THE SENTENCE, THE SENTENCER, AND THE SENTENCED: TOWARDS PRISON REFORM IN NIGERIA

AN INAUGURAL LECTURE,
2009/2010

OLUYEMISI ADEFUNKE BAMGBOSE

UNIVERSITY OF IBADAN

THE SENTENCE, THE SENTENCER, AND THE SENTENCED: TOWARDS PRISON REFORM IN NIGERIA

An inaugural lecture delivered at the University of Ibadan

on Thursday, 15 July, 2010

By

OLUYEMISI ADEFUNKE BAMGBOSE
Professor of Criminal Law & Criminology
Faculty of Law
University of Ibadan,
Ibadan, Nigeria.

UNIVERSITY OF IBADAN

Ibadan University Press
Publishing House
University of Ibadan
Ibadan, Nigeria.

First Published 2010

ISBN: 978 – 978 – 8414 – 21 – 6

Printed by: Ibadan University Printery

The Vice-Chancellor, Deputy Vice-Chancellor (Administration), Deputy Vice-Chancellor (Academic), Registrar, Librarian, Provost of the College of Medicine, Dean of Faculty of Law, Dean of the Postgraduate School, Deans of other Faculties and of students, Directors of Institutes, Distinguished Ladies and Gentlemen.

Preamble

I thank the Almighty God for this great honour to deliver this inaugural lecture, the thirteenth in the 2009/2010 series of inaugural lectures on behalf of the Faculty of Law. This is the fifth inaugural lecture to be delivered by Professors in the Faculty of Law since 1984 when the Faculty became a fully-fledged Faculty. The foundation Dean, Professor Folarin Shyllon delivered the first in 1986, late Professor J D Ojo delivered the second in 2001, Professor Anifalaje delivered the third in 2004 and late Professor Ademola Yakubu in 2006.

Today's lecture which is the third from the Department of Private and Business Law is coming up four years after the last one which was delivered in 2006, and a little over six years after I attained the professorial rank. In the lecture, I will talk to you on a subject which I have for a long time ruminated upon and extensively researched on, in the field of Criminal Justice. The title of my lecture is **"The Sentence, the Sentencer, and the Sentenced: Towards Prison Reform in Nigeria".**

Introduction

Throughout history, persons who violate society's norms and values have more often than not, been subjected to discipline, sanctions, and punishment. In his writing on the origin of punishment, Beccaria (1764) stated that the right of the sovereign to punish crime arose right from the heart of man. The reluctance of man to willingly sacrifice a portion of his personal liberty for the common good of others, created a chaotic state, which brought about the need for unity and the

creation of laws and gave rise to the right of the sovereign to punish crime. Only the law can decree the punishment for a crime. This authority resides with the legislator who represents the entire society rather than with the sentencing magistrate or judge who cannot alter the punishment established for a delinquent citizen. Under the sentencing practice, there is a sentence to be passed, a person or group of persons (either, as magistrates or judges) to pass the sentence, and the offender, on whom the sentence is to be passed. Sentencing is thus a stage in the criminal justice system.

This lecture is comparative and it is divided into four parts. The first part considers the pre-colonial and contemporary sentences. The second part discusses the sentencing process (of which the sentencer and the sentenced form an integral part) and the sentencing principles in Nigeria and some other jurisdictions. The third part analyses the prison system. The final part of the lecture, considers alternatives to imprisonment (which an improved sentencing process could bring about) and also discusses the reforms that these alternatives may bring to the ailing prison system in Nigeria.

Sentencing Practices in the Traditional Pre-Colonial Period

The word sentence originated from the Latin word "sententia" meaning literally "feeling" or "opinion" (Drapkin, 1987). A sentence is the order of a criminal court, imposing punishment on an individual for an offence for which he has been found guilty (White, 1990).

Traditional societies had a wide range of social organizations with rules and norms acceptable and known to members of the community who were expected to obey them. These culturally diverse societies implemented unwritten rules and regulations for the harmonious living of that society (Bingham, 1997). Across societies, violation of these rules was frowned upon. In cases of violation, due investigation was carried out using a variety of traditional detection methods. An offender who was found to have violated the

established rules was made to stand trial. In the traditional system of criminal justice, trials for offenders were fair and just and the principle of fair hearing was observed in these societies (Bamgbose, 2006). Due process was followed and parties in a case were given equal opportunities before the elders who adjudicated cases. There was a wide range of sentences recognized and imposed on offenders. Sentences ranged from compensation to death. The sentence of imprisonment was not a common sanction in the traditional Nigerian society. The responsibility of imposing these sentences was given to the elders in council who formed the judicial arm of the community. Notably, punishment of an offender is not a new phenomenon. Punishment is one of the most traditional means by which compliance is enforced within society. The aim of punishing an offender in the traditional society was to deter people from disturbing a society's valued peace and tranquility. This was not only true of traditional societies; it is also a feature of the modern criminal justice system that sentences are imposed for the purpose of protecting the public, an idea that will be discussed later in this lecture

The punishment, sanction, or sentence meted out to an offender varied from one society to another and depended on a variety of factors which were taken into consideration by the elders in council and other members of that society.

Forms of Sentences in Traditional Pre-Colonial Nigeria

Sentences in the traditional pre-colonial period in Nigeria, to an extent, differ from those handed out under the modern criminal justice system. These differences are the result of many factors that will be discussed in the course of this presentation.

It is apt however, to state that some of the sentences from the pre-colonial period are now recognized by statute employed under the modern criminal justice system.

It is also important to recognize that, while the effects of some of the sentences in the traditional societies were borne by the offender, others were borne by the offender's kinsmen. Within the context of this lecture, the following traditional pre-colonial sentences are discussed.

I. Mutilation, Torture and Trial by Ordeal

Mutilation, torture, and trial by ordeal were used in pre-colonial communities in Nigeria and the punishment was inflicted on the offender. Mutilation and torture were used for repeat offenders of serious offences. In carrying out the sentence, any part of the body could be mutilated. For instance, the Urhobo community wounded the eyes and caused blindness (Bradbury, 1957), and the Kalabaris amputated fingers and toes (Talbot, 1926). Trial by ordeal was the sentence meted out to persons found guilty of witchcraft, an offence regarded as a very serious one and not tolerated. This form of sentence has been totally abolished by statutes (Native Court Proclamation 1900). Customary criminal laws are no longer in force in Nigeria.

II. Slavery

Slavery was used as a sanction in pre-colonial societies in Nigeria. The offender or any other person could be made to bear the sanction and could be enslaved as payment for any offence committed. This sentence was used in biblical times as a punishment for an ambitious dreamer named Joseph instead of the death penalty that was suggested (Genesis 37:28 NKJV). He was sold to the Egyptians for a fee. When a life was lost as a result of the offender's action, the sentence of slavery could be imposed and the offender or a member of the offender's family was exchanged for the lost life. Slavery in all its forms has been abolished.

III. Banishment

Banishment was an extreme sentence given to the most serious or habitual offenders in traditional societies. It is one

of the oldest forms of sentence known to man and it was the first sentence God meted out to man, when Adam and his wife Eve, were both found guilty of disobedience to His authority in the Garden of Eden. It was recorded that "The Lord God sent him out of the Garden of Eden" (Genesis 3:23 NKJV).

Banishment was also used to maintain equilibrium within the community, when it is determined that the offender was best sent out of the community. The sentence was borne by the offender. It had a similar effect as the death penalty as the aim was to permanently eliminate the offender from the community, although it did not involve the loss of life of the offender. Milner (1972) noted that a person banished from the community could face attack and death by animals or capture into slavery.

Banishment could be temporary or permanent. Among the pastoral Fulanis, banishment meant that the offender had to go into the bush until he or she repented. This was to ensure the continued functioning of the society. Where the offence was not thought to precipitate long-term retaliation, there was no reason to totally expel the offender from the community, and a temporary banishment could be implemented to allow tempers to cool. Banishment as a form of sentence has been abolished. However, similar to the sentence of banishment is the statutorily recognized sentence of deportation, which will be discussed later in this lecture.

IV. Excommunication

A person who offended the entire community could be ostracized from that society to allow peace to reign. (Olaoba, 2002). The offender was often publicly molested Ostracism according to Olaoba is done to infuse psycho-logical fear into other members of the society of what will likely happen to them if they also commit such an offence. This form of sentence is still subtly used in traditional communities.

V. Compensation

This form of sentence used in traditional Nigerian societies is also presently recognized as a form of sentence under statute. A more complete explanation of this form of sentence used by traditional societies and under statute will be discussed together later in the lecture.

VI. Restitution or Restoration

Restitution or restoration as a sentence was typically given in cases where the position could be restored to how it was before the commission of the offence (*Akpata v Commissioner of Police,* 1961). A more complete explanation of this form of sentence used by traditional societies and under statute is also being advocated as an alternative to imprisonment and will be discussed later in this lecture.

VII. Corporal Punishment

Mr. Vice-Chancellor, corporal punishment dates back to the sixteenth century. The sentence is known by different terms including caning, whipping, trashing, flogging, hiding, smacking, and birching. In biblical times, the account of Paul and Silas in prison recorded that they were flogged as punishment for preaching (Acts 16:22, NKJV). Whipping was also used by the Egyptian soldiers on the Israelites to enforce conformity (Exodus 5:14 NKJV).

The use of corporal punishment in the mid-Victorian English schools was documented. Bradley's (1927) in his history of Marlborough College, a public school in Southern England, stated that mass flogging of pupils was known. In addition, Davis (1976) quoted Evelyn Waugh as saying in her diaries, that at Lancy College between 1919 and 1921, corporal punishment was the norm rather than the exception. Even old children's rhymes depicted the fact that caning was part of the old British system. One of such rhymes was about an old woman who lived in a shoe who had so many children she did not know what to do. The rhyme went on to say that she gave them some bread without any broth and she whipped them all soundly and put them to bed (Kronheim, 1875).

Apart from the rhymes, corporal punishment was also depicted in classic British novels. An example is the Adventure of Huckleberry Finn (Twain, 1942). In the novel, Huckleberry was said to have stated that "after playing hockey, the hiding I got the next day, done me good and cheered me up".

In the traditional societies in Nigeria, corporal punishment was used as punishment to inflict pain, as a form of correction, and to enforce compliance and conformity (Bamgbose, 2010). Corporal punishment cuts across all cultures and countries. This has been attributed to the idea that it is the most easily available form of punishment whether applied by the use of the hand or other objects such as sticks or cane. It is said to be the least expensive form of punishment, however this does not mean that it is the safest or most effective. It was used in traditional societies in France, Germany, Japan, China, Russia, the United States of America, and Britain to punish criminals and prisoners, enforce conformity; discipline wives, children, students, drunkards, mothers of illegitimate children, and as a form of religious per-secution (Adam, 1941; Freeman, 1979; Hughes, 1946; Hilbert, 1964).

This form of sentencing was also used by the Europeans on African subordinates in the army (Kilingray, 1994). Under the traditional Welsh law, the husband was allowed to strike the wife three times with a broom stick while the old French law allowed moderate wife beating that did not cause death. This law is similar to a current statutory provision in the Nigerian Penal Code, in which the correction of a child, pupil, servant, and wife is allowed through beating (Penal Code Section 55, 2004). The United Nations has called for the total abolition of corporal punishment, describing it as cruel and inhumane. Despite this appeal, this sentence is still used in many countries including Nigeria, where it is even a statutory form of punishment.

VIII. Death Penalty

The death sentence is the ultimate sanction because it permanently eliminates the offender from the community and prevents him or her from repeating the offence. Unlike sentences such as banishment, used in traditional societies, where the offender was sent away from the community and likely to be permitted to return, this is not possible in the case of the death sentence.

The use of death penalty has been in practice in various countries throughout history. This can be traced from the Code of Hammurabi in the eighteenth century B. C., through the Hittite Code in the fourteenth century B. C., the Draconian Code of Athens in the seventh century B. C., to the Roman Law of the Twelve Tablets in the fifth century B. C. The death sentence was widely used in all of these ancient law codes (Bamgbose, 2007). The methods used in carrying out the sentence in the early centuries included boiling alive, burning at the stake, beheading, drowning, quartering, crucifixion, beating to death, impalement, tying down as food for ants, gibbeting, choking, garroting (pressing down with weight), and hanging (Last Mile Tours, 2000).

Offences that attracted the death sentence have changed since the early centuries. In the seventh century Draconian Code of Athens, it was the sole punishment and thus used for all crimes (Bamgbose, 2007). In Britain in 1795 under the Bloody Code, offences such as treason, theft of livestock, arson, murder, and rape were punishable with death. At one time, the cutting down of a tree could attract the sentence of death (Trevelyan, 1978).

A less formal sentence used in the traditional societies in Nigeria is discussed briefly below.

IX. Humiliation and Ridicule

During cultural festivals, in some traditional communities in Yoruba land, criminals and unworthy persons within the community were targeted by youths, who sang satirical songs directed at the offender or the family of the offender (Olaoba, 2002). In some cases, such unworthy persons were

sarcastically censured by the community youth. This sentence is aimed to bring the offender into a state of sobriety. This was done by couching the crime that the offender committed into songs that were to be sung for the culprit or the family members to hear. It was not in doubt, for whom the ridicule was meant.

Humiliation and ridicule is a punishment that may still be meted out on adult or young offenders. A child caught stealing may be ridiculed by being asked to dance around the community with a tag indicating what he or she stole. In the same vein, a woman (although not her partner) caught committing adultery may be ridiculed in the community with the aim of deterring others within the community who may be contemplating doing such acts.

Certain forms of sentences, which hitherto were recognized in traditional societies and under customary criminal law, have been abolished because they failed to pass the repugnancy test which was a development of colonization. Under the repugnancy doctrine, any customary law, which was repugnant to natural justice, equity and good judgment (humanity as a whole) was deemed unacceptable. This rule applied in the colonial era until the sentences that did not pass the test were abolished.

Contemporary Sentencing

The statutes in jurisdictions worldwide provide for a wide range of sentences for various crimes classified broadly as custodial and non-custodial sentences. Non-custodial sentences have been further classified as financial and community sanctions. The Council of Europe has declared a policy of encouraging the use of non-custodial sentences for the most serious types of offences. This was the interpretation given by the English Court in ***R v Cox*** (1993).

In the traditional pre-colonial period, rules governing social behaviour were backed up by informal social pressures. In the era of colonization, the British brought with them the English laws, which with time had legislative backing. With the establishment of a modern criminal justice system in

Nigeria, there is a legislative body developing rules and laws backed by a process of legal machinery. Hence, sentences and sentencing practices under the modern criminal justice system in Nigeria are regulated by law.

A person shall not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred. Any punishment not backed by law is not permitted under the modern criminal justice system (Section 11 of the Criminal Code Act, 2004). There is a constitutional provision that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law (1999 Constitution of the Federal Republic of Nigeria Section 36[12]). A written law according to that provision refers to an Act of the National Assembly or a law of a state, or any subsidiary legislation or instrument under the provision of a law.

As stated previously, some of the sentences used and recognized in the pre-colonial period in Nigeria are now supported by legislation and contained in the statute books. From the range of sentences in the statutes, the underlying principles have changed drastically from settlement and restoring balance in the community and allowing peace to reign amongst the people to the principles of deterring future offences, and of punishing the offenders in a process known as retribution. This principle discussed later in this lecture is based on the mosaic law of an eye for an eye.

