts', *NIALS Journal on Criminal Law and Justice* Vol. 1 2011,
[25] Individualization of sentencing: A Nigerian Experience 01/06/2017 11:23am
[26] J A Agaba, Criminal Litigation, 1st edition p.824

capital offences which carry a death sentence include Murder[27] Culpable homicide punishable with death[28]Treason[29]Treachery[30] Armed Robbery[31], Directing or controlling or presiding at an unlawful trial by ordeal from which death results[32] Giving or fabricating false evidence on account of which an innocent person suffers death, Instigating invasion of Nigeria,[33]Abatement of suicide of a child or insane person.[34] The punishment of death is usually inflicted by hanging the offender by the neck until he be dead. A death sentence is pronounced thus; 'the sentence of this court upon you is that you be hanged by the neck until you be dead and may the Lord have mercy on your soul'.[35] However a death sentence for offences created by the Robbery and Firearms Act may also be by firing squad. Anyone who is found guilty of a capital offence shall face a death sentence as the court has no discretion to vary the sentence. There are however certain individuals who are exceptions to the above rule, who are not subject to a death sentence. These are pregnant women and young persons.

A death sentence cannot be passed on a pregnant woman. Section 368(2) of the Criminal procedure Act provides thus; 'where a woman found guilty of a capital offence is found in accordance with the provisions of section 376 of this Act to be pregnant, the sentence of death shall not be passed on her but in lieu thereof shall be sentenced to imprisonment for life'. Therefore if a woman can establish or the court establishes that she is pregnant at the time of conviction, she shall not be sentenced to death but imprisonment for life. Where a woman convicted of a capital offence alleges that she is pregnant, it then becomes the duty of the court to determine whether she is pregnant or not.[36] This shall be determined by the court on such evidence presented before it by the woman or the prosecution, which shall be to the satisfaction of the court.[37] Where it is found that the woman is not pregnant, death sentence shall be pronounced on her.[38]

The second category of persons who death sentence cannot be passed on is that of the children and young persons. When a child or an infant is found guilty of a capital offence, he shall not be sentenced to death nor will the sentence be recorded against him instead the offender shall be ordered to be detained at the pleasure of the president if the offence is a federal offence or of the Governor in the case of an offence against a state law. According to Section 368(2) of the Criminal Procedure Act, this exception covers persons who have not attained the age of seventeen (17) years at the time the offence was committed.[39]

Imprisonment

This is a very common type of sentence which is served in a government prison until the expiration of the term of imprisonment. The Prisons Act, laws of the Federation of Nigeria defines sentence of imprisonment as 'any sentence involving confinement in a prison (whether or not it is combined with labour of any kind) and includes a sentence given by way of commutation as well as an original sentence passed by a court'. The Minister of Internal Affairs may, by order in the Federal Gazette, declare any building or place in Nigeria to be a prison and by the same or a subsequent order specify the area for which the prison is established.[40] Imprisonment may be with or without hard labour and when the court is silent on this, it is deemed to be one with hard labour.[41] In most cases where a sentence of imprisonment is passed, the court either pronounces it with hard labour or be silent on it. Since a sentence of

[27] Criminal code cap 38, section 319
[28] Penal code section 221
[29] Criminal Code cap 38 section 37. Penal code section 411
[30] Criminal Code section 49A (1)
[31] Robbery and firearms (special provisions) Act 1990 cap 398 section 1(2)
[32] Criminal Code, section 208
[33] Criminal Code cap section 38
[34] Penal Code section 227
[35] Criminal Procedure Act section 367(1), Criminal Procedure Code section 273
[36] Criminal Procedure Act section 376(1)
[37] Criminal Procedure Act section 376(2)
[38] Criminal Procedure Act section 376(3)
[39] Criminal Procedure code section 270 and 272
[40] Prisons Act, Laws of the Federation of f Nigeria,2004 section 2(1)
[41] Criminal Procedure Act section 377

imprisonment is deemed to be with hard labour while the court is silent on it, it seems therefore that every sentence of imprisonment in Nigeria goes with hard labour. There has not been a specific definition of Hard labour as was provided in the Nigerian laws. Hard labour may however be defined as a heavy physical labour in addition to imprisonment imposed upon convicts sentenced for serious crimes or for misconduct while in prison.[42] The Prisons Act[43] however provides thus 'Subject to this section, the effect of a sentence of imprisonment with hard labour passed upon a prisoner shall be that the prisoner shall be imprisoned for the period of the sentence and during his imprisonment shall work at such labour as may be directed by the superintendent'. This implies that the level of hard labour to be carried out by the prisoner is determined by the Superintendent in charge of the prison.

