

# The Lock and Key Phenomenon: Reforming the Penal Policy for Child Offenders in Nigeria



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## Abstract

The legal and institutional frameworks for child offenders in Nigeria are punitive. The Children and Young Persons Law 1943 contains provisions with inadequate guidelines. Judges are granted wide discretionary powers in sentencing resulting in offenders being sent to custodial institutions with scarce infrastructure. Recognizing the need for a change, the Child Rights Act was enacted in 2003. It introduces the use of diversion, albeit for minor offences. This paper examines the challenges of using diversion. It proposes that diversion is workable against the backdrop of the nature of juvenile offending in Nigeria. There is also the issue of bifurcation, hence, apart from specified listed offences in the Act, all other offences can be deemed “minor”. Moreover, the paper canvasses the necessity of widening the use of other non custodial measures in the Act for any meaningful reform.

## Introduction

Prior to the enactment of the Child Rights Act in 2003, the Children and Young Persons Laws (CYPL) of the various states of Nigeria, were essentially the laws

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regulating the administration of juvenile justice<sup>2</sup>. It contains laws regarding the criminal process such as bail and detention for the juvenile offenders. However, there are inadequate guidelines on the interpretations of the provisions; hence it was interpreted just like the laws for adult offenders within the larger criminal justice procedural safeguards and constitutional framework (Ajomo&Okagbue, 1991). In addition wide discretionary powers are granted to the Magistrate or the judge in sentencing. Hence, despite custodial and non-custodial sentences for juvenile offenders<sup>3</sup> researchers have established, they were mainly sent to custodial institutions in order to fulfill the rehabilitative objective.

The state of these institutions contradicts the twin pre-requisite of this objective, because they lack adequate programmes and the conditions that accord with decency. In 1991, a National Workshop issued a communiqué on overhauling the CYPLs which was not implemented (National Workshop, 1991). In 2002, a National Conference on juvenile justice administration concluded that there is need for capacity building for the juvenile justice institutions such as the police, judiciary and prisons as well as overhauling the existing legal framework to ensure effective adherence to international standards on juvenile justice administration. (National Conference, 2002).

Clearly, the need for change was inevitable. Eventually, this occurred with the enactment of the Child Rights Act (CRA)<sup>4</sup>. Generally, the fundamental human rights provisions in the Nigerian Constitution were included in the Act. This is to ensure specific and adequate protection for child offenders both with the police and courts. The CRA addresses the incessant use of custodial disposition methods. In accordance with the new paradigm of child-oriented justice in international juvenile justice law which focuses on early reintegration of child offenders into the society to assume constructive roles (Van Bueren, 1992), the CRA provides for the use of diversion. The police, prosecutor or any other person dealing with a case involving a child offender has the power to dispose of the case without resorting to formal

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<sup>2</sup> There are 36 states in Nigeria, the Children and Young Persons Act was promulgated in 1943 and all these states adopted it as their Children and Young Persons Laws (CYPLs). Each state has its CYPL but since it is an adaption of the 1943 Act, it contains similar provisions. For instance, Children and Young Persons Law, Cap.C10 Laws of Lagos State 2005; Children and Young Persons Cap.29 Laws of Oyo State of Nigeria (2000). Obviously, this writer can only use the CYPL of only one state, since I am based in Lagos State; I decided to use the Lagos CYPL.

<sup>3</sup> In the CYPLs, juvenile is in two categories: a child is any person below the age of 14 years whilst a young person is any person above 14 but below 17 or 18 years. They are referred to as juvenile offenders. However, the Child Rights Act (CRA) defines a child as any person below 18 years. This paper uses juvenile offenders for provisions under the CYPL and child offenders for provisions in the CRA.

<sup>4</sup> Presently, 24 states out of the 36 states in Nigeria have adopted the CRA.

trial. It specifically provides for four types of diversionary measures. These are supervision, guidance, restitution and compensation of victims. They are for minor offences.

This paper examines the challenges of working diversionary measures against the backdrop of international law and nature of juvenile offending in Nigeria. It considers the implication on 'serious' offences which may lead to bifurcation of offences<sup>5</sup>. Most importantly, it argues that a meaningful reform must protect the child offender facing trial by widening the ambit of the use of other non custodial measures in the CRA.