Basically, the statutes creating offences in Nigeria are the Criminal Code Act (Cap C 38, 2004) applicable to Southern Nigeria and the Penal Code (Northern State) Act (Cap P3, 2004) applicable to the Northern part of the country. There are other statutes prohibiting certain acts and stipulating sanctions. These include the Economic and Financial Crimes Commission [Establishment, etc) Act] (Cap E1, 2004) popularly referred to as the EFCC Act (Under this Law, there is a legal and prosecution unit charged with the responsibility of prosecuting offenders (Section 13 [2a] EFCC Act 2004)),

and the Corrupt Practices and Other Related Offences Act (Cap C 31, 2003), popularly known as the ICPC Act. Under this Act, an offender can be prosecuted by the Attorney General. Sentences are not passed arbitrarily but must be prescribed for the particular offence for which the offender has been convicted.

The two major statutes mentioned above—the Criminal Code and Penal Code stipulate some sentences. These include fines, caning, forfeiture, imprisonment, and death (Criminal Code Act Section 17, 2004). Others include haddi lashing and compensation (Penal Code Act Sect-ions 68 and 78, 2004). These statutory forms of sentences are discussed below.

I. Fines

A fine is a financial sanction and an appropriate sentence for less serious offences (Part 43, Sections 389-400. C41, CPA, 2004). The main objectives of imposing fines are retribution, prevention and deterrence. An offender should not be allowed to profit from his or her crime. Where it is shown that an offender profited from a crime, he or she should be relieved of it. The idea according to Ratanlal and Thakore (1956) that a man should, when his imprisonment is over, return to the enjoyment of three quarters of his property (property that may be very extensive and may have been accumulated by his offences) appears to us highly objectionable. Fines serve as a means of collection of revenue for the state, although it is not the objective of the state to enrich itself as a result of a citizen's crime. In imposing this sentence, the sentencer takes into consideration certain factors including the financial means of the offender so far as they appear or are known (CPA Section 391; Penal Code Section 72). The court must not exceed the maximum fine for the offence committed by the accused and it must not extend outside of its jurisdiction (*Fashusi v Police* 20 N L R 126).

Ordinarily, fines should not be used as punishment for serious offences. *In Asuquo Etim and Another versus Queen* (1964), the Supreme Court held that it is only in exceptional

cases that fines should be the appropriate sentence for serious offences. In addition, heavy fines should not be imposed on a person with low income. This is because a court must not act in vain knowing that the offender cannot pay a fine. However, the fine imposed should be severe enough to deter any future occurrence of the crime, and, at the same time, should not be too severe to make it useless if the offender is unable to pay the fine (*Goke versus Inspector General of Police* [1957] *and Akile Gbila versus Commissioner of Police* [1965]. Where the offender cannot pay the fine, the court may allow installment payments (CPA Section 392[2] C41, 2004).

Where an accused is sentenced to pay a fine and he or she refuses to pay, the accused can be sentenced to a term of imprisonment in default (CPA Section369, C41, 2004). The law provides for the scale of the terms of imprisonment that an offender will be asked to serve when the fine imposed is not paid (Section 390 of the Criminal Procedure Act [2004]). The total term of imprisonment must not exceed two years. When a fine is imposed upon an accused person and he fails to pay and therefore becomes liable to imprisonment, the court has the power to do any of the following:

(a) issue a committal warrant
(b) allow time for payment or
(c) direct installment payments or
(d) give security with or without surety for payment of money.

A sentence of fine may be recovered by distress. The warrant of distress must be in writing and must be signed. A person authorized to execute a distress warrant may take any money or certain goods belonging to the offender. The sale of such goods may be used to offset the payment of the fine (Section 399[2] CPA; CPC Section 304 [2] [3]).

An offender given a sentence of fine may admit that he or she is incapable of paying the fine and opt for a committal to prison. The court may then issue a warrant for committal. If an offender pays the fine after committal to prisons, he or she

will be released from prison (CPA Section 397). An accused that pays part of the fine and is unable to pay all will be committed to prison in default of the unpaid amount rather not the total fine (CPA Section 397 [3]). Fines as a sentence have the advantage of solving the problem of overcrowding in prisons and it avoids the stigma associated with imprisonment.

II. Forfeiture/Confiscation

An offender who is convicted of an offence under sections 98-99 (Criminal Code Act, 2004) dealing with corruption and abuse of office or sections 170, 175, 177, 179, 180 or 183 of the same law, dealing with offences relating to posts and telecommunications, may, in addition to or in lieu of any penalty which may be imposed, be ordered to forfeit to the state, any property that has passed in connection with the commission of the offence or ordered to forfeit any personal property that has been used in the commission of the offence. If such property cannot be forfeited or cannot be found, the court shall assess the value of the said property, and the offender may be ordered to pay that sum. The sum that is to be forfeited may be enforced in the same way as fine. The governor will then direct the way the property or the sum will be dealt with.

The rationale for this form of sentence is preventive. The steps involve impounding, confiscating, or ordering the forfeiture of such property. This may lead to destruction of the property if necessary. Destruction of property is another form of sentence that will be discussed later.

When property is forfeited, it can be kept or sold. If sold, the proceeds will be held by the court until a person comes forward and it is established by the court that he or she has a right to the proceeds. If after six months nobody comes forward to claim the proceeds it becomes the property of the government. Before an order for forfeiture is made, the accused is given an opportunity to be heard, to see whether he or she should retain the articles. After an order of forfeiture,

the court may make further orders regarding delivery to the appropriate per-son, confiscation or destruction of the goods.

There are orders that are made by the sentencer alongside a sentence passed on the offender. One example is the order of delivery which could be made with a sentence of forfeiture. In the case of firearms, on the instruction of the Inspector General of Police, they may be put in an official armory or be destroyed in the case of a useless or a dangerous object such as a bow, arrow or spear.

It is important to note that where an appeal lies in a case of forfeiture under CPA, Section 263, the order will not be carried out until the period allowed for the appeal has lapsed except in the case of livestock or the property is subject to speedy and natural decay. The court may also order that the property be destroyed. This is usually the case with adulterated food or drinks and counterfeit materials.

III. Caning

Caning was frequently used in the traditional pre-colonial period in Nigeria and in many other jurisdictions around the world, but is now banned in many countries. It is however very difficult to completely eradicate this practice because of its informal use in the domestic arena for discipline and correction.

Caning is recognized in the statutes as a form of sentence (Criminal Code Act, Section 17, 2004 and the Penal Code (Section 68 [1] [F], 2004). The manner in which the sanction must be carried out is set out in the law. An offender above the age of forty-five years cannot be sentenced to be caned and a woman cannot be given this sentence (CPA Section 385, 2004). At the time of sentence, the number of strokes must be specified and it must not exceed twelve strokes. According to a report (*Daily Trust*, 2009), a twenty-seven year old man was sentenced to twelve strokes of caning for stealing three crates of eggs. After pleading guilty to the charge and begging for leniency, the magistrate rebuked him and directed that the flogging be done in public. Additional

regulations include that the sentence must be carried out with a light rod cane in the prison in the presence of a prison administrator (CPA Section 386, 2004).

The health condition of the accused must be ascertained both at the time of sentence and the time of caning. The importance of the pre-sentence investigation is acknowledged in England and the United States of America. If at the time of the carrying out of the sentence of caning, the accused is found unfit, the execution of the caning must be stayed and the court that passed the sentence of caning should be informed of the condition of the offender and the court may substitute caning with another sentence found suitable. If the caning has started and the accused is found bodily unfit to continue with the sentence, the remaining strokes may be remitted to another sentence (CPC Section 309). The caning must be carried out as soon as practicable except in the case of delay due to appeal (CPA Section 388, 2004), and cannot be carried out in installments (CPC Section 308 [3] 2004).

The sentence of caning can be given in lieu of or in addition to a term of imprisonment. This statutory pro-vision is similar to the sentence given in the biblical account of Paul and Silas, who were flogged and later sent to prison (Acts 16 NKJV). The two punishments may be combined if the court takes into consideration the prevalence of the crime in the society and the previous record of the individual in question.

In an interview with some judicial officers in Oyo and Ogun States, it was discovered that this sentence is not commonly used. Reasons given by them include the fact that it is not a popular sentence, though it is in the law books. In a few cases, the sentencers said they used it in addition to the sentence of imprisonment in rape cases involving older men with young girls. The aim of that punishment was to humiliate the accused. Caning is highly recommended in less serious cases which do not warrant a custodial sentence. This may include cases of dangerous driving not involving death, affray, disturbing the peace and similar offences.

Though frowned upon in many countries, caning is still being used in others for less serious offences. A Singapore

court decision to sentence an American teenager to receive a flogging for vandalizing cars with spray paint produced a predictable nod of approval from many Singaporeans (Wallace, 1994). For many Americans the punishment seemed unduly harsh, while other Americans expressed the view that this might be the answer to the United States' crime problem. The American teenager was sentenced to six strokes of the cane, four months in prison, and a $2230 fine after pleading guilty to two counts of vandalism, two counts of mischief, and one count of possession of stolen property. In Singapore, caning is carried out by a jailer trained in martial arts who uses a moistened, four foot tattan cane. The offender is stripped and bound by the hands and feet to a wood trestle. Pads covering the kidney and groin are the only protection from the cane. If the accused passes out due to the caning, an on-site physician revives the offender and the caning continues. The wounds generally take two weeks to heal. In Singapore, it is said that the sentence is intended not just as punishment but as a deterrent.

IV. Haddi Lashing

The sentence of Haddi lashing is a form of caning. It is a sentence recognized under the Penal Code (Sections 387, 388.392.393, 402, 403, and 404). It can be imposed only on offenders of the Muslim faith who have committed offences relating to immorality and drunkenness. The punishment is symbolic because the aim is not to inflict pain, but to disgrace the accused.

V. Deportation

In Nigeria, the court may recommend that the offender be given the punishment of deportation (CPA, Chapter 45, Sections 402-412, 2004). However, this has to be approved by the President before it is carried out. Deportation is a sentence for specific offences. Pending the carrying out of the sentence of deportation, a person recommended for deportation may be remanded in prison. Similarly, if the

recommendation of the court for deportation is not approved by the President, the President will inform the court.

Where the court has sentenced the offender to imprisonment in addition to the recommendation for deportation and the recommendation is not approved, the offender will be made to serve the prison term (CPA Section 411, 2004). However, if the offender is sentenced to imprisonment in addition to the recommendation for deportation and the recommendation is approved by the President, the offender will serve the term before deportation (CPA Section 412[1], 2004).

Both Nigerian citizens and non-citizens may be deported. In the case of a citizen, the individual may be deported outside of the jurisdiction where the offence is committed but within Nigeria. In the case of a non-citizen, the deportation is outside Nigeria.

VI. Death Penalty

The death penalty is a fixed and strict sentence in cases of murder, culpable homicide punishable by death, treason, treachery, instigating invasion in Nigeria and fabricating or provision of false evidence (Criminal Code Act Section 316, 2004; Penal Code Act Section 221, 2004; Criminal Code Act Section 37, 2004; Penal Code Section 411, P3, 2004; Criminal Code Act Section 41, 2004; Criminal Code Act Section 38, 2004; Penal Code Act Section 159 [1], 2004). This means that once an offender is found guilty of any of the offences listed above, a sentencer must impose the sentence of death by hanging, which is the method presently used in Nigeria (Criminal Procedure Act Section 367, 2004). The sentencer must give the direction that the accused should be hanged by the neck until he or she dies. However, if the sentencer fails to give this direction and only states that the accused is sentenced to death, it will not invalidate the sentence (*Olowofoyeku v The State* 1984).

Different arguments have been brought forth in favour of and against this sentence. Arguments against include that it

induces bizarre behaviour in offenders and the unreliability of methods. The arguments for the death sentence include the prevention of further crimes on the part of the offender and that it allows the community to demonstrate its rejection of the offender. Of the countries that still employ the death sentence, some have discarded or modified the ancient methods of carrying out the sentence and have adopted new methods. Shooting was used in Nigeria in the 1970s as punishment for armed robbery. Beheading is now used in Saudi Arabia (Hillman, 1993). Some of the new methods adopted include the use of the electric chair, lethal injection and cyanide gas (Randa, 1997; Bohn, 1999).

There have been public agitation for the total abolition of this form of sentence. With the emergence of the abolitionist groups and public outcry against execution, many countries revisited the issue of the death sentence. Many countries have abolished the use of the death sentence, while many others retain it in their law. Still others maintain a moratorium which is a stay in executing condemned prisoners (Bamgbose, 2007).

VII. Imprisonment

Imprisonment was not widely used as a sanction during the pre-colonial period, but it was not a strange practice (Bamgbose, 2003). At that time, imprisonment was carried out in the back of the king's palace. Imprisonment as a sentence can be traced to the British colonization when it was used to keep in close custody persons that posed political and economical threats to the British administration (Ekwuruke, 2005). It was to guarantee a peaceful atmosphere for colonial, economic and political interests (Bamgbose, 2003).

The modern concept of imprisonment is a relatively new form of punishment under the modern criminal justice system in Nigeria, and it is also the most common sentence administered by the court. In an interview with magistrates and judges in Oyo and Ogun States, on the use of this form of sentence and why it is the most commonly used, the responses were similar. Imprisonment is said to be the most

common type of sentence prescribed by law (Criminal Procedure Act Section 377, 2004). It is also said that for certain offences, there are no alternative options after considering all of the facts surrounding the case and the accused. Some even said that where there are other options, the structures for their use are not in place. It is the gravest custodial punishment that is open to the sentencer to impose for an offence. Of all the forms of sentences open to the courts, imprisonment figures out prominently in the public imagination. This is because other forms of sentences are considered lenient. Over the years, the popularity of imprisonment remains undiminished. Duff (2007) says that the sentence of imprisonment sends a message to the prisoner and the society that they are unfit to continue living in that society. Imprisonment imposes deprivation and restriction on the accused in a much greater degree or kind than the type of setback against the offender's interest in other non-custodial sentences (Currie, 1998). In some countries, there is an expansion of different building programmes, and in european countries there is a more liberal approach to imprisonment, including less use of it and more humane treatment of prisoners (Whiteman, 2003).

The term of imprisonment given for an offence that has been committed must not exceed the maximum provided by law and what the court has jurisdiction to impose. When the law prescribes a fixed minimum sentence the sentencer may not go lower than that sentence (CPA Section 378, Penal Code Section 303, 2004). The term of imprisonment given to an offender must not be excessive (*Ekpo v The State* (1982); (*Olanipekun v The State* 1979). In Ekpo's case, the court sentenced an eighteen-year-old first time offender to the maximum punishment prescribed for the offence which was twenty-one years. On appeal, it was held that the sentence was excessive. The sentencer, must take into consideration the time already spent by the offender on remand when considering the appropriate term of imprisonment to give. It is the sentence of imprisonment and not the treatment accorded to the offender in prison that constitutes

punishment. It is therefore the length of sentence that measures the degree of punishment and not the condition under which it is served (Patterson, 1951).

The term of imprisonment that can be imposed on an offender ranges from a couple of days to a life sentence. A life sentence is given by the court in serious cases such as rape and robbery, inciting to mutiny and offences relating to currency. Unlike other types of sentences of imprisonment with definite terms to be served by the offender, no fixed term is given in a life sentence. Sentences of life imprisonment rarely mean that a person will spend the rest of his or her life in prison. The average length served in prison on a life sentence before release is twenty years. This was the decision in *Ozuloke v the State* (1965). In the case of multiple sentences of imprisonment, where the offender has committed several crimes and is serving a term in prison for one of the crimes, the court may direct that the new sentence commence after the expiration of any other term of imprisonment. This is known as consecutive sentence (CPA Section 380, 2004). On the other hand, if the offender is charged for an offence with several counts and the offender is found guilty and sentenced to different terms of imprisonment for the different counts, the sentencer may direct that the terms of imprisonment run concurrently. In computing the term of imprisonment in a concurrent sentence, the period of imprisonment equals the length of the longest sentence.