A sentence of imprisonment may be concurrent or consecutive. A sentence is said to be concurrent when after conviction for more than one offence, the sentence is ordered to be served at the same time as another sentence imposed at the proceeding or at an earlier proceeding. Simply put, the convict is sentenced to more than one imprisonment and all the sentences are running at the same time. On the other hand, a court may pronounce that sentences of imprisonment may run consecutively. This is a sentence that is ordered to begin after the expiration of a term imposed either at the proceeding or at an earlier proceeding.[44] The Criminal Procedure Act[45] provides thus;

> Where a sentence of imprisonment is passed on any person by a court the court may order that the sentence shall commence at the expiration of any other term of imprisonment to which that person has been previously sentenced by any competent tribunal in Nigeria so however that where two or more sentences passed by a magistrate's court are ordered to run consecutively the aggregate term of imprisonment shall not exceed four years or the limit of jurisdiction of the adjudicating magistrate whichever is the greater.

The Criminal Procedure Code[46] has a similar provision and it provides that where the court is competent to inflict distinct punishments, such punishment shall commence after the expiration of the other as the court may direct, unless the court orders that such punishment should run concurrently. Therefore, where a court convicts an accused person for more than one offence and sentences the convict for each offence but is silent on whether it is to run concurrently or consecutively, they are deemed to run consecutively. It should be noted that a sentence of imprisonment takes effect from and includes the whole of the day of the date on which it was pronounced.[47]

Fine

This is the payment of money as a punishment. Some offences are expressly declared to be punishable by fine. The court also has a general power to fine a convict in lieu of sentencing him to imprisonment even where the law creating the offence does not specifically provide for imposition of fine.[48] The Criminal Procedure Act provides thus; 'Subject to the other provisions of this section, where a court has authority under any written law to impose imprisonment for any offence and has not specific authority to impose a fine for that offence, the court may, in its discretion, impose a fine in lieu of imprisonment'. This provision however has some restrictions attached. In the case of a conviction in the High Court, the amount of the fine shall be in the discretion of the court, and any term of imprisonment imposed in default of payment of the fine shall not exceed two years.[49] In the case of a conviction in a magistrate's court, the amount of the fine is at the discretion of the court and must not exceed the maximum fine authorized by

[42] Garner, p 734
[43] Prisons Act, Laws of the Federation of Nigeria,2004 section 4(1)
[44] J.A Agaba, Criminal Litigation, 1st edition, p. 832
[45] Criminal procedure Act Cap C 41 section 380
[46] Cap 42 Section 24
[47] Criminal Procedure Act Cap C 41 section 381
[48] Criminal Procedure Act Cap C 41 section 382 and section 23(1 of the Criminal Procedure Code)
[49] Criminal Procedure Act Cap C 41 section382(2)

or under the law by virtue of which the magistrate was appointed.[50] Again where a statute expressly precludes the option of fine and provides a minimum period of imprisonment to be imposed as punishment for an offence.[51]

When the convict is unable to pay the fine, he may be ordered to be imprisoned. The Act[52] provides thus;

> Where by any written law the court is empowered to impose a penalty for a summary conviction offence it may, in the absence of express provision to the contrary in the same or any other written law, order a defendant who is convicted of such offence, in default of payment of the sum of money adjudged to be paid by the order, either forthwith or at the time specified in the order, as the case may be, to be imprisoned, with or without hard labour, in accordance with the scale set forth in this section.

However in imposing a sentence of fine, the court must have regard to the ability of the convict to pay. The Criminal Procedure Act provides that 'a court in fixing the amount of any fine to be imposed on an offender shall take into consideration, amongst other things, the means of the offender so far as they appear or are known to the court'. [53]

Caning

This is another type of sentence available both in the Northern and Southern part of Nigeria even though it is not available against all types of offenders. This sentence cannot be passed on a woman or on a man that has attained the age of 45 years and above.[54] Caning shall be with light rod or cane or birch, and the number of strokes shall be specified in the sentence and shall not exceed twelve and where a person is convicted of one or more offences at one trial the total number of strokes awarded shall not exceed twelve.[55] When any person is convicted of any offence for which he is liable to imprisonment for a period of six months or more the court may, if it thinks fit, having regard to the prevalence of crime within its jurisdiction or to the antecedents of the offender, sentence such offender to caning either in addition to or be in lieu of any other punishment to which the offender is liable.[56]

