INDIVIDUALISATION OF SENTENCING : A NIGERIAN EXPERIENCE

I Introduction

EVERY CRIMINAL trial determines two vital issues, *viz.*, is the accused guilty and if so, which of the many sanctions permitted by law needs to be applied to him to meet the ends of justice ? A trial court usually spends much of its time in the process of guilt finding, while it gives only a few minutes[1] to the sentencing process, on which depends the offender's life, liberty, property or future prospects of rehabilitation. The haste with which the sentences are awarded, make the onlookers feel that the court has not properly deliberated the principles involved.[2]

The result is that most of the offenders punished by the Nigerian courts return to society to indulge in criminality with greater fury and finesse. This inefficacy of punishments to serve the purpose of either deterrence or reformation indicated that they do not fit the individual needs of offenders but only the requirements of judicial precedents or demands of prosecution for punishment. Therefore, if punishments awarded by courts are to be meaningful and serve any useful purpose, they will have to be geared to such individual needs in accordance with a rational sentencing policy.

Individualisation of penal treatment means two things, (*i*) the courts shall make individual case studies of every offender based on information covering his family, social background, physical, mental conditions, antecedents, character and above all the chances of reform; and (*ii*) select the most appropriate penal and social measures that will serve the interest of both society and the offender. It presupposes not only knowledge on the part of judges of the existence of peno-correctional measures in relation to different categories of criminals but also their effectiveness and suitability for the individual needs of offenders. Thus individualisation of punishment demands that judges should, (*i*) look more to the criminal than to the crime; (*ii*) treat every offender according to his individual need rather than apply punishments on a tariff system; and (*iii*) be guided not by hunches, guesses or intuitions but by scientific investigations and evaluations of those personal and social stresses which are the contributing factors in the commission of crime.

---

1. Jackson, *Machinery of Justice in England* 211; see also, James Stephen, "Punishment of Convicts", 7 *Cornhill Magazine* 189 (1863).

2. Okonkwo, *Criminal Law in Nigeria* 40. For a discussion of the principles on which the court is guided in passing sentence, see, *I.G P.* v. *Kusumo Akano*, (1957) 2 W.R.N.L.R. 103.

The object of this paper is to emphasise the desirability of adoption of a programme of individualisation of penal treatment in Nigeria.

II Existing penal practices

The Nigerian laws contain provisions for custodial and non-custodial methods of penal treatment and courts have a wide discretion as to their use depending on the nature and gravity of the offences committed by the offender.

(1) Custodial penal treatment

Imprisonment is the most important form of custodial treatment meted out to certain category of offenders in Nigeria. It may take the form of short and long-term sentences, *e.g.*, in 1978 out of 65,567 prison inmates 83.1 per cent were there for less than two years, and 18.1 per cent for longer terms.[3] Similarly a study of the prison population in Nigeria during 1966-1979 disclosed that between 30 to 45 per cent constituted recidivists.[4] These figures show that most of the persons imprisoned were involved in trivial offences and the courts had failed to explore the possibility of applying non-custodial penal treatment which would have involved lesser pressure on our prisons and been useful in protecting the first time offenders from the bad effects of prison life.

(2) Non-custodial penal treatment

Non-custodial measures of penal treatment in Nigeria include probation, fine, discharge and binding-over.[5] But it is quite disappointing to find that, barring fine, courts do not make much use of them.

Although courts in Nigeria have been given discretion in the matter of grant of probation to offenders in cases where it appears that if released on probation they can go well in the community without further breaches of law, it is most disheartening to note that they hardly make use of this measure.[6] It has been rightly observed :

> Nigeria has statutory provision for probationary sentences but the administration of justice hardly ever employ such provision. Yet, evidence shows that on the basis of statutorily stipulated

---

3. Source : *Nigerian Prison Service Annual Report 1978.*

4. These figures are quoted from Femi Odekunle, "Deinstitutionalization of Sentencing in Nigeria : Prospectives and Problems", 3 *Nigerian Law Commission* 34 (1983).