In the famous treason felony case of Chief Obafemi Awolowo, the former Premier of Western Region, he was sentenced to ten years imprisonment with hard labour in the first count of treasonable felony, five years imprisonment with hard labour in the second count of conspiracy to commit felony, and two years imprisonment with hard labour for conspiracy to effect an unlawful purpose. The sentences were to run concurrently. The implication was that Chief Awolowo would spend ten years in prison.

A sentence of imprisonment takes effect from and includes the whole of the day of the date on which it was pronounced (CPA section 381, 2004). An offender may be

detained for one day in the precincts of the court or a police station. This may occur when the sentencer has found the offender guilty and has the power to pass a sentence of imprisonment. In lieu of passing the sentence, the court may order that the accused be detained either on the court premises or in a police station. However, the accused must not be detained in either of the two places past eight o'clock in the evening on the day he or she is convicted (CPA Section 379 2004). The court must, however, ensure that it will be possible for the accused to return to his or her place of residence on that day of conviction before the stipulated time. This form of sentence of imprisonment can be used in less serious offences and to reduce overcrowding being experienced in many Nigerian prisons.

The sentencer may impose a fine where the law provides only for imprisonment (CPA Section 382 [1] 2004; CPC Section 23 [1] Act. C42, 2004). The case of *Price Control Board v Ezema* (1982) should be compared with *Dada versus Board of Customs and Excise* (1982). In Ezema's case, the accused was charged with hoarding under the Price Control Act. The law provided for a sentence of not less than six months. The accused was sentenced to six months imprisonment with the option to pay a ₦500 fine. The state appealed. The Court of Appeal held that despite the mandatory sentence, CPA section 382(1) allows the court to impose a fine where it is not prescribed. However, in Dada's case, the accused was charged with unlawful importation under the Custom and Excise Management Act. The law provided for a maximum punishment of five years, without the option of a fine. The accused was sentenced to two years and he appealed. The Court of Appeal held that the magistrate was correct. The court held that where a specific law states no option of fine, this should be followed with preference given to the general law. If the accused is given an option of fine in lieu of imprisonment, and he or she defaults in paying the fine, the offender becomes subject to a term of imprisonment that must not exceed the maximum fixed term authorized as punishment for the offence.

A sentence of imprisonment must be accompanied by a warrant of committal issued by the sentencer to the prison administrator. The warrant is an authority to the superintendent of the prison or any other prison official to implement the content therein as contained in the warrant signed by the sentencer (CPA Section 253, 2004). When a sentence of imprisonment is given, it may be with or without hard labour which is also known as prison labour or convict labour in some jurisdictions. Where no specific order is given, it is with hard labour. The term of imprisonment must come into effect within three months of the passing of the sentence (CPA Section 393 [3] 2004).

The history of the principle of hard labor in imprisonment can be traced to 1863 (Priestley, 1985). A committee led by the Earl of Carnarvan was amazed by the difference in opinion as to what constitutes hard labor. After the Earl of Carnarvan committee visit to British prisons in 1863, an attempt was made to define hard labour. It was defined as "work which visibly quickens the breath and opens the pores" The committee during the visit considered the various forms of work available in the British prisons at the time and found that the tread wheel, crank and shot drill appeared to the members to properly merit the designation of hard labor. The tread wheel was created by William Cubitt, a civil engineer; in 1818 after he visited an English prison and found the prisoners "lounging idly about" He felt it was a "demoralizing waste of strength and time". The justice who accompanied Cubitt on the visit then said to him "I wish to God, Mr. Cubitt, you could suggest to us some mode of employing these fellows: could nothing like a wheel become available?" Mr. Cubitt then whispered to himself "the wheel elongated" and thus he conceived the tread wheel. The tread wheel was used in prisons to do a variety of tasks such as pumping and supplying water, grinding wheat for prison use and to "grind the wind." This last use generated a lot of controversy because some thought that hard labour should be used for productive and not useless purposes.

The crank known as "Appold hard labour" was another form of hard labour. The machine did not grind anything but the air and the effect it had was a humiliating sensation of labouring hard to achieve nothing (Priestly, 1985). Of this type of hard labor it was said "I know of nothing harder or more degrading than this work." The third form of the hard labour was the shot drill. A former soldier described it as "the last survival of those barbarous personal punishments by which a century ago, military discipline was maintained" (Harding and Koffman 1995).

Prior to 1895, the prison regime was punitive, there-fore enforcing two layers of punishment. That is the imprisonment itself and the harsh prison regime. The Gladstone Committee in 1895 condemned useless labour and advocated a system of useful prison work. If a prisoner escapes from lawful custody while serving a term of imprisonment, upon arrest, he or she will serve the term when he or she was absent from prison in addition to the remaining term not yet served. It does not matter whether or not the sentence had expired at the time of capture.

Mr. Vice-Chancellor, from the above discussion, it is apparent that almost all the sentences discussed above if not all, will take the offender to the prison in one way or the other as an inmate or a prisoner. This is because a fine is imposed as either an alternative or addition to a term of imprisonment; forfeiture, confiscation, restitution, and restoration are sometimes given further to a term of imprisonment; caning and haddi lashing are applied in the prison, while an offender is invariably in prison custody before deportation or death penalty is carried out.

The Sentencing Process

The issue of sentencing comes up in the criminal process after the accused has been found guilty of an offence and convicted by a magistrate or a judge. According to Justice Belgore, former Chief Justice of Nigeria, sentencing is a very important aspect of a judge's duty and though it appears easy, it is not at all. Justice Gbaja-Biamila (2007) says that

sentencing is the most delicate and difficult aspect of criminal adjudication. It is the stage at which measures for criminal wrongdoers are decided upon.

Sentencing, according to the Canadian Law Reform Commission, is the process in which the court or officials having inquired into an alleged offence give a reasoned statement, making clear what values are at stake and what is involved in the offence. Similarly the Victorian Sentencing Committee states that sentencing is the process by which people that offend against the law have sanctions imposed upon them in accordance with the law. Sentencing is the stage at which the sentencer is no longer a procedural watchdog, but exercises the ultimate authority of the state in determining the appropriate sentence (Gaines and Miller 2009).

It is in the post-conviction stage of the criminal justice system where the offender is brought to the court for the imposition of a penalty, after the court's verdict has found the offender guilty (Gaines and Miller 2009). A verdict is a formal decision of the court in a criminal case after hearing the evidence presented before it by both the prosecution and defense. The verdict is also known as the judgment and must be recorded in writing (CPA Section 245, 2004). Similarly, the verdict must contain the points for determination, the decision and the reason for the decision. It must be signed and dated by the judge or magistrate at the time of the pronouncement (CPA Section 245, 2004). An offender who is found not guilty will be discharged and acquitted. When the verdict is that the offender is guilty, the sentencer will proceed to sentencing. A sentence may be passed immediately or adjourned to a later date (CPA Section 248, 2004). Ashworth (2007) describes the process of passing a sentence on an offender as probably the most public face of the criminal justice process. The law creating an offence always prescribes the punishment. It is important to note that, the principal source of the sentencing law in Nigeria is legislation.

The purpose of sentencing is to protect the society from the dangerous action of an offender, to assist as much as

possible the victims of a crime, to reform the offender and to prevent other people from criminal activity. However, it is not in all cases, that a sentence is passed immediately by the court. An offender may be ordered by the judge or magistrate to enter into his own recognizance with or without sureties in a sum of money that the court feels is appropriate, and on condition that the offender may appear to receive judgment at a future sitting of the court (CPA Section 250, 2004).

Before a sentence is passed on an offender, the registrar of the court asks if the offender has anything to say to the court as to why sentence should not be passed on him or her according to the law (CPA Section 247 2004). Yet if the offender is not asked this question by the registrar or if the judge or magistrate asks, the validity of the proceedings is not affected. In the same vein, it is the practice of the court before sentencing an offender to ask the prosecutor if there is any information about the offender, which is within the prosecutor's knowledge that the court should know before deciding the appropriate sentence. Information regarding past records and convictions is often times relevant at this stage. Further discussion on this will come later in this lecture.

The Sentencer in the Sentencing Process

The decision to find an appropriate sentence for an offender, which is the most "difficult and delicate" aspect of sentencing is the function of the sentencer, that is the magistrates and judges. At the trial court, the sentencer is solely responsible for giving the verdict and passing the sentence on the offender. At the Appeal Courts, the Justices affirm, vary or set aside the decisions of the trial court. This is the position in Nigeria and some other jurisdictions, although there are variations in different countries. The decision to give a particular sentence or another to the offender will invariably have an effect on the prison system. This is because this decision will either add to, or potentially reduce the population in the prison.

Sentencers are individuals and thus their decisions reflect their individuality. Sentencers are products of different

backgrounds and they have different social values. Lewin (1998) in a classic study of the criminal court in Pittsburg and Minneapolis has shown that there is a correlation between the judges' background and the sentencing behaviour. Lewin found out that Pittsburg judges, all of whom came from humble backgrounds exhibited a greater empathy towards defendants than judges from Minneapolis who tended to come from upper-class backgrounds. While the Pittsburg judges tried to make decisions that they believed would help straighten out the offender's lives, the Minneapolis judges were more inclined to follow the law precisely and emphasized society's need for protection from crime.

The above argument has been given support by legal realists who say that a judicial decision is the product of the judge's background and attitudes rather than a rational deduction. Hart pointed out theoretically that judicial decision can be both rational and consistent even if the judge's decision is not always one or the other. It is usually asserted that judicial decisions are not exclusively determined by the judge's model of what is legally correct, but that even non-legal factors influence the outcome of a case (Hood, 1962; Gluck, 1956). According to Aubert (1972), this includes motives that cannot be understood by examining the law itself. The central task of a sentencer is identified to be how to assess the relative seriousness of each case and how to arrive at a commensurate penalty. As rightly put by Judge Straut White (1985), a sentencer is not just seeking the answer to a two-sided question as is a magistrate who has to decide whether or not a defendant is guilty. Rather, a sentencer makes a complex decision. The sentencer decides first what type of sentence should be imposed, for example whether it should be a fine or a conditional discharge or community service or probation order. The sentencer also has the function within the above wide categories, to set the sentence at the appropriate place on the scale and to determine how much of a fine should be paid. It is also the function of the sentencer to determine how many hours of community service are to be done by the offender and how

long the custodial sentence should be. A sentencer's decision in the sentencing process has been described in a variety of ways. According to Blackstone, the passing of a sentence is simply a mechanical application of a set of legal rules of special cases (Ulla Bondeson, 2002).

The sentencer deals only with a small sample of offences and offenders (Ashworth, 2000). Offenses for which the sentencer has to pass judgment are both quantitatively and qualitatively different from what might be described as the social reality of crime. Ashworth (2007) stated that the quantitative differences between crimes actually committed and those that come up for sentence are immense. This was attributed to the fact that from the total number of offenses committed in the society; only a small percentage is reported. Many cases are settled in private, while others are not reported due to fear of stigmatization. From the small percentage actually reported, there is a differential response to crime by the police and other agencies, resulting in a much smaller percentage being recorded. This can be attributed to insufficient evidence, parties agreeing to settle the case, and the age of the offender. In Nigeria in particular, the police have classified some cases as "family or domestic cases" and these are not recorded in the police stations; instead, parties are advised to settle such cases within the family. This reduces the number of cases that actually go for prosecution. Cases that go before the court may result in a discharge or acquittal. A nolle prosequi may be entered by the Attorney General, or the case may be thrown out for lack of diligent prosecution. In other instances, an offender may be warned or cautioned at the end of a case.

Only a small percentage of actual offenders are convicted and sentenced by the sentencer. As Ashworth (2007) put it, "the type of cases which come up for sentence are an imperfect reflection of the nature of crime in the society." Baldock (1980) also stated that there is an elaborate process of selection by the public, police, court, and judges before an offender gets to the sentencing stage. During the pre-trial and trial stages of a criminal case, the sentencer is somewhat

passive. The sentencer at such stages is primarily a watchdog ensuring that the process of the law is followed and the rights of the defendants are not infringed upon. The main players at the two stages above are the prosecutor and defense counsel.

The sentencer is the main actor in the passing of a sentence on the offender. The task at this time is to punish the offender according to his or her culpability. However, the role of the sentencer at this time is not to find a sentence which will make good the damage done (Thomas, 1994). Before a sentencer passes a sentence on an offender, the following facts must be noted. It is the magistrate or judge that tried a case that must deliver the judgment and if the offender is guilty, pass sentence on the offender (CPS Section 251, 1990). Where the magistrate or judge who heard the case is prevented by illness or unavoidable cause from delivering the judgment or passing the sentence, such a sentence, if it has been reduced into writing and signed by the magistrate or judge, may be delivered by another magistrate or judge and given in open court (CPA Section 251, 1990).

Mr. Vice-Chancellor, in performing his or her duties, the sentencer is involved in a multi-choice question to which there is no correct answer. Narding and Koffman (1995) have stated that if there is a correct answer to each sentencing problem the sentencer will encounter, the sentencer would be replaced by a computer. The sentencer in the process of sentencing has to strive to operate the law for the attainment of social engineering. Fabiyi JCA (as he then was) in *Ekwenugo v. Federal Republic of Nigeria* (2001) said it is by so doing that our desire to attain national rebirth and regeneration can be attained.

The sentencer must look at the statute book relating to the offense, must understand the legal framework within which the sentence must be carried out, and must be guided by the sentencing framework. The position of the law in imposing punishment is that a person shall not be punished for doing or omitting to do an act unless the act or omission constitutes an offense under the law in force when it occurred (Criminal Code Act Section 11, 2004). In the same vein, no person shall

be liable to be punished in any court in Nigeria for an offence except under the express provision of the code or some act or law, which is in force or forms part of the law of Nigeria (Criminal Code Act Section 4, 1990; Penal Code Act Section 3[1], 1990).

The sentencer is only allowed and has discretion to hand out a sentence within the prescribed sentence allowed by law. This was emphasized in *Enahoro v, Queen* (1965). He must be fully informed and must understand the concept and principles of punishment and sentencing so as to give the appropriate sentence (Gbaja-Biamila J 2007). He must base sentences on fact. The facts of each case at hand, which are established before the court of law and for which the offender is found guilty, must be used in passing the sentence. There is a constitutional principle *Nulla Poena Sine Lege,* that is, no one is to be punished on a charge for which they have not been tried and found guilty (*Attorney General v. O'Callaghan* [1966] *King v. Attorney General* [1981].

Any fact brought out in the proceedings before the court, for which the offender was not charged cannot be used as a basis for sentencing (*R v. Singh*, 1981). In the same vein, a sentencer must not use as basis for sentencing any fact brought before the court, which was not proved or admitted and for which the offender is found not guilty by the court (*R v Clutterham* 1982). In Clutterham's case, the appellant pleaded guilty to assault occasioning actual bodily harm, but not to the possession of an offensive weapon. The court accepted his plea, but in sentencing, the judge referred to the possession of the offensive weapon. The Court of Appeal reduced the sentence given by the trial judge because the trial judge took into consideration an extraneous factor in sentencing. This principle was also upheld in *R v. Fisher* (1981), *R v. Ayensu* (1982), and *R v. Johnson* (1984).