Haddi–lashing

This type of sentence is prescribed under the Criminal Procedure Code and is peculiar to this CPC states with respect to offence bordering on immorality which is only applicable to Muslim men.[57] The offences in which this sentence may be imposed include adultery, defamation, injurious falsehood and drunkenness. This sentence is not necessarily to inflict pain as in the case of caning rather it is meant to disgrace the convict. It is therefore merely a symbolic sentence.[58]

Forfeiture

This sentence has to do with seizure of property as a punishment for a person's offence. Forfeiture may be more in the nature of an ancillary order made after conviction than a substantive sentence. It is usually imposed in respect of offences bordering on property illegally acquired or illegally produced or used for illegal production, bribe. Section 19 of the criminal code provides that 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 of bribery.

Deportation[59]

This sentence usually applies in relation to a foreigner in a state or country who commits an offence. It may apply to both Nigerian citizens and non Nigerian citizens. It may be imposed in addition to any other sentence or it may be a sole sentence. Deportation when imposed against a Nigerian citizen may mean to

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[50] Criminal Procedure Act Cap C 41 section 382(3)(a)
[51] *Dada v Board of Customs and Excise Management*
[52] Criminal Procedure Act Cap C 41 Section 390
[53]Criminal Procedure Act Cap C 41 Section 391
[54] Criminal Procedure Act Section385, Criminal Procedure Code Section 308(4)
[55] Criminal Procedure Act Cap C 41 section 386(1)(2)
[56] Criminal Procedure Act Cap C 41 Section 387
[57]Criminal Procedure Code Cap C 42 section 307
[58]Agaba, Criminal Litigation, 1st edition p.836
[59] Criminal Procedure Act Cap 41 section 402

remove the convict from the place where the offence was committed to any other part of the country in the interest of justice. In the case of a foreigner to Nigeria, where he is found to be engaging in dangerous conducts and acts considered to constitute a threat to the society, he may be deported.

It should be noted that deportation as a punishment is not ordered by the court as the court does not have power to deport a foreigner. What the court does is to recommend to the Minister of Internal Affairs that a certain convicted person should be deported. The Minister who has the power of deportation may, based on the recommendation order the deportation of the foreigner.

6. Sentences In The Case of Juvenile Offenders

No child shall be subjected to the criminal justice process or to criminal sanctions. A child alleged to have committed an act which would constitute a criminal offence if he were an adult shall be subjected only to the child justice system and process as stipulated in the Childs Right Act[60]

As a general rule, no child shall be sentenced to imprisonment or face a death penalty.[61] However, there are certain offences that a child may be found to have attempted to commit, then the court shall order him to be detained for a period of time. Where a child is found to have attempted to commit treason, murder, robbery or manslaughter, or wounded another person with intent to do grievous harm, the Court may order the child to be detained for such period of time and at any place and condition as the court may deem fit.[62] Where a child charged with an offence is tried by a court and the Court is satisfied that the child actually committed the offence, the Court shall take into consideration the manner in which the case should be dealt with and may include the following;[63]

a) Dismissing the charge
b) Discharging the offender on his entering into a recognizance
c) Placing the child under care order, guidance order and supervision order
d) Ordering the child offender to participate in group counseling
e) Ordering the child offender to pay fines, compensation or cost
f) Ordering the parents or guardians to pay fines compensation or cost
g) Committing the child offender to custody in a place of detention

There are four types of recognized custodian institutions for juvenile offenders in Nigeria. These are;

a) Remand Homes: this is where juvenile offenders are detained[64]

b) Another is the Borstal Centre: this is a federal institution for the detention of convicted offenders between the ages of 16 and 21 years.

c) Approved Schools: this is for the care and protection of juvenile offenders

d) Prisons or Police Cells**;** which are meant for the detention of young persons who are of unruly or depraved characters[65]

7. The Extent and Limitations of the Discretion of the Court in Pronouncing Sentences

The powers of a court in pronouncing a sentence is a discretionary one. When a statute prescribes a sentence for a particular offence, the court, considering certain factors, has discretion to pronounce a lesser sentence on the convicted person. The Court of Appeal per Aderemi JSC[66] held thus;

> Where the sentence prescribed upon conviction in a criminal charge is a term of years of imprisonment, then some extenuating factors such as the age of the convict, whether he is a first offender etc can be taken into consideration by the trial judge in passing the sentence on the convict.