5. S. 346, Criminal Procedure Code, s. 129, Criminal Procedure Act; see also, s. 8(1), Probation of Offenders Law.

6. It was admitted by a Supreme Court judge that from the time he became magistrate till the time he was elevated to the present post he made probation orders only in two cases. See Ayua, "Towards a More Appropriate Sentencing Policy in Nigeria", 1 *A.B.U.L.J.* 12 (1983).

> criteria for probationary sentences about 40% of offenders presently sent to prison should have qualified for such sentences. This particular situation (i.e. virtual non-application of a statutory provision) may be explained by the colonial heritage and training of our justice administrators, their belief in deterrence and their tendency to take the path of least resistence.[7]

One of the effects of non-use of probation by courts is that there is overcrowding in prisons while the state cannot find the resources to build new prisons in the present climate of economic adversity. This makes it impossible to keep undertrials and first offenders separate and away from the influence of hardened criminals.

It is noteworthy that a vast majority of about 50,000 persons in Nigerian prisons are those who have been convicted for committing minor offences and are undergoing imprisonments ranging between six months to two years. The state spends 2.50 *kobo* per day for feeding every prisoner. If courts make increasing use of probation for offenders in place of short prison terms it may also go a long way in reducing financial burden on the state.

Fine is the most commonly applied form of non-custodial sentence in Nigeria. All Nigerian courts have the power to impose fine in lieu of, or in addition to imprisonment. It may be used alone,[8] or in conjunction with other sentences.[9] It is an exclusive penalty for a wide range of petty offences, such as traffic violations.[10]

III Sentencing in action

The sentencing process in Nigeria is largely controlled by the Penal Code Law 1959[11] and Criminal Procedure Code[12] in the Northern States and the Criminal Code[13] and Criminal Procedure Act[14] in the Southern States. Some other statutes like the Children and Young Persons Law,[15] Probation of Offenders Law[16] and the Borstal Training legislations,[17] provide alternative methods of dealing with offenders.

---

7. "Crime and Quality of Life in Nigeria", *Nigerian National Paper for Sixth United Nations Congress on Crime Prevention and Treatment of Offenders* 46 (1980).
8. S. 185, Penal Code.
9. *Id.*, s. 99.
10. S. 39, Road Traffic Law.
11. Cap. 89, Laws of Northern Nigeria, 1963.
12. *Id.*, Cri. Cap. 30.
13. Cap. 42, 1958 Law.
14. *Id.*, Cap. 43.
15. Cap. 32, Laws of the Federation. Similar laws exist on the lines of the above Act in states.
16. Cap. 101, Laws of Northern Nigeria.
17. Borstal Training (Lagos) Act 1960, North-Central State Borstal Edict 1968.

As is well known, the Nigerian criminal law has been inspired by the non-classical utilitarian concept of criminal jurisprudence based on the "hedonistic calculus" of pleasure and pain,[18] under which the pain for doing an act has to be increased to such a degree as to deter the prospective offender from committing it. The Nigerian penal system has graded its penalties in accordance with the seriousness of crimes. The legislature has provided precise dosages of punishment fatuously believed to fit different crimes. And judges are required to pronounce sentences mechanically according to the schedule of punishments contained in the criminal laws concerned. The legislative prescription of penalty for a crime in advance leaves no room for a court to look into the circumstances and factors operating at the time of commission of the crime or to fully consider the needs of the offender and his potential for reform and rehabilitation.

The two Nigerian Codes[19] reflect "legislative individualisation of sentence" as follows:

First, they prescribe mandatory punishments for certain offences (*i.e.*, death penalty for a person who attempts to commit culpable homicide while undergoing a sentence of imprisonment for life).[20]

Second, they lay down the maximum punishments (*e.g.*, upto five years imprisonment or fine or both for theft).[21]

Third, they permit the courts, (*a*) to impose forfeiture of property as an additional punishment (*e.g.*, ordering forfeiture of any emblem flag, article of clothing, or other token or device worn or carried or displayed in public by a person for causing annoyance to public or breach of peace);[22] or (*b*) to hand over offenders in appropriate cases to the care of probation officers (*e.g.*, a person found guilty of an offence not carrying a sentence fixed by law).[23]

Fourth, they also fix minimum punishments (*e.g.*, person who commits robbery or brigandage with an attempt to cause death or grievous hurt is to be punished with at least seven years imprisonment).[24] Again, by recognising certain factors as mitigating the gravity of offences (*e.g.*, grave and sudden provocation may mitigate the offence from murder to manslaughter),[25] the Codes permit judges to award punishments commensurate with the special situation of individual offenders.