The sentencer exercises much judicial discretion in the process of sentencing. He should therefore have the knowledge and understanding of the facts of both the case and the offender. He must acknowledge the limit of his or her

power of judgment and must not exceed it. A sentencer has sentencing options as well as legal restrictions. In passing a sentence, the sentencer must keep this in mind and must act accordingly within the boundaries and limits. Some of the sentencing options or restrictions include the following:

Statutory Maximum: For many offences, there are statutory maximum punishments. In such offenses and in the penal laws, the punishments stated are the highest for such offenses and the sentencer cannot go above the maximum already stated in the laws but has the discretion to impose punishment within an established range.

Fixed Minimum Sentences: In certain offenses, discussed earlier in this lecture, the sentencer is bound by law to fixed sentences from which the sentencer cannot depart once the offender is found guilty. In the case of Muslim Folorunsho, discussed later in this lecture, who was found guilty of murder, despite the plea for leniency by the counsel, the judge had this to say:

> The law of the country does not prescribe any other punishment for the offence of murder. The court does not have the prerogative of mercy, but must allow the law to take its course (Apuru, 2010).

Jurisdiction Limits: Depending on the court in which a case is heard, there are limits placed on sentencers on the type of sentence, term of imprisonment, and amount of fine that can be imposed. An example is that a magistrate court cannot adjudicate on a homicide case involving death and therefore cannot impose a death sentence. The limit is also imposed on the amount of fine that a magistrate can impose.

Restriction on Gender, Age, and Condition of the Offender
The age, gender, or condition of an offender may restrict a sentencer, as to the type of sentence that may be imposed.

There are certain sentences in the statute that must not be given to offenders of a particular sex, age, or condition. For example, the sentence of caning must not be given to any female offender (CPA Section 385, 1990). With reference to age, the death sentence must not be given to a child.

With regard to condition, an offender that is medically unfit must not be caned and a pregnant woman must not be sentenced to death. An offender found guilty of an offense for which a fine can be imposed must not be given a heavy fine as a sentence if the sentencer is sure that the offender is indigent and would be unable to pay the fine. This is based on the equitable maxim that a court will not act in vain. It is expected that those who decree sentences must exercise fairness and freedom from prejudice or bias from any kind of attitude that may lead consciously or unconsciously to improper discrimination (Radzinouwicz and King 1977).

The sentencer must be sensitive to the kind of person to be sentenced. Factors that have influenced the offender in the past and are likely to influence him or her in the future must be taken into consideration. Therefore, before passing a sentence, the sentencer must consider certain facts, circumstances and peculiarities of the offender. This may include the antecedent of the offender, the character of the offender and previous conviction, the criminal records of the offender if any, the age of the offender, domestic and family circumstances, educational back-ground, family background, work record, details of income of the offender and medical history of the offender. In *R v. Ball* (1951), these conditions were well-explained. These factors help the sentencer come to a decision on the appropriate sentence to give to the offender and to determine if the sentence will be aimed at rehabilitation, retribution, deterrence, or reformation.

The sentencer must know and understand which sentence is appropriate and just. This according to Harding and Hoffman (1995) is the essence of the sentencer's discretion. He has the freedom to use his or her discretion, but does not have the discretion to misuse it. He must be humane in

applying the principles and proclaiming a sentence. Draconian, harsh, or inhumane punishment must not be imposed. This was aptly stated in *Ekpo v. State* (1982). The sentencer has a large range of approaches from which to select an appropriate sentence for the offender found guilty. Finlay C. J. in *DPP v. Tierman* (1988) said;

> There is little in the way of legislative or judicial ruling on the decision which must be made by the sentencing judge. However, a few approaches adopted by the court can be deciphered from some judicial decisions. The effect is that sentence must not only be appropriate to the particular circumstance but also to the particular offender.

Aims of Sentencing

In deciding on the approach to adopt, the sentencer must bear in mind that the major and overall aim of sentencing is to reduce crime by making as many people as possible obey the laws of the land. This was well-stated in *Queen v. Bartholomew Princewell* (1963). Under English law, the Home Office (1990) stated that the first objective for all sentences is the denunciation of and retribution for the crime. Depending on the offense and the offender, the sentencer may also aim to achieve public protection, reparation, and reform of the offender, preferably in the community. The different approaches are discussed below.

I. Retribution: The principle of retribution or dessert theory is based on the justification that punishment is a morally appropriate response to crime. This is based on the biblical expression of "an eye for an eye, a tooth for a tooth."

The principle is based on the notion that those who commit a particular crime should be punished in proportion to the gravity of the offense or to the extent to which others have been made to suffer. The severity of the sanction should fit the seriousness of the crime. Proportionality is the key

concept in the dessert theory. A light sentence of the rape of a five-year-old girl or a heavy sentence of ten years imprisonment for the theft of a bundle of chewing sticks would clearly breach the proportionality test. It is the function of the state, through the courts, to punish repulsive and offensive acts within the community.

II. Deterrence: This theory or principle regards the prevention of further offence through deterrent strategy as a rationale for punishment. This theory was used in the sentence of a popular ruling-party chieftain who was sentenced to a term of imprisonment with no option of fine (Osundefender, 2008). According to the EFCC prosecutor, the sentence of two and a half years imprisonment given to the chief would serve as deterrent to other people who may want to use their position in office to benefit themselves. Jeremy Bentham (1789), the foremost proponent of this theory, developed the notion of setting penalties at levels sufficient to outweigh the likely benefit of offending. It is believed that human behaviour is controlled by calculation of the benefit versus the cost of the act. The proponents override the claim of proportionality.

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

III. Rehabilitation: This principle is aimed at the restoration and reformation of the offender with the rationale for preventing further offence through the strategy of rehabilitation. It may involve education, therapy, counseling, family intervention, or vocational training since its proponents believe that criminal behaviour is treatable. Reintegration into the society is aimed for under the principle of rehabilitation. The concept of rehabilitation focuses on the offender (Cole and Smith, 2001).

IV. Incapacitation: This theory is based on the assumption that by removing the offender temporarily by putting him or her in a secured institution for a specified period of time or permanently by putting to death, the capacity to commit crime is removed. Under the Nigerian traditional system, incapacitation was carried out through banishment from the community. According to Cole and Smith (2001) in early American society, where the theory was used in punishment, the offender was asked to go away or join the army.

Incapacitation has nothing to do with the behaviour of the offender nor is it linked with changing the behaviour of the offender. The theory primarily looks at predicted risks and the protection of potential victims such as children or the elderly. There is a preference for the rights of potential victims over those of the offender. Incapacitation's proponents focus on the characteristics of the offender instead of the offence. For example, a woman who kills another in self defence or under provocation may have a reduced punishment, while a woman caught stealing who has been previously convicted six times for stealing may receive a longer prison sentence.

In adopting any of the approaches discussed above, the sentencer must consider a variety of factors. In the case of rampancy of the offence, the sentencer may want to adopt the deterrent approach (DPP v. Preston, 1984). In choosing the approach, the reformation of the offender is not important; attention is paid to what will deter prospective offenders from committing the crime. If the offender is a first-time offender,

and the offence is not serious, the sentencer may want to look at the best way to reform the offender and may decide to opt for the rehabilitative approach.

In *The People (Attorney General) v. O'Driscoll* (1972) Walsh J. said:

> The rehabilitative approach is the most positive as the object of sentence is not merely to deter the criminal from committing crime, but to induce him as far as possible to turn from a criminal to an honest life and that public interest will be best served if the criminal could be induced to turn away.

The disparity in sentencing is caused by the discretion given to the sentencer. The lack of coherent policy from which sentencing options are decided by the sentencer causes frequent conflicts and inconsistencies. O'Driscoll's case can be compared with Buckley's case (1 Freven, 190). The offender in the latter case while on probation committed another offence and was not availed an opportunity for reformation.

The sentencer in adopting any of the approaches discussed above and in imposing a particular sentence must take into consideration the cost implication of the sentence. The sentencer needs to know the likely facilities available when an offender will be sent to prison. The types of prisons available, space, and facilities must be within the knowledge of the sentencer, and he/she will be wrong in assuming that what happens to a prisoner after sentencing is of no concern to him or her.

Other Relevant Persons in the Sentencing Process

The judges and magistrates have the sole responsibility of sentencing the offender, however, they invariably depend on the offender, professionals and other persons for the provision of reliable information in imposing the most appropriate sentence. Some of these persons are discussed below.

The Legislator

A lot in the sentencing process depends on the legislative arm of government. The legislature is a powerful participant in the process. The role of the legislative arm of government in sentencing is to determine and enact into law what acts or omissions amount to a crime and the elements that will constitute that crime. It is the role of the government to see that the courts have a satisfactory range of sentencing options open to them and that when the sentences are passed on the offender, especially in the case of imprisonment, there are suitable accommodation and facilities for the prisoner (Home Office, 1988). They can narrow or expand the choices available to the sentencer. For example, the 2007 Laws on Criminal Justice Administration in the High Courts and Magistrates Courts of Lagos State expanded the options open to the sentencers by introducing new sentences.

The legislature may increase, decrease or abolish punishments for particular offences. In England, the punishment for murder was reduced from the death penalty to life imprisonment, and in the United States of America, some states also reduced the punishment while others retained it. The legislature has the power to impose mandatory minimum sentences for a number of offences, thereby ensuring that the sentencer is bound by those sentences and there is no discretion. In Nigeria, as discussed above, there are minimum mandatory sentences for certain offences to which the sentencer must adhere. It is not the function of the legislature to decide if an offender has committed a crime or what particular sentence should be given. In England and the United States of America, the most significant innovation with regard to the legislative arm in sentencing is the sentencing guidelines. This was done by a Sentencing Council for England and Wales to replace the Sentencing Guidelines Council and Sentencing Advisory Panel. In the United States of America, Congress authorized a Sentence Review Commission to carry out this function. These bodies are authorized to develop sentencing guidelines. In the United

States the guidelines were developed for the Federal Court, however many states now have their own guidelines.

The effect of the guidelines in both the United States of America and Britain is to greatly restrict the vast sentencing discretion of judges in the hope of achieving uniformity and predictability. The guidelines have been a subject of debate in the two jurisdictions and it has removed the flexibility that existed under the old system. This flexibility still exists in the Nigerian sentencing system (Coroners and Justice Act 2009).

The Prosecutor

The function of the prosecutor does not end when the guilt of the accused has been established but the role varies from one jurisdiction to another. In England, before a sentence is passed, the prosecutor presents a summary of facts of the case to the court, dealing with the background information about both the offence and the offender (Practice Direction 1966). The antecedent evidence will, where applicable, include the offender's previous conviction(s).

In the United States of America, the prosecutors use tremendous discretion in the sentencing process. They can easily increase or decrease a sentence by adjusting the number of counts they charge the accused with. They can also determine which case to refer to the federal prosecutors. It is not unknown that the state prosecutors put pressure on accused persons to enter a plea of guilty in a state court to avoid being transferred to a federal court where punishments are more stiff (*Sentencinganswer.com*).

It is the function of the prosecutor in the United States of America to present the pre-sentencing report to the court. At the court hearing, the prosecutor may contest the content of any recommendation made in the report with the offender or his counsel. The role of the prosecutor in sentencing has come under severe criticism in the United States (Cabranes, 1992).

In Nigeria, the prosecutor has an important role in the sentencing process. Before a sentence is passed on an accused, the sentencer will ask the prosecutor if there is any relevant information known to the prosecution about the

accused. This may have included past records of the accused and may affect sentencing. The role of the prosecutor in bringing the report of the accused to the court either as information or pre-sentence investigation is not always adversarial. In the Nigerian case of a drug baron known as Ile Eru, found guilty of drug offences, the prosecutor informed the court that the accused did not have any previous record (Kuponoyi, 2008).

The prosecutor in certain cases may advocate leniency for the accused by recommending a short term of imprisonment or another sentence. However, in the Nigerian case of Muslim Folorusho, a sixty-year-old police inspector, found guilty of murder, after the verdict of guilt and the allocutus of the defence counsel, the prosecutor enjoined the court to allow the law to take its natural course (Apuru, 2010).

The Defence Counsel

The counsel to the offender has an important and vital role to play in the sentencing process. The role varies from one jurisdiction to another, though the ultimate goal is to ensure that justice and fairness is done to the offender in giving the sentence.

In the United States and England, where a pre-sentence investigation is expected to be carried out, the defence counsel will be interviewed in the process of preparing the report. It is the duty of the defence counsel to present a version of the facts consistent with his sentencing goal for his client. It is his or her duty to ensure the accuracy of the information contained in the report and that it is not prejudicial to the accused. The defence counsel is entitled to make a plea in mitigation during the sentencing process. This is an opportunity to make known to the court, the defendants' attitude to the crime, individual circumstances, feelings of remorse and other mitigating factors why the court should not impose the appropriate sentence. This in Nigeria is known as the "allocutus" which means to speak out formally. Allocution is an address, especially a formal oratory authoritative address (Barrett, 1944).

The defence counsel is allowed to allocute, that is explain special circumstances of his or her client to the court before a sentence is passed. While in some countries, it is an absolute right and in its absence a sentence may be set aside, in Nigeria, it is not. In Nigeria and some other jurisdictions, it is the defence counsel that allocutes where the defendant is represented by counsel. Allocutus originated in the early Common Law in England in trials for high treason, where defendants were not allowed counsel and the court was considered the guardian of the interests of the accused. It was required that the accused be asked by the court for his comments, and why judgment should not be given against him (*R v Geary* [1689-1712] and *King v Speke* [1681 – 1712].

In Nigeria, the case of a popular Yoruba movie actress, Taiwo Akinwande Hassan, (Yetunde Wunmi) is illustrative (*Naijarules.com*). On January 25 2007, Justice Ahmed Mohammed of the Federal High Court Lagos sentenced the movie actress to three years imprisonment or a fine of one million naira. The actress had earlier pleaded guilty to a charge of drug trafficking filed against her by the National Drug Law Enforcement Agency (NDLEA) after she was arrested on September 23 2006 at the Muritala Mohammed Airport Ikeja, Lagos as she was about to board a Virgin Atlantic Plane to London. In his allocutus, the lawyer to the accused actress asked the court to temper justice with mercy adding that all the relatives had abandoned the actress and that the court should not abandon her by being hard on her.

In the case of Muslim Folorunsho, a sixty-year-old former Inspector of Police who was found guilty of killing a young man in August 2003 by unlawful shooting, the counsel to the accused had this to say before the sentence:

> The defendant is a man of about 60 years old and had served this country for about thirty years during which he never received a query or any punishment. He is a family man who believes that life is sacred. Ironically, this led to his present situation. Justice is a three way traffic: for the

> victim, the society and for the accused. The defendant had never shot anyone before the incident in this suit. I believe he has learnt his lesson in a very hard way so also his colleagues who are still in the police force. He has been in detention for over four years. If he is able to go back to the society, he will impart the positive knowledge he has acquired in the society..... The victim cannot return to life. Taking the life of the defendant will not compensate the family of the deceased. I passionately appeal to the court to temper justice with mercy and minimize the sentence due to the defendant. He should be given the opportunity to educate the police from his experience. The society will benefit more from this than from taking his life (Apuru, 2010).

In passing the sentence on another Lagos drug baron, Akindele Kumoluyi (also known as Ile Eru), in his plea for leniency, the counsel to the accused cited Matthew 6: verse 9 and Mark 10 of the Holy Bible and likened the case of the accused to that of the prodigal son who has repented of his wrongdoings (Kuponoyi, 2008).

The Probation Officers

The probation officer plays an important role in an offender's sentencing. In the United States of America and England, probation officers are very important in the pre-sentence investigation and the report written after the investigation is valuable in determining the appropriate sentence. The use of probation officers varies from one jurisdiction to another. According to Asuni (1979) there is limited or no adult probation service in Nigeria, while that available under the juvenile justice is inadequate.