[60] Childs Right Act 2003
[61] Child's Right Act Section 221
[62] Childs Right Act 222(1) (2)
[63] Childs right act section 223
[64] (Section 3(1)(a) of the Borstal Institutions and Remand Centres Act, Cap 38, Laws of the Federation of Nigeria (LFN) 1990).
[65] (Section 111(1) of the Children and Young Persons Act (CYPA); Article 30 of the African Charter on the Rights and Welfare of the Child
[66] *Tanko v State* 2009 LPELR 3136(SC)

> Indeed, the trial judge in my view has the discretion to employ these factors to reduce the years of sentence.

This discretion however, is not absolute as there are some limitations to it. Some of these limitations may be seen as follows:

a) Mandatory sentence: A mandatory sentence is one which must be imposed regardless of any circumstances. Where a statute prescribes a mandatory sentence for a particular offence, no court can pronounce a lesser sentence to that effect. In Nigeria, offences such as murder, armed robbery and treason which are capital offences carry mandatory death sentences and the court has no discretion to pronounce a lesser sentence. The Court of Appeal per Owoade[67] on whether where a statute prescribes a mandatory sentence in clear terms, the courts can impose a punishment less than the mandatory sentence held thus 'where as in the instant case, a statute such as the robbery and firearms Act prescribes a mandatory sentence in clear term, the courts are without jurisdiction to impose anything less than the mandatory sentence as no discretion exist to be exercised in the matter. Rather it is a duty imposed by law and the sentence must be pronounced without any reservation'.

b) Minimum and maximum sentence: Where the law creating an offence prescribes a minimum punishment for that offence, the discretion of the court becomes limited. These minimum punishments are mandatory and therefore the courts cannot pronounce a sentence lesser than that which is already prescribed by the courts. For example where the statute creating an offence prescribes that the minimum sentence is two years imprisonment, the court cannot sentence him to six months imprisonment nor order him to pay a fine. This also applies in cases where a statute has prescribed a maximum sentence for a particular offence, the courts discretion to exceed the prescribed maximum sentence become limited. This could be seen in the case of Okoma v Udoh[68] where it was held that a judge cannot impose a penalty heavier than that imposed by the law at the time of the commission of the offence.

c) Capital Offences: generally, capital offences carry corporal punishment which is not within the discretion of the court to alter. Allocutus in the instant case is of no effect.[69] The Court of Appeal per Jauro JCA held as follows on whether a judge has jurisdiction to listen to allocutus and the discretion to reduce death penalty to a term of years once the accused person has been found guilty;

> Once a judge finds an accused person guilty f culpable homicide under section 221 of the penal code, the only sentence he can pronounce is death. A judge has no jurisdiction to listen to allocutus and no discretion to reduce death sentence death sentence to a term of years once the accused person as been found guilty under section 221 of the penal code. The sentence of 14 years imprisonment after finding the accused guilty of culpable homicide was wrong. It is a material irregularity in the proceedings of the trial court and this court could remedy it so that substantial justice might be done.

8. The Role of *Allocutus* in Sentencing

Allocutus is also known as the plea of mercy. It takes place after the conviction of the accused person but before sentencing. The court inqures of the convict whether he has anything to say why sentence should not be passed on him according to law. It is usually a plea for mitigation of sentence upon the convicted person. The Supreme Court per Ngwuta JSC [70] in defining *allocutus* hold thus; '*allocutus* is a plea in mitigation of the punishment richly deserved by the appellant for the offence with which he was charged

[67] *Pedro v State* 2015 LPELR 24547 CA
[68] 2002 1 NWLR (Pt 748) 438
[69] *Musa v State* 2014 LPELR 22912 CA
[70] *Lucky v state* 2016 LPELR 40541 SC

and for which he was tried and found guilty and convicted accordingly'. *Allocutus* has a statutory backup. Section 247 of the Criminal Procedure Act provides as follows;

> If the court convicts the accused person or if he pleads guilty, it shall be the duty of the registrar to ask the accused whether he has anything to say why sentence should not be passed on him according to law, but the omission of the registrar so to ask him or his being so asked by the judge or magistrate instead of the registrar shall have no effect on the validity of the proceedings".