By providing maximum, minimum and mandatory sentences the Nigerian penal laws have given a wide discretion to courts. As a result of the

---

18. C.R. Ogden (ed.), *Bentham's The Theory of Legislation* 328.
19. The Penal Code Law; Criminal Code.
20. *Id.*, s. 229 (2), ; s. 321.
21. *Id.*, s. 287; s. 390.
22. S. 111, Penal Code.
23. S. 435, Criminal Procedure Act; s. 5, Probation of Offenders Law.
24. S. 303, Penal Code.
25. *Id.*, s. 222 (1) ; s. 318, Criminal Code.

absence of specific guidelines relating to the exercise of this discretion, the sentences imposed by courts lack rationality and sometimes appear to be disproportionate to the injury caused by the offender. Justice Fatayi Williams (as he then was) has rightly pointed out:

> [T]he pronouncement of sentence is perhaps the most confused area of our criminal legislation. This is because the penalties are not fixed by the legislature. On the contrary, statutory maximum are prescribed within which the judge or magistrate, depending on the limit of his jurisdiction, is free to roam in the exercise of his discretion.[26]

The existing trial procedures also do not contain specific provisions which may be helpful in individualisation of sentences. No doubt, section 164(1) of the Criminal Procedure Code provides that after the accused is found in a trial before a magistrate, the court can call upon him to give evidence of his character if he wishes to do so in mitigation of punishment and under sub-section 3 of section 164 of the same Code, it may also permit the police to give evidence of the accused's previous convictions, if this is necessary to be proved, before passing a sentence; yet these provisions can hardly be considered as adequate steps in the direction of real individualisation of penal treatment. Similar is the position in relation to trials before the High Court.[27]

Apart from requirements relating to the evidence of character[28] and previous convictions[29] of the accused, the Criminal Procedure Code as well as the Criminal Procedure Act, require no other information about the accused. It shall, therefore, cause no surprise if courts do not make any serious attempt to know the antecedents[30] of the offender and go by 'intuition' rather than 'information' in determining the sentences awarded by them.

IV Towards individualised sentencing

Human experience shows that a decision based on information and intelligent work is much better than one proceeding on mere intuition and guesswork. This also applies to sentencing by courts. Therefore, if we wish to have a better and more rational sentencing policy for Nigeria it is necessary that courts select their sentences for every convicted offender, not

---

26. Fatayi Williams, "Sentencing; Seen by Appeal Court Judge", in Elias (ed.), *Nigerian Magistrate and the Offender* 33.

27. S. 196, Criminal Procedure Code; s. 287, Criminal Procedure Act.

28. *Id.*, ss. 164(2)—197(1); s. 287; also see, s. 68(4), Evidence Act.

29. *Id.*, ss. 164(3)—197(2); s. 287.

30. See, Fadipe, "Sentencing : Seen by a Magistrate", in Elias (ed.), *supra* note 26 at 41; also see, Akin Adaramaja, "Character as a basis of Criminal Liability in Nigerian Law", 3 *Nig. L.J.* 116 (1969).

as a matter of intuition as at present but on the basis of information obtained regarding his character and antecedents.

In order to obtain such information it is desirable that the devices of "pre-sentence report" and "sentence hearing" may be introduced in the Nigerian judicial system.

(1) **Pre-sentence report**

"Pre-sentence report" also known as "social inquiry report" or "preliminary inquiry report" is furnished by probation or social welfare officers after making thorough investigations of personal factors, background and character of the offenders. The report enables the court to determine the most appropriate mode of dealing with the offender on the basis of the best available information. Sheldon Glueck[31] has rightly pointed out:

> Not only is the pre-sentence report valuable as a basis for sentence and treatment in the individual case but the accumulation and study of many pre-sentence reports can lead to a realistic, rather than a merely theoretical, re-examination of the entire philosophy of punishment.