On the other hand, in the United States of America and England, probation officers are very important in the sentencing process. Prior to sentencing in a felony and some

misdemeanor cases, a pre-sentence investigation is performed. This is usually carried out and reported by a probation officer. This report is a valuable document about the accused that assists the sentencer in determining the proper sentence. The report includes an analysis of the circumstances attending the commission of the crime and the defendant's history of criminality. The probation officer will have to work with the judge to determine if the probation terms are satisfied. It is important to state that there is provision for the use of probation in the Nigerian law, however, the structures to ensure its effectiveness as a sentence are lacking.

The Prison/Corrective Officers

An accused when sentenced may be given a prison term or committed to a particular institution. The sentencing process extends to the prison or correctional institution. In jurisdictions where the pre-sentencing reports are used, a copy of the report must be transmitted to the prison correctional institution or another particular institution such as a psychiatric hospital. The role of the prison/correctional officer is of great importance while the accused is serving his or her term. The behaviour of the accused if considered to be good while serving the term may bring about a reduction in the term or a remission or pardon. Such reports of good behaviour come from the prison administrator.

Mr. Vice-Chancellor, it is clear that there are many actors involved in the sentencing process. Their collective roles are focused at ensuring that the sentence, given by the sentencer to the sentenced person, is fair and just and that the interests of the victim, the accused, the society and the criminal justice system as a whole (of which the prison system is a major part) are taken into account.

The Sentenced in the Sentencing Process

The sentenced offender has a vital role to play in the sentencing process. After finding him or her guilty, efforts are

made to find the appropriate sentence. The efforts are geared towards deterring him from further committing any offence or as deterrent to others; efforts are also made to give the individual the deserved punishment or rehabilitation. Where the aim of punishment is reformation, this is aimed at the offender himself or herself and also where the aim is reparation, it is the offender who is made to restitute or compensate the victim or the victim's next of kin as the case may be.

The actions taken by the offender and the sentence given may affect the process. If the offender pleads guilty to a charge, it might affect the sentence given. When he or she pleads not guilty and after the trial, is found guilty, the gender, age, health, financial, and other conditions of the offender may also affect the sentence to be passed. All these actions may ultimately have an effect on the prison system.

The offender is entitled to make a plea in mitigation during the sentencing process. This is in the same way in which the defence counsel is allowed to make a plea on the client's behalf. In Nigeria, an accused is allowed to personally allocute to the court before a sentence is passed. One notable example of when the allocutus was given by the accused person was in the treasonable felony case of the late sage, Chief Obafemi Awolowo on September 11, 1963 at the High Court in Lagos after he was found guilty. Before the sentence was passed, Chief Awolowo was asked if he had anything to say to mitigate the sentence and he made a long and moving allocutus as follows:

> "For upwards of 30 years, I have been in politics in Nigeria: during this period I have operated in various important theatres in the life of this great Federation. I have, with others fought against British imperialism with all my might, and with all the talents that it pleased God to give me.
>
> Together with other nationalists, some of whom are with me and many of whom are not

with me here, we have successfully thrown out British imperialism and enthroned Africans in positions which, 20 or more years ago, they never dreamt of occupying.

I have been an unyielding advocate of a Federal Constitution for Nigeria. I have all along, with other leaders of this country, been a very active and constructive participant in all the constitutional conferences which have taken place since 1953, and which have culminated not only in the attainment of independence but in the production of a Constitution of which Nigerians are very proud.

This Constitution is now being gradually violated.

I have also fought against anything which savours of injustice. It is thus an irony of history that as one of the architects of Nigeria's independence, I have spent almost half of Nigeria's three years of independence under one form of confinement or another.

Since 1957 I have fought, as your Lordship remarked, with vigour against the feudal system in the Northern Region and for its eradication. I have also fought to prevent the spread of this evil political system to other parts of Nigeria.

During the same period I have strongly advocated the breaking up of Northern Region into more states in order to have true federation in Nigeria, to preclude the permanent subservience of the people of Nigeria to the autocratic ruling caste in the North, and to preserve peace and unity in the country.

In short, I have always fought for what I believe, without relenting and regardless of consequences to myself, I have no doubt, and I say this without any spirit of immodesty, that in the course of my political career, I have rendered services to this country which historians and the

coming generations will certainly regard as imperishable.

Naturally, Sir, in the course of my long, turbulent and active political life, I have attracted to myself a sizeable crop of detractors and political adversaries. Similarly, I have in the course of this long career seen both triumphs and set-backs; and I have met them with equal mind.

Peter, not Peter the Apostle, but Peter the hero of Hugh Walpole's novel entitled "Fortitude" said: "it isn't life that matters but the courage you bring to it,

After life had done terrible things to Peter he heard a voice that said to him among other things, "Blessed be all sorrow, hardships and endurance that demand courage. Blessed be these things. For of these things cometh the making of a man."

In the words of Peter, therefore, my Lord, I declare (not that I have heard a voice): Blessed be your verdict; and I say in advance, blessed be the sentence which your Lordship may pass on me.

I personally welcome any sentence you may impose upon me. At this moment my only concern is not for myself, but that my imprisonment might do harm to Nigeria for three reasons.

First, the invaluable services which I have hitherto rendered and which I can still render will be lost to the country – at least for a season.

Second, there might be a heightening of the present tension which has lasted 15 months, and has done incalculable injuries to the economy of the country.

Thirdly, for some time to come, the present twilight of democracy, individual freedom and the rule of law will change or might change into utter darkness, but after darkness and this is a commonplace comes a glorious dawn.

It is therefore, with a brave heart, with confident hope, and with faith in my unalterable destiny that I go from this twilight into the darkness, unshaken in my trust in the Providence of God that a glorious dawn will come on the morrow.

My adversaries might say who am I to think that if I am imprisoned the country might suffer? What if I died?

The point, of course, is that I am still alive and will not die in prison. Furthermore, the spirit of man knows no barrier, never dies, and can be projected to any part of the world.

This being so I am confident that the ideals of social justice and individual liberty which I hold dear will continue to be projected beyond the prison walls and bars until they are realized in our lifetime.

In this connection, I must stress that in this very court room, indeed in this dock and in the entire Federation of Nigeria, the spirit of a new Nigeria is already active and at work. This spirit, working through constitutional means which I have spent the whole of my lifetime to advocate, is sure to prevail, before very long, to the delight, freedom and prosperity of all and sundry.

Before I close, I must say that in spite of the delay of the past few weeks on the part of your Lordship in giving judgment in this case, and in spite of my disagreement with your verdict which I have just given expression to, I must acknowledge your Lordship's patience throughout the trial of this case.

Particularly, I want to thank your Lordship for the due and especial consideration which you have always accorded me and the other accused persons.

I thank your Lordship; and I am prepared to abide by your sentence.

Sentenced persons suffer psychological trauma due to neglect, abandonment, or rejection by family members and relatives. They also suffer irreparable loss while incarcerated. This was aptly illustrated in the case of Akindele Kumoluyi (Ile Eru), as cited above. It was alleged that while the accused was in prison, he lost his father, his aged mother was traumatized by the case, the defendant had no contact with his many wives and ten children, and the education of the children was affected (Kuponuyi, 2008). In the case of the Nigerian actress cited above, who was caught for a drug offence, the court was informed that her relatives deserted her. The decision of the sentenced person to appeal or not, when the appropriate sentence has been given, may affect the immediate carrying out of certain sentences.

The Prison System

The narrow funnel of the criminal justice system is the prison and sentencers continue to pour new offenders into it. After an offender is sentenced to imprisonment, the warrant for committal to prison is issued by the sentencer and the offender is taken into prison custody. Describing a prison, Coetzee (1990) says "it is the stomach of the state, a state which stamps Michael K. with a number and gobbles him down." One of the many functions of the prison system is to carry out the decision of a court in relation to imprisonment of an offender or remanding a person in prison. Prisons must cope with inmates convicted of different types of crimes from trivial to the most serious and it holds prisoners not yet sentenced, who are referred to as Awaiting Trial Persons (ATPs) and who constitute the greatest percentage of inmates in prisons worldwide.

History of Prisons

Prisons arose from the evolution of punishment (Bamgbose, 2003). Prisons have existed since biblical record times. The accounts of Joseph in prison on a false allegation (Genesis 39:20 NKJV), and John the Baptist in prison for opposing the

actions of the political head (Matthew 14:3 NKJV), are a few examples that show that there existed prisons at that time. Confinement of offenders though not in its present form, existed in many Nigerian societies before the advent of the British rule. It was then used as one of the traditional legal instruments for the maintenance of peace, law, and order (Bamgbose, 2003). It was then restricted to the confinement of the offender at the back of the kings palace.

The introduction of prisons to Nigeria can be traced to colonialism, when the colonial masters used prisons to compel obedience from the natives through the native rulers. Prison service in the country is a federal phenomenon. The implication is that only the Federal Government can legislate on prison issues. The states have no power to operate or maintain prisons (The Nigerian Prisons Service). This is unlike the position in the United States where prisons are run by both the federal and state governments. In England, prisons are run under the management of Her Majesty's Office.

Types of Prisons

One of the major ways in which prisons worldwide function is through the process of categorization and classification. Prisons house different categories of persons. Prisons are divided into several categories based on age, gender, security, ownership/management and the mental state of the prisoners that a particular prison holds. The classification is as follows.

I. Male and Female Prisons

A prison may be categorized according to the gender of the offenders it houses. There are prisons for male and female offenders. These prisoners are kept separate, either in different buildings, or in the same prison building but in different wings. In most Nigerian prisons, the latter option is the most common. The Agodi and Owerri prisons are good examples. There are also two exclusively female prisons in Lagos and Ondo States.

II. Minimum, Medium, and Maximum Security Prisons

On the categorization based on security level, different countries have different categorization methods. In Nigeria, prisons are categorized as medium or maximum security prisons. Prisoners are given a security categorization soon after they enter the prison. The maximum security prisons take custody of condemned prisoners (those with life sentences and long-term prison terms, whose escape would be highly dangerous to the public and national security). According to the Nigerian Prison Service, the different maximum security prisons also have an unclassified categorization in terms of heightened security (*www.prison.gov.ng*). The medium security prison takes into custody both remand inmates and convicts who may be serving short-term sentences. The two categories above are classified as convict prisons.

Within this security categorization, in the United Kingdom, sentenced prisoners are categorized in four prison security classes based on the severity of crime and the risk posed for the prisoner to escape. There are categories A, B, C, and D prisons. Category A prisoners are those whose escape would be highly dangerous to the public or national security, while category D includes prisoners who can be reasonably trusted not to try to escape. In the United States, prisons are categorized as maximum, medium and minimum with the maximum prisons housing violent offenders and minimum prisons containing the less violent offenders.

III. Open and Closed Prisons

Another way in which prisons are categorized is by whether they are considered open or closed. In Nigeria, most of the prisons are closed prisons. One open prison exists in the northern part of Nigeria. In this categorization, the barriers and restrictions normally seen in prisons determine whether it is an open or closed prison. In the open prison, there are neither barriers nor gates and there is a lower level of security: offenders can wander around freely. It is usually for very low-risk offenders who are first-time offenders or

prisoners who are towards the end of their prison term, who are reasonably trusted not to try and escape. In the United Kingdom, prisoners in Category D prisons are given the privilege of an open prison, and are at times allowed to work in the community or to go on "home leave" after meeting certain conditions (Wikipedia: Prison Security in the United Kingdom). In contrast, closed prisons have the features of a regular prison with gates, barbed wires, guards, and restriction as to movement of the prisoners. The measures are to prevent prisoners from escaping.

IV. Federal and State Prisons

Prisons can be classified according to the tier of government that runs it. Prisons can be run by the federal, state, or local government. In Nigeria, all prisons are the concern of the federal government and states do not have any power to operate prisons. In the Constitution of the Federal Republic of Nigeria (1999), prison is on the exclusive legislative list. This is unlike the position in the United States where there are federal and state prisons.

V. Public and Private Prisons

Prisons are categorized according to their management or ownership. Under this categorization, there are public and private prisons. Public prisons are government-run institutions, while private prisons are run by privately-owned corporations and individuals. In Nigeria, all prisons are public. Private prisons have a more recent history. These prisons are contracted by the government to private operators and the corporation enters into a contract with the government who commits the prisoners and then pays a daily or monthly rate for each prisoner confined in the prison. Private prisons are for-profit companies (Bamgbose, 2003).

Modern private prisons sprung up in the United States in the mid-1980s, when the prison system hit a snag and ran out of money and the federal government ran into a brick wall while seeking voters' approval to build new prisons. Before

this time, a form of private prison had existed in California in 1852 (Wikipedia: Private Prison). With this problem in the 1980s, states then turned to private investors for new prison projects (Bamgbose, 2003). This started with a group of Tennessee investors coming together and forming a group known as Correction Corporation of America (CCA), which today is one of the largest firms involved in the private prison business. The first private prison in the United States was in Tennessee. Other corporations involved in the private prison business are the Wackenhut Correction Corporation (Now GEO Group) and the Cornell Corrections Incorporation. Some of these corporations have prisons outside the United States. In Europe, United Kingdom was the first to use private prisons. This was with the opening of the Wolds private prison in 1992. Private prison contracts are now awarded under a Private Finance Initiative in the United Kingdom.

The introduction of private prisons in different jurisdictions has met with severe criticisms from human rights activists, criminologists, economists, and religious and community leaders. (correctionsproject.com). Regarding the debate over whether privatization is a solution to the problem of prisons in Nigeria, Mr. Vice-Chancellor, I would adopt the warning given by Taylor and Pease (1985) to the British government. They said;

> If prison privatization takes place as an unthinking copy of North American practice, the situation in the United Kingdom will probably become worse. If it takes place without strong insistence on standard and on rewards for success in reconviction term, the situation will probably be worse. If it takes place with no restriction on the triviality of offence which consign one to a private prison, the use of imprisonment will increase and the private facilities will gain a spurious reputation as offering value for money....If all the right elements are not in place, privatization will have entered our penal system

> to no good effect. We will have opened our gates to a particularly unpleasant Trojan horse.

The position taken by Porter (1990) on the issue of privatization of prisons in Britain is one that I would recommend presently to the government in Nigeria. He said;

> The involvement of the private sector in correction is really still in its infancy. At least, Britain would do better by standing back and monitoring the experiment for longer. Using a more cautious approach, it might be possible to avoid adopting some of the difficulties and problems experienced in the United States.

VI. Psychiatric Prisons

Prisoners are categorized in some jurisdictions based on this factor. Prisoners, upon being convicted and found to be mentally unbalanced may be diverted to a psychiatric prison. This category of prison is not available in Nigeria.

VII. Juvenile Institutions

Young offenders are diverted from the adult prison to the juvenile correctional institution, which is outside the scope of this lecture. Young offenders should go through the juvenile justice system and go to correctional institutions such as remand homes, borstals, or other juvenile institutions.

Functions of Prisons

The prison serves several functions. It acts as a social service, therefore serving a social function (Galtung 1958). The functions have also been identified as political and cultural. Reason and Kaplan (1975) say that there are four important functions that prisons serve and eleven latent functions serving various interests and needs. Generally, prisons have three basic functions: to secure and control, to punish, and to rehabilitate and reform offenders. According to the Nigerian Prison Service, the functions of prisons include taking into

lawful custody all those certified to be kept by court of competent jurisdiction; producing suspects in court as when due; identifying the causes of their antisocial dispositions; setting in motion mechanisms for their treatment and training for eventual reintegration into society as moral law-abiding citizens upon discharge; and administering prison farms and industries for the purpose of generating revenue for the government (*www.prisons.gov.ng*). For this last purpose, the Nigerian Prison Service has some farm centers throughout the country.