There is a similar provision in the section 197(1) of the Criminal Procedure Code which provides that 'If the finding is guilty the accused shall, if he has not previously called any witness to character, be asked whether he wishes to call any such witness and after such witnesses, if any, have been heard he shall be asked whether he desires to make any statement in mitigation of punishment'.Taking into consideration the above provisions, we could see that there appears a slight variation from the two provisions. The criminal procedure code of the Northern Nigeria provides for the convict to call witness to character, if he has any, the provision in the criminal procedure Act is silent on the issue of calling a witness of character, it does not therefore make any provision for such.

When *allocutus* is entered, the court on hearing the accused person or his counsel and putting some factors into consideration has discretion to mitigate the sentence of the convict. One can rightly say that *allocutus* is a mockery of the discretion of the courts as there are so many limitations.[71] Taking into consideration mandatory sentences, minimum sentence, capital sentences and the fact that most offences carry mostly minimum or mandatory sentences, what more is left for the court to exercise discretion over?

9. Theories of Punishment:

There are different theories of punishment. The main objective of the different theories is to determine the rationale for punishment, the goal it tends to achieve, the way and guideline in which punishment is to be applied.[72] As the practical implications of the different rationales for punishment can conflict among the different theories, there is need to examine the rational strength of each of them. These theories include;

i. Deterrence
ii. Incapacitation
iii. Retribution
iv. Rehabilitation
v. Restitution

Deterrence Theory: Bentham[73] 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. This is simply the thrust of the deterrence theory. There are two types of deterrence which include specific deterrence and general deterrence. Specific deterrence relates to those who experience the punishment themselves, that is the actual persons who were deterred. They are deterred from committing the offence again. For example while a criminal is in prison he will be prevented from committing further crime, even when he is out of prison or another punishment, he will not want to commit the same offence again for the fear of punishment. General deterrence involves those who did not personally experience the punishment but desist from committing crimes as a result of the punishment meted on another. It deters them from committing crimes by making them realize that they risk suffering the same fate in similar behavior.[74]

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[71] *Pedro v state* 2015 LPELR 24547 CA

[72] Ikenga K.E. Oraegbunam, 'Some Basic Principles of Penal Jurisprudence: An Analytical Approach', *Nnamdi Azikiwe University Journal of International Law & Jurisprudence,* Vol. 1, 2010, pp. 126-150

[73] Jeremy Bentham, 'Principles of Penal Law' in J. Brown (Ed.), *The Works of Jeremy Bentham*, 1843, p. 380.

[74] J.M. Elegido, *Jurisprudence*, Spectrum Series 1st edition p.214

There is little or no scientific evidence to prove the efficacy of this theory. Presently in Nigeria and in other countries, so many criminals have become so recalcitrant that they are not afraid of the punishment that come with their criminal acts nor are they discouraged by the punishment meted to other criminals. It is not the fear of punishment that deters criminals from committing crimes. If the only objective of the Nigerian criminal justice system is to deter criminals, perhaps a more severe punishment should be meted out for all offences committed. This theory does not take into consideration the innocence of an accused person as one need to be punished in order to deter others from committing the same offence. The question then is, has the deterrence theory solved the issue of the Nigerian criminal justice system? The deterrence theory therefore should not stand alone as a means to Criminal Justice; it should therefore be applied with caution.

Incapacitation: The idea of incapacitation is to prevent or reduce the possibility of future crimes by those convicted of crimes. This theory seeks to disable the criminal from further commission of crime through capital punishments and long terms of imprisonment especially life imprisonment. 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.[75] Lawton, L.J[76] posits as follows: '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 protection which the public has is that such persons should be locked up for a long period'. The Court of Appeal in R v Adebesin[77] increased the sentences of two armed robbery convicts sentenced to 10 and 8 years imprisonment respectively to 15 and 12 years respectively on the ground that for the protection of the public, the convicts should be sentenced for a longer term than the one pronounced by the trial court. The question that arises then 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. Again where there is only a temporary incapacitation, there is no guarantee that the individual will not go back to the same crime or even a worse offence.

Some other forms of punishment permitted by the Sharia Law 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 criminal justice system cannot resort to these 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 prevention of crime.