Many states in the United States of America have made laws requiring courts to make use of such reports.[32] In England, the Home Office has been empowered to require criminal courts to ask for such reports, before imposing any kind of custodial sentence on any category of offenders.

In Nigeria however there is no general provision for such report. The Probation of Offenders Law merely provides for an enquiry on a limited scale about an offender in whose case the probation order is to be made. Therefore Nigeria will have to give pre-sentence report the position it deserves and make provision for an adequate number of probation officers competent to provide such reports. However, pending the increase of such officers, we may usefully employ the English practice under which the investigating police officer prepares "antecedent statement" showing the home, surrounding circumstances, education, employment, family conditions and previous convictions of the offender to enable the court to determine the most appropriate sentence.

(2) **Sentence hearing**

Under this method, the court, after declaring an accused guilty of the offence charged, may hear him on the question of the sentence to be awarded to him. The prosecution and the defence may place before courts facts relevant in sentence determination. This controls the discretion of the

---

31. 41 *Journal of Criminal Law and Crime* 717.

32. See, Dawson, *Sentencing : The Decision as to Type, Length, and Conditions of Sentence* 35 (1974).

judges and brings uniformity in the sentencing process. Because the judge is not alone to decide the fate of the accused and is assisted by the parties who are going to be affected by the decision greater confidence is created in the minds of the public as to the fairness in sentencing.

In the United States this method operates in many jurisdictions.[33] In India, sentence hearing is a statutory obligation of the court in every criminal trial held before it.[34]

Unfortunately, there is no provision for sentence hearing in the Nigerian Criminal Procedure Code and Criminal Procedure Act. Sections 164 and 197 of the Criminal Procedure Code, which require inquiries relating to the character and previous convictions of the accused or section 247 of the Criminal Procedure Act which requires the accused to be asked whether he has anything to say before sentence is pronounced, can hardly be considered as good substitutes for "sentencing hearing".

It is, therefore, necessary that the system of sentence hearing be introduced in the Nigerian laws of criminal procedure.

VI Conclusion and suggestions

It is a sad fact that the sentencing process in Nigeria has not been able to check the curse of recidivism. Improvement in the existing situation is possible if a two-pronged attack is made on the problem. *First*, the sentencing practices should be made to conform with modern developments in the fields of psychiatry, psychology, criminology and penology, *etc.* *Second*, as we have seen above, the judges and magistrates should make increasing use of the devices of "pre-sentence reports" and "sentence hearing" and employ to a greater extent non-custodial measures such as probation, *etc.*

In order to provide judicial officers basic knowledge of behavioural and social sciences such as criminology and penology, these subjects may be usefully included in the curricula of the law faculties of the Nigerian universities.[35] It is further desirable that a short course on sentencing process be added to the curricula of the B.W. Course of the Nigerian Law School,[36] so that persons desirous of entering the judiciary may acquire knowledge of the techniques of sentencing.

In addition to the above, short-term courses may be arranged to acquaint judges with the latest techniques of selecting punishment fitting the need of the individual offender. The Streatfield Committee's recommendation[37] that British judges should be regularly informed about the impact of

33. *Id.* at 51.

34. Ss. 235 (2)—258(2), (Indian) Criminal Procedure Code 1973.

35. See, Adeyemi, "Importance of Criminology to Legal Training", a paper presented at the Conference of the Association of Law Teachers at Ahmadu Bello University, Zaria held on 1 April 1968.

36. See, Adeyemi, "Sentence of Imprisonment: Objectives, Trends, and Efficacy," in Elias (ed.), *The Prison System in Nigeria* 253.

37. See the *Report of the Interdepartmental Committee on the Business of the Criminal Courts* (Comnd. 1289).

different forms of peno-correctional measures in the form of text-books on sentencing may also be used in Nigeria, and the Nigerian Law Reform Commission may be entrusted the task of conducting relevant research projects and passing the information so collected to judges throughout the country.

It may be hoped that, if the above suggestions are properly implemented, the Nigerian sentencing policy may become more viable, meaningful and effectively reduce the course of recidivism.

*Mohammad Akram**

38. It may take the form of manual on the lines of the English Home Office publication, *The Sentence of the Court or Desk Book*.

* Faculty of Law, Ahmadu Bello University, Zaria, Nigeria.