State of the Prisons

1. Treatment of Prisoners

Prisoners have rights. Although they are incarcerated and some of their rights such as the right to freedom are suspended during the period of incarceration, other rights such as right to dignity must be respected. Offenders are sentenced to prison as punishment and not for punishment. The prison culture has always been dominated by aggression, running counter to the values of humaneness, softness, openness, and anti-oppression (Weschler, 1999). Physical and sexual abuses are common in the prison environment and punitive methods are used to coerce inmates into compliance (Wright and Goodstein, 1989).

A psychiatrist working in a prison, wrote in a protest resignation letter that "treating human beings with humanity rather than brutality makes them and us safer, more secured and above all more civilized" (Guardian, 1996). Weschler (1991) says that the prison is such that inmates are sentenced twice. He explains that the first time is by the court to a certain period of term and the second time by the prison administration to particularly harsh conditions. This second sentence is open-ended and it is imposed without the benefit of a counsel.

Awaiting Trial Persons (ATPs) continue to suffer. In the prison system, they can be referred to as the forgotten ones. A committee in England in 1981 observed that hardship in the prison would be intolerable enough when inflicted on persons

found guilty of an offence, but for the many persons still awaiting trial and thus innocent before the law, these experiences are completely insupportable (The House of Commons Home Affairs Committee, 1981). This statement applies to all awaiting trial prisoners irrespective of which country they are in. ATPs form the majority of inmates in the prisons. Statistics show that ATP form about 65% of the prison population in Nigeria. This has greatly contributed to the problem of overcrowding facing prisons everywhere. ATPs are locked in their cells for longer periods, than prisoners who have already been sentenced to prison and they have no recreational facilities. According to a report, many of the ATPs have been awaiting trial up to seven to ten years (Africa Focus report, 2008).

As early as 1955, there have been international standards protecting the rights of prisoners. The Standard Minimum Rules for the Treatment of Prisoners was first adopted by the first United Nations Congress on the Prevention of Crime and Treatment of Prisoners in 1955 and subsequently approved by the United Nations Social and Economic Council. The United Nations Basic Principles for the Treatment of Prisoners (1990), in paragraph eight, enjoins states to create conditions enabling prisoners to undertake meaningful remunerated employment that will facilitate their reintegration into their country's labour market. Despite the provision, there are reports of inhumane treatment of prisoners. This inhumane treatment is not localized in particular jurisdictions but is a global issue. In a report of inquiry of the prison disturbance of April 1990 in England, Lord Justice Woolfe, had this to say about the prisoners (in their interview):

> The inmates contend that they had no other effective method of ventilating their grievances. As the inmates repeatedly told the inquiry, if they were treated like animals, they would behave like animals. The prison was overcrowded and the inmates provided with insufficient activities and association (Woolfe, 1991).

A prison should be a humane, efficient conveyor belt. It is, however, unfortunate that many of the prisons function like production lines. The purpose of a prison sentence is to simply deprive the inmate of liberty, not to cause the offender any lasting harm of a physical or psychological kind (Rutherford, 1984). However, this appears to be what is happening to prisoners in Nigerian prisons.

2. Space in Prisons

Prisons are sometimes called human warehouses, because of the small space available to a great number of prisoners. The state of persons sentenced to prison in Nigeria is well fitted into the description given by Fitzgerald and Sims (1980) when they said that it "represents a shift from warehousing which simply involves storing people, to zookeeping where some limited consideration is given to the state of the stored."

The cells in most prisons are considered too small. A one-time Chief Inspector of Prisons in England condemned a six-foot square cell in the United Kingdom and said it was below the minimum standard. A director of a zoo had this to say about the space allotted to people in prison:

> No zoo would confine an ape in an area measuring 6 foot by 6 foot. This would be unacceptable and indeed would damage both the psychology and the physical well being of an animal. (May Justice, 1979)

Overcrowding is an abiding problem facing prisons in countries around the world. Most prisons are operating at capacities far above their limit. The level of overcrowding has been described as an affront to civilized society (Rutherford, 1984). This is because the prisoners eat in their cells and the chamber pots are in the same cells. The conditions are deplorable and degrading. A prisoner at the Kirikiri Medium Security Prison in Lagos had this to say; "There is a general cell which can contain up to 25 people. We sleep over ourselves on the cold floor with no mat. You cannot turn, you

have to stand up to turn; and if you even get a place on the floor to lie on, thank God." He continued; "In this cell, there is no toilet. The men defecate in buckets which are located inside the room. The windows are small and there is no ventilation" (Adelaja, 2009).

Nigerian prisons, for example, are under pressure arising from congestion and overcrowding. They are overcrowded as much as 250% of capacity. Ifeanyi (2002) reported that Kirikiri prisons had over 2,600 inmates occupying a space built for 956 prisoners. In England, as of November 1999, Lead Prison had 1257 occupying a space for 786, and Birmingham had 1097 prisoners but only 732 spaces (Ashworth, 2000). Skovron (1988) wrote that by 1984 overcrowding in prisons became a national scandal in some states in the United States. In 1985, it was recorded that the prison and jail populations in the United States was the highest in the world (United States Department of Justice Bureau).

Prison overcrowding all over the world has worsened in the last few years. The prison population continues to exceed available accommodations. This has created crises in prisons and jails worldwide (Guardian, 1988; Angelos and Jacobs, 1985). The space constraints in prisons have been attributed to long prison sentences, the high number of persons sentenced to prison, and sentencers not using adequate alternatives to prison. The effects of this include an increase in correctional costs, deterioration of living conditions for inmates, strains on officers, facilities, and prisons, and the development of gangs. Therefore, there is a need for a rethink and more use of alternatives to prison.

3. Security and Control in Prisons

It is the duty of the prison service to ensure security and control in the prison. When security is breached and a prisoner escapes, it frustrates the sentence imposed by the court. Similarly, when there is no control in the prison, and prisoners riot, security is put at risk. Given the opportunity, many prisoners would not want to remain locked up and

would escape from the cell if given the chance. Conditions in the prisons, the squalor, inhumane conditions, long hours of lock up, and overcrowding have led to terrible outbreaks of violence, riots, and destruction at many prisons. Some of the violence has resulted in jail and prison breaks with many dangerous prisoners escaping. Prison breaks have been experienced around the world and are not peculiar to Nigeria, although frequent prison breaks have occurred in the country in the past several years. According to a spokesman of the prison service, restiveness on the part of the inmates due to overcrowding, poor medical facilities, and delays in justice have been the cause of prison breaks.

Ikoyi prisons in Lagos state, Agodi prisons in Oyo state, Sokoto prisons in Sokoto state, Onitsha prisons in Anambra State, and the Enugu Prisons in Enugu state were listed as examples of prisons where prison breaks had occurred. In a report on the Onitsha prison break that occurred in June 2008, it was stated that out of the 280 inmates that escaped, only 195 were caught (*Allafrica.com* June 2008) In the Enugu prisons, there was a massive prison break on June 3, 2009. There were 987 prisoners in the prison. Out of this number, 724 were ATPs. In the massive break, 150 prisoners, all awaiting trial cases, escaped in a midnight break (Planet Data, 2009). The 150 inmates overpowered the security officials and escaped from the prison. The prisoners broke through the roof ceiling and locks to facilitate their escape. They also attacked the prison officials, beating them into comas before making good their escape (Ugwoke, Francis 2009). It was reported that 130 of the escaped inmates were recaptured (Daily Champion, June 2009). In the Agodi prison break, eight inmates were shot dead and 18 others were wounded when over a thousand prisoners tried to break out of the prison. The inmates smashed holes in the walls after overpowering the guards and four officials were wounded trying to stop the inmates. Although no inmates escaped, lives were lost (Press T.V., 2007).

Similar jail and prison breaks have occurred in England (Woolfe Report, 1991). On April 1, 1990, there was a terrible outbreak of violence at Strangeway Prison in Manchester. The prison had space for 970 inmates but on that day had 1647. This stands as the worst outbreak of prison rioting in British penal history. The violence erupted while 309 prisoners attending a church service in the prison chapel suddenly attacked prison staff with fire extinguishers, hymn books, and table legs. Keys were taken from prison officers and by the noon the inmates were in control of the prison and the lives of 97 prisoners, who were not part of the riot and were separated from other prisoners for their own safety, were in danger. The prisoners occupied the prison and were in control for twenty three days with television crew from many parts of the world watching. They were in control until April 25. At the end of the riot, 147 prison officers and one inmate were injured in the riot, and the inmate later died. The prisoners were taken to court, tried for attempting to escape, and given additional prison sentences. Although refurbishing work estimated at tens of millions of pounds was due at the prison, after the riot, the damage was estimated at about 60 million pounds.

Similar jail breaks have also occurred in the United States of America. On July 12, 2009, three inmates escaped from an Indiana prison through an underground tunnel under the prison yard. They were all caught (Wikipedia: Prison Escape). Similarly, another occurred in 2006, with the prisoner escaping a New York facility using a can opener to cut through the ceiling of the kitchen. The prisoner was caught on September 8, 2006 (Wikipedia: Prison Escape).

From the above discussions of the prison system, it is evident that there is a great difference between what the prison is and what it ought to be. Prisons should be more adaptive to the special cases of individual prisoners. Prison discipline and treatment should be more effectively designed to develop the prisoners moral instincts, to train them in orderly and industrial habits, and whenever possible to

release them as better men and women both physically and morally than when they entered.

Whether imprisonment deters crime has been subject to debate, thus raising the question of the effectiveness of prisons. Lippke (2004) says that it does not deter crime and that prisons are enormously expensive to build and operate, and they impose terrible suffering on inmates, exposing them to violence and degradation, offering dehabilitation rather than rehabilitation. In spite of these arguments, prisons are much-needed institutions for certain crimes in the criminal justice system. The answer to the question as to whether within the present state of the Nigerian prisons, a prisoner can lead a good and useful life is not far-fetched. With the problem of overcrowding, poor conditions, long periods in lockups, and little access to constructive work and recreation, there is need for urgent reforms of the Nigerian Prison Service to enable it to execute its vitally important responsibilities as part of the criminal justice system.

Towards Prison Reform in Nigeria

Alternatives to the Prison System

Mr. Vice-Chancellor, alternatives to imprisonment is a matter of necessity because of the ailing prison system and custodial institutions, and there is the need to check the enormous problems in the prisons. There is no doubt however that it is only an overhauling of the sentencing process that can bring this about. Attempts to humanize the correctional process will bring about innovations in the sentencing system. This is one way towards reduction of the prison population.

It is not correct to say that imprisonment as a form of punishment should be abolished, but rather that the most serious offences should still be punished by imprisonment, while alternatives should be available as punishment for less serious crimes. I am in support of the opinion given by Lippke (2007) that imprisonment should only be a sentence for offences that have high degree of culpability, or inflict or threaten to inflict loss of life or severe physical or psychological injuries. The sentencer, if he or she is to keep

offenders out of prison, must have access to alternatives that are economically viable.

Vass (1990) defined alternatives to imprisonment as those penalties, which following conviction and sentence, allow an offender to spend part or all of his or her sentence in the community or outside the prison establishment. These alternatives are punishments that would be seen by all to present a firm and fair way of dealing with offenders whose crimes do not merit custodial sentences.

The twentieth century has witnessed an increase in the range of available sentences. This is occurring in Nigeria and many other countries. The problems of prisons have been addressed from the perspective of sentencing practices. This has been on the agenda of many countries including France in 1976, Canada in 1980, Sweden in 1988, New South Wales in 1989, England in 1991, and more recently, in Nigeria within the past ten years. Three distinct phases were recognized in the development of criminal sanctions. In the first phase, the body of the offender was used as the object of severe punishment; the use of this approach declined by the eighteenth century. In the second phase there was the search for more refined penal measures, and the third phase was the emergence of the prison and other sanctions in the nineteenth century. Ball (1988) suggests a fourth phase which is the reaction against prison and custodial penalties. Mr. Vice-Chancellor, we are now in that fourth phase.

There have been different comments on why there should be a shift from imprisonment to other alternatives. Martinson (1972) says that punishment within the community is more desirable because it reduces isolation, labelling, and the disastrous personal, mental, and physical effects of incarceration. Rothman (1971) suggests that rather than trying to improve or rehabilitate the prison establishment there ought to be plans to get on with the task of emptying them and closing them down. Alpher (1973) opines that the custodial form of punishment seems to have run its course. The remedy to all of a person's problems lies in the community where the person comes from. According to Cohen and Taylor (1972),

prison does not appear to reduce crime nor does it deter the offender from committing further criminal acts. They further state that imprisonment has serious adverse effects on the prisoners and their families. The Home Office (1986) states that imprisonment costs an awful lot of money and should only be imposed for the most serious offence and when truly necessary.

Advocates of alternatives to custodial sentences have pressed for non-custodial sentences that could be used at all levels of criminal justice and not at the sentencing stage alone (Bottoms, 1989). However, whether the non-custodial sentences are more effective has been difficult to assess. Bottomley and Pease (1986) caution that care should be taken in concluding whether a sentencing measure is effective or not, since different offenders will respond differently to different penalties. Therefore, Brody (1976) says, that there is the distinction between effects and effectiveness of a particular penal measure. Arguments have arisen that the term "alternatives to custody" suggests softer penal measures. It is my candid opinion that there is no basis for this argument. However, it has been suggested that the term "punishment in the community" is preferred to the term "alternatives to custody." Other terms suggested include "non-custodial penal measures," "diversionary penal measures," "decarceration," and "deinstitutionalization" (Bottoms, 1989).

Non-custodial Sentences as Alternatives to Imprisonment

The non-custodial sentences as alternatives to custody are recommended in this lecture as alternatives to imprisonment to address the problems of the ailing prison system in Nigeria. They are seen as more humane, less expensive, and more constructive than custodial methods of imprisonment. These non-custodial sentences are as follows:

I. Suspended Sentence

A sentencer may decide to suspend a prison sentence for a period of time and not enforce it immediately. Under certain

conditions, in less serious offenses, if the court after going through the process of eliminating other possible sentences concludes that the appropriate form of punishment for the offense is imprisonment, the sentencer may decide to take a series of steps. The sentencer may decide whether immediate imprisonment is required or if the sentence of imprisonment can be suspended. Where the offender constitutes a risk to the public and the offence is serious, immediate custodial sentence is recommended; however, where there is no risk or no likelihood of the offender committing a crime again, then a suspended sentence can be given.

In a suspended sentence, the imprisonment will only be enforced if a future offence is committed within a given time as stated by the court. This means that while the sentence is suspended, there is an axe hanging over the head of the offender (Coutts, 1994).

The offender during the operational period of the suspended sentence is at risk of having his or her sentence activated should a further offence subject to imprisonment be committed. If the offender does not commit any offence during the stated period, the custodial sentence will not be activated. Once the term given by the sentencer for the offender has lapsed, the axe is removed from above the head of the offender. It is only when the court is convinced that imprisonment is the appropriate sentence for the offence, that the option of a suspended sentence can be considered (*R v. O'Keefe* 1969).

Suspended sentences are two-pronged. They allow diversion from congested prisons while at the same time emphasizing the seriousness of the offence. Bottom (1981) refers to this as "the special deter theory" and "avoiding imprisonment theory." It has been recommended that suspended sentences should be given in exceptional cases. These may include the old age or serious health problems of the offender (*R v. Ullah Khan,* 1993).