Retribution: This theory looks at the circumstance of the crime committed and decides what type of punishment the accused deserves for his offence. Punishment is imposed in order to relieve the indignant feelings of the public or it could be imposed to mark the level of revulsion with which the public regards the crime. This should however be differentiated from revenge by the victims. In the retribution theory, there is a notion that every offender must be given what he deserves, the offenders should not be punished more than his offence and a person should be punished only if he has actually committed an offence as defined by law. It may be difficult however to decide what is a fair proportion between a crime and the punishment attached to it.[78] Another challenge this theory faces is to explain exactly how is it that inflicting suffering on the criminals can have in itself a positive value. Finnis approached this problem from the standpoint of distributive justice which demands that there must be a fair distribution of benefits and burdens in the society. Punishment is rationally justified as retribution for the crime committed which restores the fair balance of benefits and burdens among the members of the society. It will also be reasonable to take advantage of the opportunities offered by the imposition of a deserved punishment to

[75] NIALS Journal on Criminal Law and Justice Vol. 1 2011 p. 184

[76] *Regina v Sargeant* (1974) www.swarb.co.uk cacd 1974 8/6/2017 10 am

[77] 6 WACA(1940) 197

[78] www.research infos.com/theoriesand types of punishment 8/6/2017 12:30 pm

try to reform the criminal and to deter both the criminal and others which will only be justified if the level of punishment which the criminal deserves is not exceeded.[79]

Rehabilitation: Rehabilitation theory posits that each offender must be treated as an individual whose special needs and problems must be known in order to enable the state deal effectively with him. Like deterrence, rehabilitation is a method of achieving the prevention of crime. Analyzing rehabilitation as a justification for punishment, this theory further posits 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 and that the inquiry is not into how dangerous the offender is but rather into how amenable to treatment he is. 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. 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. Where rehabilitation is subscribed to, it is proclaimed that the principal rationale of sentencing is to achieve 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. From the point of view of human rights, this theory could have extremely serious punishment. Elegido[80] is of the following view 'even if we insisted on referring to the person who had committed a crime as a 'patient' rather than a criminal, in at practice he wound still have to be interned in an establishment to undergo treatment whether he liked it or not'. The treatment would be directed at changing his personality in such a way that he would not wish to commit that same offence. The period of detention is usually indefinite and it is not sure when the offender will be released.

It is however disappointing that the Nigerian Criminal Justice System does not put rehabilitation theory into consideration at all. There is little or no scheme for an offender to be rehabilitated. The main aim is usually to punish the offender by deterrence. In the United States of America, this theory of rehabilitation is highly applicable. Except in a case of a capital offence, the offenders are not just sent to prisons as a way of punishment, possible rehabilitation schemes are made available, (depending on individual cases) to the offender to make him a better person at the end of his term. For example, a person who has been convicted of rape and has the tendency of continuing in the act may be ordered to a psychiatric hospital where he will receive treatment and be rehabilitated.

Restitution: It may involve the imposition of a financial obligation that is limited, determined by the court and based on an individual act. 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. 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 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. The property must be identified at the trial before a restitution order can be made. 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.

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 and how many offenders can afford to compensate the victims?[81]

[79] J.M. Elegido**,** Jurisprudence, Spectrum Series p. 220
[80] ibid p. 217
[81] NIALS sentencing by Peter A Anyebe

- In Nigeria, restitution orders are usually made in bribery and corruption matters involving EFCC and ICPC, where an offender is ordered to refund to the government a certain amount of money. Restitution need not be ordered during sentencing. The Administration of criminal Justice Act, 2015 has made provisions for plea bargaining. The Act provides thus[82]

> The prosecution may enter into plea bargaining with the defendant, with the consent of the victim or his representative during or after the presentation of the evidence of the defence provided that (a) the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt (b) where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative.

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. In the case of cash, no such order can be made once the cash has passed into circulation.

10. CONCLUSION AND RECOMMENDATIONS

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. 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 the courts of erroneous beliefs about the validity or efficacy of some of the measures that have been adopted thus far.

This study observes that sentencing will be more rational and articulate if some of the following measures are adopted:

1. An effective Borstal system should be instituted and other non-custodial sentences such as community service orders and suspended sentence should be introduced. This will widen the sentencing options and facilitate choice of appropriate sentence for offenders.
2. Specialized sentencing trainings are critically important. There is little or 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
3. 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
4. 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.

[82] Administration of Criminal Justice Act 2015 section 270(2)(a)(b)