In jurisdictions where suspended sentences are used, not any new offence can activate the suspended sentence. A new

offense that would activate the sentence may be of such a nature that would warrant a custodial sentence (*R v. Bee*, 1993), although this is not an absolute rule (*R v. McQuillan* 1993). A sentencer may also decide to activate the suspended sentence, where a new offence has been committed and no new or separate sentence is passed for the new offence. This was the position in *R v. Calladine* (1993).

II. Community Service

Greater use of community service has been advocated because of the pressure on prisons. Punishment in the community is seen as a means of keeping prison spaces available for more serious crimes and alleviating overcrowding. It helps the offender to remain in his or her community. It helps the offenders to retain their jobs in certain cases and teaches them to be self-reliant and responsible. Mr. Vice-chancellor, through supervised activities, offenders can contribute to their own well-being, as well as to that of the community. It is suggested that for less serious offenses, a temporary custody is not the most effective punishment. Imprisonment restricts the offender's liberty, but it also reduces his or her responsibility. They do not have the opportunity to face up to what they have done wrong, see the effect on the victim(s), or make amends with the victim or/and the general public. If not imprisoned, offenders are more likely to be able to compensate their victim and make reparations to the community through useful unpaid work.

In this way, their liberty can be restricted without putting them behind prison walls. Moreover, if they are removed in prison from the responsibility, problems, and temptations of everyday life, they are less likely to acquire the self-discipline and self-reliance that will prevent future criminal activity.

Skovron (1988) wrote that in the early eighties, over-crowding in prisons became a national scandal in some states in the United States. The case of ***R v. Lawrence*** (1982) established that community service is not merely an

alternative to custodial sentences, but a sentence in its own right. When community service is imposed on an offender, the court must state the number of hours to work, the days on which the work is to be performed, and the period and place where the service will be carried out. Failure to perform the service leads to cancellation of the sentence and a fine or a prison sentence may be imposed in place of the remaining days for which the community service was to be performed. Suspended sentence has been introduced in Lagos State (Lagos State Law Section 350, 2007) and it is being proposed in many other states in Nigeria.

III. Probation

This independent form of penal sentence is also called supervised release in the United States of America. The offender's sentence is put on hold or abeyance, and the offender is released under the supervision of a probation officer, subject to terms and conditions to be fulfilled by the offender. The offender given a sentence of probation is called a probationer. In Nigeria, probation is recognized in Part 47, Sections 435-440 of the Criminal Procedure Act (Cap 41, 2001). The sentence is recognized under the Criminal Justice Act of Lagos State (Sections 345-349, 2007).

Where an offender is charged before a court with an offence and the charge is proven, the court may take into consideration some factors such as the character, antecedents, age, health, mental condition of the person charged, the trivial nature of the offence or the extenuating circumstances under which the offence was committed. If the court concludes that no punishment should be given to the offender or that the punishment should be very nominal, it may decide to release the offender on probation. The court may then ask the probationer to enter into a recognizance. This recognizance will contain conditions, known as probation orders. The conditions may include the court asking the offender to meet family obligations, keep a job, abstain from liquor, undergo medical or psychiatric tests or treatment,

submit to drug testing, follow a prescribed course of study, report regularly to a probation officer (which is the most common condition), remain within a specified geographical area, refrain from further criminal conduct, and perform regular community service.

Sentencers are, however, advised that when imposing a probation sentence, conditions that may be an infringement on the rights of the probationer must not be imposed. Mr. Vice-Chancellor, in a reported case of *United States v. Smith*, (1992), the condition imposed on the probationer was that he should not cause the conception of another child other than to his wife unless he could demonstrate that he was fully providing support to the three children in existence and two others to unknown women. The sentencer was concerned that if the probationer Smith was released, he would father children he would not be able to support. The Court of Appeal held that the sentencing court had no authority to impose such a condition and that conditions imposed to restrict liberty must be aimed at the rehabilitation of the offender and protection of the public. The Court of Appeal further held that, where the appropriate condition could be found to impose on an offender, as in the case of Smith, to stop him fathering children he could take care of, then he should be incarcerated. It is therefore important that the conditions imposed are considered necessary for preventing a repetition of the same offence or the commission of other offences, and such conditions are in writing and clearly explained to the probationer.

The probationer will be supervised by a named probation officer who will ensure that the conditions are complied with. The duties of a probation officer include visiting or receiving reports on the probationer at reason-able intervals, ensuring that the probationer observes the conditions of probation, periodically giving reports to the court on the probationer's behavior and generally advising, assisting, and befriending the probationer (CPA Section 438, C41, 2004). It is the duty of the probation officer to give a report to the court if there is

need for a variation of the conditions or if the behaviour of the probationer no longer requires supervision.

Probation sentences are given for fixed periods. Where the probationer fails to observe any of the conditions given under probation and he or she is made to appear again before the court, the court may sentence the individual for the original offense. Probation is a suitable sentence for non-serious offences and for first-time offenders.

The question arises as to whether a probationer has a right to reject probation and opt for another sentence the court may wish to impose. A court in the United States replied in the negative *United States v Thomas* (1991). In the case of *United States v Thomas* (1991), the probationer said the period of probation given to him was too long and that he preferred a prison term, which in the case of the offense he committed, was shorter. On appeal, the court held that giving offenders a choice to pick between one sentence and another would have a negative effect on the sentencing process. Salzburg and Capra (1995) have, however, suggested that a probationer who is not satisfied with the conditions could simply violate the conditions of probation and then go to prison.

Probation is different from a suspended sentence. In a suspended sentence, the original sentence must be imprisonment, which is then suspended. In probation, the original sentence which could be any type of sentence can be put on hold for probation. Probation originated in England in 1820 for young offenders, and in the United States in 1840. In the United States, probation started with the use of the police, followed by family members, and then volunteers as supervisors. With time, the work of the supervisor extended to such tasks as social inquiries, regular reports, and home visits, a function with which probation officers later became well-known. Presently, in jurisdictions where the sentence is well-established, trained probation officers are used to supervise offenders on probation. Probation is a very

effective form of sentence when the offender is properly supervised.

With the many advantages of probation as a sentence and the fact that the sentence is widely used in other countries, it is unfortunate that in Nigeria, though there is provision for the use of probation as a sentence, the structures for its implementation are not in place. In Nigeria, probation is not used for adult offenders but it is used in the juvenile justice system. Lack of adequate numbers of and qualified probation officers have been given as reasons why the sentence is not used for adult offenders but restricted to juvenile offenders.

Mr. Vice-Chancellor, the solution to the above problem may be found right here at the University of Ibadan. The direction in which the University is going is, "to make the University of Ibadan more responsive to the needs of the country." Our vision statement is, "to be a world-class institution for academic excellence geared towards meeting societal needs." The Department of Social Work is a fully-fledged department at the University, producing qualified social workers—the much needed personnel for probation services. There is a challenge thrown to this department, to exploit its unique position. A case should be made for the products of the department, and legislative backing sought, for social workers to be employed as probation officers. This will help in utilizing this trained manpower and finding solutions to the problem of the ailing Nigerian prison system through effective probation services.

IV. Compensation

The aim of compensation under the traditional society was, and under statute is, to compensate the injured party in such a way as to leave him or her no worse off than he or she was before the injury caused by the offender. The offender either pays in cash or kind. According to Bradley (1927), in certain cultures, the offender in a homicide dispute may be ordered to give a human being to the family of the deceased as a slave or in substitution for the victim killed. The philosophy behind

the sentence was, and under statute is, to restore balance, peace, and harmony to the community. The sentence is borne by either the offender or the family members.

By virtue of Section 17 of the Criminal Code Act (Cap C. 38, 2004), compensation is not recognized as a specific sentence. However, in certain cases, the Criminal Procedure Act makes provision for compensation (C41, 2004 Sections 256-257). In addition, in Northern Nigeria, Section 78 of the Penal Code (Northern States) Federal Provisions Act (2004), recognizes compensation as a sanction. The compensation may be in addition to or in substitution for any other punishment. Under the Penal Code, compensation can only be awarded where the victim is injured. This is similar to the position in Malawi. In the Malawi case of *R v. Tadeo* (1923), the Court stated that compensation can only be awarded where physical injury is suffered by the victim. While the prisons reform is receiving considerable attention, and alternatives are being considered, victims of crime are being focused upon in the ongoing discussion about prison reform. Compensation is one of the viable alternatives being considered.

It has been argued that in the punitive and rehabilitation programme under the criminal justice system, too much emphasis is placed on the offender to the detriment of the victim, and that the injury to the victim remains no matter how much punishment is given to the offender. Criminal law and the court can be used both in dealing with the offender and remedying the wrong done to the victim. In light of the above argument and in looking for alternatives to prisons, many jurisdictions have developed compensation schemes where the victims of crime are compensated by the state (Alan Milner, 1972). In some cases, the offender is made to compensate the victim for injury, damage, and loss. Compensation is a punishment to the offender to show that he or she has an obligation to the victim. Where compensation is awarded to the victim in a criminal case, it saves both the victim and the state the expense of filing a civil action to

claim damages where an offender has been found guilty of inflicting injury on a victim.

There have been arguments for and against the use of compensation in criminal cases. These include the impracticality of instances where the offender cannot pay the compensation. In Kenya and Tanganyika, compensation was recognized as a sanction that could be awarded by the court. However, there was a variation that it could be paid out of a fine imposed (Brown, 1966).

V. Restitution/Restoration

This sanction mentioned earlier as a pre-colonial sentence is also recognized by law in Nigeria (Criminal Procedure Act Sections -270 Cap 41 2004). It is applicable where real and immovable property is involved in the criminal case. The rationale is to restore to any person any unmovable property that has been unlawfully taken away from such a person, after the court of law is convinced that such property was so dispossessed. This sanction can be given in addition to any other sanction and it can be made even after possession of the property has passed (*Cundy v. Lindsay*, 1878).

In giving the sanction, the property to be restored or restituted include the property in its original state, property into or for which the same has been converted or exchanged, as well as anything acquired by such con-version. This was emphasized in the case of *R v. Akinloye* (1931). It is important to state, however, that a court will not act or make an order in vain. Therefore, the court can only give this sanction when it can be effective (*R v. Okotie-Eboh* FSC 126/1961, unreported). There are however restrictions on who can be liable to restitute. The above section will not apply to a person who comes in the possession of property bona fide, or has paid just and valuable consideration for it without notice or reasonable cause to suspect it was stolen.

In an attempt to decongest the prison, more of the use of this sanction is being advocated either alone or in addition to any other non custodial sentence. This sentence can be used

especially in cases of petty stealing where the property is recovered.

VI. Disqualification

Another alternative to imprisonment in a move to reform the prisons and solve the problem of overcrowding is disqualification. The rationale behind this form of sanction is that if a person qualified or licensed to carry out a function commits a criminal offence, such a person portrays himself or herself unfit to continue to carry out that task. Therefore, disqualification makes such a person ineligible to hold or continue to hold or qualify in the future to perform that task again either temporarily or permanently. This was aptly demonstrated in the case of a Nigerian Barrister jailed for massive fraud (*http://www.afrol.com*).

The policy behind this sanction is preventive justice—either deterrent or retributive. This is because the accused deserves to be punished after being found guilty and it is a deterrent because other persons who value their position may have to conform to the law and be of good behaviour so that they will not suffer the same fate. The sanction is recognized under section 46(1) of the Criminal Code Act 2004 but it is not a punishment under the Penal Code. The Constitution of the Federal Republic of Nigeria 1999 (Cap C23, 2004) recognizes the sanction for members of the National Assembly in Section 66, members of the House of Assembly in Section 107, the Governor in Section 182, and the President of the Federal Republic of Nigeria in Section 137. It is also recognized for driving offenses (*Okeke v. IGP*, 1957). It is said that such offences must involve actual driving and not be static (*Brown v. Crossley,* 1911). The period of disqualification must be fixed rather than indefinite (*R. v. Fowler*, 1937). In *Tunde-Olarinde v. R* (1967), the court held that the sanction could last for the life of the offender where the danger to the public is sufficient or to terminate at the occurrence of some specific event such as passing or re-

passing of a driving test. The sanction of disqualification starts on the day of sentence or conviction.

Disqualification as a sanction will be effective if the offender values the act he or she is disqualified from doing. Where the offender is no longer interested in the function, and the sanction is given, the sentence will not be effective. The effectiveness is in the offender knowing that he or she cannot legally do what he or she is interested in doing. It is also important in imposing the sentence, that there must be effective monitoring. If not, the disqualification will be disregarded without detection. This applies especially in driving offenses, where the accused may continue to drive without being detected.

Disqualification is a very effective sanction on professionals and office holders who have committed a criminal offence and found guilty of such an offence. Disqualification as a sanction may not be a fair sanction on a person found guilty of a driving offence if it is for a very long period. This is because of the temptation to drive and the effect it may have on other areas of the offender's life such as his or her ability to get to and from work.

VII. Binding Over

Binding over is an alternative to a custodial sentence and usually given to deter a person from committing an offence or further committing an offence. A bound person promises to do or refrain from doing something and undertakes to forfeit a stated sum of money if the promise is not kept. Binding over may be given to a person in anticipation of an offence. There are two types of binding over: as a preventive measure, or as a sentence. As a preventive measure, a complainant, informant, or offender may be bound (Lagos State Criminal Justice Law (2007) Section 34, 2007; *Ex Parte Ajani*, 1961). As a preventive measure, it is not compulsory that there must be a conviction and there is no need for an offence to have been committed (CPC Section 25; CPA Section 300). Binding over can be used for intending or habitual offenders (CPA Section 37; CPC Section 89 CPC). A person who is

likely to disturb the peace and tranquility of the society can be bound (CPA Section 35; CPC Section 88; *Ejinkoye v. COP*, 1965). In addition, binding over can be used as part of a sentence or instead of a sentence (CPA Section 250; CPA Section 435). As a sentence, binding over can be used in petty cases such as where the offender has a clean record but may run the risk of repeating the offence.

The sentence takes effect on the date of the court order. If it is for a sentenced person, it becomes operative on expiration of the sentence. In giving this sentence, the judge must consider the nature of the offence, and the offender's character, antecedents, age, and mental health (CPA Section 309; CPA Section 300; CPA Section 25; CPC Section 309; CPA Section 300 CPA, CPC Section 25, Section 87). In binding over the offender, conditions must be given in recognizance. In *R v. Ayu* (1958), the offender was told to return to Nigeria and never return to the United Kingdom. Where an offender breaches the binding over sentence, he or she forfeits the money tied to the binding over order for failure to observe the condition. Where the money is not paid, the offender is committed to prison. The size of such recognizance depends on the offence and the offender.

There are arguments against this form of sentence. Issues of supervision, surveillance, and compliance are always there. However, it is suggested that this form of alternative can be effective if a responsible member of the family or a community leader is made to ensure compliance.

VIII. Plea Bargaining

This is recognized in Section 75 & 76 of the Lagos State Criminal Justice Law (2007).The prosecution and defence counsel, may, where it is in public interest enter into an agreement on the appropriate sentence to be imposed by the court if the defendant is convicted of the offence to which he intends to plead guilty (S. 76[8]).

The twenty-first century has witnessed an increase in the range of available sentences, the introduction of many alternatives, the abolition of some and the modification of

others. Electronic monitoring and tagging of offenders is one of the many options now available to keep a check on non-serious offenders (Guardian, 1988). In 1991, curfew order was established in England and in 2000, drug abstinence order was also introduced (J frank 2010). Another custodial form of sentence is Home detention. Unlike where the offender is kept in a public or private facility, this form of sentence within the offender's home is less stigmatizing, more humane, reduces pressure on prison crowding, and is a flexible approach that keeps the offender in the community. This was introduced in England in 1999 and could be used for the release of a prisoner before his or her official release date, subject to a curfew and monitoring.

With the gamut of alternatives to incarceration and custodial sentences, all aimed at the prison reform and combating overcrowding, the quest for a total solution to the problem has not yielded much result. As Harms (1985) observed, instead of serving as alternatives to custody, they are used as substitutes. An example was seen in a case study of the position in England where suspended sentence was introduced in 1967 with the intention that it would be in lieu of imprisonment, but years later, it was discovered that the rate of imprisonment rose after 1968 because of breaches of conditions, which resulted in imprisonment. In Nigeria, where alternatives exist, there are inadequate or no structures to enforce the sentences. As the magistrates and judges that were interviewed stated, they are left with no alternatives but imprisonment.

The problems of computer hackers and the introduction of viruses capable of knocking out entire computer systems are serious ones challenging the electronic monitoring and tagging of offenders in countries where they are used. This option, used for less serious offenders to put them on check and to make sure they are of good behaviour, may not for now be effective in Nigeria until the power situation improves drastically.

Conclusion

In the move towards prison reform, there seems to be a retreat from custodial penal optimism, which is described as an expensive way of making bad people worse, to more emphasis on alternatives to imprisonment (Harding and Koffman, 1995). Custodial measures are still advocated as the last resort.

This move must ensure that the alternatives are genuine alternatives to prison and also economically viable. This is because a search for a genuine alternative may be driven more by political and pragmatic considerations rather than criminological and penological research. The problems being experienced in looking for genuine, suitable and adaptable non-custodial measures in Nigeria were expected. Despite these problems, the search for viable alternatives continues. To expect a totally effective alternative, free of pitfalls and criticism, is fantasy.

The fact that the alternatives introduced in some states and being proposed by some others are more humane, less taxing on public revenues, and more constructive, are not in doubt. However, care must be taken. These alternatives should be used as real alternatives and as intended, so that the offenders in the long run will not end up in prison. This may happen where the offender is unable to pay a fine, or the suspended sentence is activated, or probation conditions are violated. Sentencers must therefore understand the underlying principles of these options so that in the long run, more offenders are not diverted to the prisons.

The Chief Justice of the Federation, Honorable Justice Aloysios Katsina-Alu, at the swearing in of new Senior Advocates of Nigeria on April 12, 2010 (NTA News at 9 pm), stated that efforts are being made to introduce many alternatives to imprisonment. Many states in the country are looking at their penal laws and recommending new alternatives to incarceration. The reforms at the federal and state levels are more victim focused. This therefore brings home to the offender, the consequences of his or her action. Compensation or restitution where possible, will serve this

purpose. Reparation to the community should also be encouraged in less serious property offences, in addition to financial penalties such as fines.

It is suggested that government should restructure the sentencing system through the introduction of viable options of sentences available to the sentencers. It is a great task on the sentencer, in ensuring that appropriate sentence is given to the offender, for the sake of the offender and the society. There is the need for the sentencer to function effectively. In Nigeria, magistrates, judges, and Kadis undergo some measure of training usually in the form of meetings, refresher courses, conferences, and exposure to current literature on a regular basis. In Nigeria the training is organized by the National Judicial Institute. Continuing education is a vital part of any profession, particularly one that is concerned with a constantly changing subject such as law (Baldwin 1975). Great strides are being made in many jurisdictions. In England, in a report of inquiry by Justice Woolfe and Tumlin (1991), it was stated that great strides have been taken in England in training judges and magistrates and this is being handled by a Judicial Studies Board.

As a matter of urgency, the conditions in the prisons must be addressed. Prisons in a reformed state must continue to exist for more serious offences and for offenders who need to be kept in prison to protect the public.

Mr. Vice-Chancellor, if there is a wide range of viable sentencing options, well-informed sentencers, and well-catered for inmates whose cases are promptly and judiciously considered and whose rights are protected, and there is greater concern for victims of crime and the community, Nigeria will be on the right course towards the reform of the ailing prison system.

Acknowledgement

Mr. Vice-Chancellor, permit me to acknowledge all those who have helped me to attain this great achievement.

I thank the Almighty God for everything and I give Him all the glory for leading and directing me into what I know

best to do–dissemination of knowledge. Great is His faithfulness, Lord unto me. I thank my parents Chief A. A. K. Degun C.O.N and late Iyalode C. M. Degun for their wonderful support and upbringing and my six lovely sisters and their admirable husbands who really are my brothers, for putting up with me and my books. I appreciate Beauty and Ada and I am grateful to my nieces, all my uncles and aunties, particularly Uncle Doyin, my parents-in-law, and all my other in-laws. I appreciate Pastor Muyiwa and Pastor Deola Bamgbose.

My journey into academics would never have been without the Lord using my late uncle, Professor Ojetunji Aboyade and my look-alike aunty, Professor Bimpe Aboyade to point me in this direction precisely on my engagement day I thank you. I thank Professor Folarin Shyllon, my first Dean in the Faculty of law, for believing in my ability.

I am grateful to Professor O.O. Oduye, Professor A.O. Falase, Professor Abiola Odejide, Professor O. Adewoye, Professor Filani and Professor J.A. Akinwunmi and Professor Okonjo for the confidence they had in me during my climb to the top; and to the present Vice-Chancellor, Professor Olufemi Bamiro, for upholding justice at all times; Professor Adigun Agbaje, for his consistent and valued advice; Mrs Omotayo Ikotun, for her guidance and support, and Professor E.A. Bamgboye for his support.

My special gratitude goes to my good friends Tayo and Titi Salako in Milwaukee, Wisconsin, for the encouragement during the preparation of this lecture and their support during my short sojourn in the United States. I acknowledge my colleagues, Professors Roger Goldman and Henry Ordower at Saint Louis University Missouri USA, Professor Kimberly Norwood at Washington State University, USA, Professor and Dr (Mrs) Michael Afolayan of the Illinois Board of Higher Education, Judge Clea Stovall of the 22nd Judicial Circuit Court of Missouri Division Court, Dupe Oji, Anne Craver, and the Association of American Female Lawyers in Saint Louis, Missouri, USA, for their support during my six

months stay at Saint Louis University School of Law, Missouri, USA.

Professor Toyin Falola, the Frances Higgenbotham Nalle Centennial Professor in History at University of Texas at Austin, USA deserves special mention for painstakingly going through the manuscript and making very useful comments.

I acknowledge the contributions of eminent members of the Nigerian Bar Association, Senior Advocates of Nigeria; erudite jurists of the High Court, Court of Appeal and the Supreme Court in my legal and academic career. I want to specifically mention those who helped during the gathering of materials for this lecture. They include Honourable Justice (Professor) M.A. Owoade, Justice Bolaji Yusufu, Justice Eni Esan, Justice Aiki, Justice Segun Olagunju, Justice Diran Akintola, Justice Dotun Onibokun, Justice Olopade, Justice N. I. Saula, Justice Lanre Mabekoje, Justice Biodun Akinyemi, Justice Ogunfowora, Mrs Bimbo Daniel, Mrs Bose Bolaji, and Mr Kotsco of the National Judicial Council library.

Special thanks to the Faculty of Law (University of Lagos) 1980 – 1983 set for the great support. I am grateful to all my colleagues, staff, and students (both old and present) in the Department and the Faculty. I cherish your support in diverse ways. I remember especially late Professor J.D. Ojo and all those that are no longer in the University service. I commend and thank the Chairperson of the Faculty Event Committee, who is also my Acting Head of Department, Mrs Toyin Akintola, Mrs Smaranda Olarinde, and the Faculty Officer, Mr. O. M. Oladejo for the planning and success of this inaugural lecture. Senator and Mrs. Bob Effiong, I appreciate your support. I thank the personal secretary to the Dean, Mrs. Titi Okeniyi for painstakingly coping with my writing during the preparation of this lecture, Dr Yinka Oyewo for the editorial work, Mr. Olu Matthew and Mr. Victor Ajiboye for the arrangement of the presentation. To the many colleagues and friends in the University, I thank you all.

I appreciate Dr. and Dr. U. Obed of Glory Tabernacle Ministry and Pastor Adetokunbo and Dr (Mrs) Dupe Oloruninmbe of the RCCG for the spiritual support.

To Ademola, Olaoluwatofunmi and Morewaoluwa, my lovely children, my colleagues soon to be in the legal profession, thank you for giving me peace which has helped me to concentrate on my work. May the Lord continue to keep you. Olatokunbo, the legal journey started right in your presence. We have been through all the steps together. Thank you for your love comfort, support, encouragement and ideas being of the same profession. I could not have made it to where I am now, if the home front was not conducive. God gave us to each other. You have done well.

I thank you all for coming and for listening.

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BIODATA OF
PROFESSOR OLUYEMISI ADEFUNKE BAMGBOSE

The thirteenth in the series of the University Inaugural lectures for the 2009/2010 academic session will be delivered by Professor Oluyemisi Adefunke Bamgbose of the Department of Private and Business Law, on behalf of the Faculty of Law.

Professor Oluyemisi Adefunke Bamgbose was born in Ibadan on 26 June, 1961 to Chief Adedotun Adedeji Kayode Degun, CON and Iyalode Christiana Morolake Degun of Porogun, Ijebu-Ode.

After her elementary education at University of Ife Staff School, Ibadan Branch (Now The Polytechnic Staff School Ibadan) in December, 1971 she was admitted in January 1972, to the prestigious Queens School, Moor Plantation, Ibadan where she obtained her School Certificate in 1977. While in school, she was an outstanding lawn tennis player and represented her school in the then Western State Games. She proceeded to the famous Comprehensive High School, Ayetoro, Ogun State and completed her Higher School Certificate (HSC) at Adeola Odutola Comprehensive, School, Ijebu-Ode, Ogun State with the overall best results in the school in 1980.

She gained admission to read Law at the University of Lagos, Akoka, Lagos from 1980 to June 1983 where she obtained a Bachelor of Laws (Honours) Degree. After her LLB Honours Degree, Oluyemisi Bamgbose went to the Nigerian Law School in Lagos and was called to the Nigerian Bar as a Solicitor and Advocate of the Supreme Court of Nigeria, in 1984.

She returned to the University of Lagos for her postgraduate (LLM) Degree, in 1990. Professor Bamgbose was adjudged by the Postgraduate School, University of Lagos as the overall best Law graduating student in the class of one hundred and two students, and she was commended accordingly.

She began her legal practice in the Director of Public Prosecution Division, Ministry of Justice, Ibadan, from 1984

to 1985 where she exhibited her passion for Criminal Law and Criminal Justice.

In 1985, Professor Bamgbose was appointed as State Counsel in the DPP Division, Ogun State Ministry of Justice. It is important to note that throughout her stint in the Ministry, from 1985 to November 1987 she was in charge of the Criminal Cases in Ota Judicial Division.

Professor Bamgbose married in August 1987 and moved to Ibadan to join her husband.

Her rewarding career in academic began in November 1987 when she was appointed as Assistant Lecturer at the University of Ibadan.

With a clear focus, resolute determination and hard work, Professor Bamgbose climbed every step of the University promotion. She was elevated to the grade of Lecturer II in 1990, Lecturer 1, in 1993; Senior Lecturer in 1996 and Reader in 1999. She became a Professor in October 2003 making her the first home grown Professor of Law in the University of Ibadan.

The teaching career of this diligent, resourceful and dedicated Professor includes stints during approved leaves at:

- Marquette University School of Law, Milwaukee, Wisconsin, United States of America from August to December 2001 as Visiting Professor teaching Comparative Criminal Law and Justice;
- Saint Louis University School of Law, Saint Louis, Missouri, United States of America from January to May, 2008 as Visiting Professor teaching Juvenile Justice Administration in Nigeria;
- Ogun State University Faculty of Law (now Olabisi Onabanjo University), Ago Iwoye, Ogun State from January to November 2000 on Sabbatical Leave.

Professor Bamgbose is a Consultant and External Examiner at various universities and institutions including University of Lagos, Olabisi Onabanjo University, Ago Iwoye, Osun State University Osogbo, Adekunle Ajasin

University, Akungba Akoko and the Legal Research Resource Development Center (LRRDC), among others.

She was invited twice to serve as member of the Jury at the Milwaukee County Court in the State of Wisconsin United States of America. She is a recipient of a scholarship of the Macarthur Foundation Links Senior Staff Exchange Programme, Faculty of Law, Makerere University, Kampala, Uganda, 2006. Professor Bamgbose is also the recipient of a scholarship for the British Council Seminar 99033 on Violence against Women: Into the Mainstream, held in Belfast, Ireland, 1999. She is a Fellow of Salzburg Seminar, Austria on Human Rights, Session 339, 1996. She delivered a Faculty lecture at the Washington University School of Law, Missouri, USA in April, 2008. She was the special guest speaker at the centenary celebration of 100 years of Women in Law Lecture held at Center for International Comparative Law, Saint Louis University School of Law, Saint Louis, Missouri U.S.A. in November 2008. Permission has been sought at the international level to translate some of her research publications from English language into other languages and one of her works was cited as authority in a court case in Ireland. She is a Reviewer and Editor of some international journals including the International Journal of African & African American Studies.

Professor Bamgbose features regularly at international conferences and seminars. She has more than forty-five articles in peer reviewed journals, monographs, conference proceedings, chapters in books and a long awaited book on Criminal Law by Evans Publishers.

The Inaugural Lecturer as an expert in Criminal Law, Criminal Justice and Criminology has served Nigeria in various capacities. She was Chairperson of the Study Group on Death Penalty for the Nation and member of the Committee that looked into the reform of Discriminatory Laws against Women in Nigeria.

Apart from teaching in the Faculty of Law, Professor Bamgbose also teaches in the Department of Psychology, Faculty of the Social Sciences. She has supervised the

research work of over 200 undergraduate students, 20 post-graduate students and currently supervising 5 Ph.D students. A teacher of teachers, she is teaching the 23rd generation of Law students. It is worthy of note that 10 of her former students are her colleagues in the Faculty. Indeed, some of her former students are, at present, Senior Advocates of Nigeria (SAN) and judges of superior courts of records in Nigeria.

At various times, Professor Bamgbose has served the University in various capacities. She was Assistant Warden, Queen Elizabeth Hall (1992-1997), Acting Warden. Queen Elizabeth Hall (1995), Sub-Dean, (1996-1997); Acting Head, Department of Private and Business Law (1997-1999 and 2001 -2003); Acting Dean (17 February, 2009 – 31 July, 2009); Director, Women's Law Clinic (February 2009 to Date) and Substantive Dean of Law, 1st August 2009 to Date.

At the Committee Level, Professor Bamgbose served as and is a member of several Committees which include:

- Committee to Develop a Five-year Internationalization Strategic Plan.
- Committee on the Establishment of a Framework for the Management of Research and Allied Matters (CEOREMA)
- Committee on Gender Policy
- Links Committee
- Committee of Provost and Deans (COPD)
- Senior Staff Disciplinary Committee (SSDC)
- Student Disciplinary Committee (SDC)
- Committee on Student's Jointly Committed Offences

She is a member of the Nigerian Bar Association, the Nigerian Association of Law Teachers and International Federation of Women Lawyers (FIDA).

Professor Oluyemisi Adefunke Bamgbose is happily married to a successful practising Legal Practitioner and Notary Public, Mr. Olatokunbo John Bamgbose. The marriage is blessed with three children.