## Administration of Juvenile Justice in Nigeria (1943-2003)

The Children and Young Persons Law contains provisions on the criminal process for handling juvenile offenders. In this section, I will examine its provisions on bail and detention though complemented by other legislations such as the Nigerian Constitution; Criminal Procedure Act and Criminal Procedure Code.

### *Bail*

Where a person apparently under the age of seventeen years is apprehended with or without a warrant, and cannot be brought before a court of summary jurisdiction, the police officer in charge of the police station shall inquire into the case. He or she can release such a child to the parent or guardian when they have entered into a recognizance with or without surety.<sup>6</sup>

The implication of this provision, which is complemented by the Nigerian Constitution, is that where a juvenile offender is arrested by the police or any other competent authority upon reasonable suspicion of having committed a criminal offence, he or she must be taken to court within 24 or 48 hours. In other words, for non capital offences whether felonies, misdemeanour or simple offences,<sup>7</sup> such a

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<sup>5</sup> Bifurcation means minor offences are diverted by the police, serious offences pass through the child justice administration such as police, courts and such offenders may be given custodial sentences.

<sup>6</sup> Section 3 Children and Young Person Law Lagos State 2005.

<sup>7</sup> Section 35 of the 1999 Constitution of Nigeria Laws of the Federation (LFN) 2004. Section 2 and 3 of the Criminal Code Cap 38 (LFN) 2004 defines an offence as any act or omission which renders the person doing the act or making the omission liable to punishment under the Code, any Act or Law; a felony is any offence which is declared by law to be a felony, or is punishable, without proof of previous conviction with death or with imprisonment for three years or more; a misdemeanour is any offence which is declared by law to be a misdemeanour or is punishable by imprisonment for not

person must be arraigned in court within 24 or 48 hours, depending on the proximity of the court with competent jurisdiction to try the offence. But where he or she cannot be brought to court within the stipulated time limit because police investigations into the alleged offence have not been completed, he or she must be granted bail by the police. This is to secure his or her release on condition that he or she returns to the police station at a time specified in the bond. (Doherty, 1990).

Since the CYPL does not contain guidelines on the conditions for granting bail to juvenile offenders, the provisions in the Criminal Procedure Act 2004 or Criminal Procedure Code 2004 are followed. Generally, in respect of police bail, the Criminal Procedure Act or Code does not outline considerations to govern police decisions to grant or refuse bail. A perusal of these Laws shows the following considerations: the nature of the charge; the nature of the evidence in support of the alleged offence; the severity for the offence; the likelihood of the accused appearing in court to attend his trial and the substance of the surety provided (Ibidapo-Obe&Nwankwo, 1992).

Similarly, there are no specific considerations stipulated for the award of court bail to the juvenile offender. According to the court, the main objective of bail is to ensure that the accused person does present himself for trial. To grant bail or not is a discretionary matter for which the trial judge in the exercise of his discretion must act judicially and judiciously. He must, therefore act only on evidence placed before him. The grounds for refusing bail must be on facts on the record. The trial judge must not act on his instinct on which there is no evidence in support (Joel Omodara v The State (2004) 1 NWLR (pt 853) 89-90).

The courts over the years have used the following guidelines based on statutory provisions, judicial practice and precedent. The nature and gravity of the offence (Dogo v Commissioner of Police(1980) 1 NCR) 14; cogency of evidence (Olawoye& Ors v C.O.P. (2006) 2 NWLR (pt 965) 427 CA ); character and antecedents of the accused (R v Jammal 16 NLR 54); and interfering with witnesses and investigations (Ishaya Bamaiyi v The State & Ors (2001) 8 NWLR (pt 715) 270 SC). Conversely, there are inconsistencies in the award of bail by the courts making it appear more like a privilege than a right (Ibraheem, 2007). The Court of Appeal gave two conflicting decisions in the award of bail. The first case, Arabi v State (2001) 5 NWLR (pt 706) 265, the court affirmed the award of bail in criminal offences which are bailable. But in Ude v FGN (2001) 5 NWLR (pt 706) 328-329, the court rationalized that in an offence which is prevalent, a strict condition would be laid down for the grant of bail.

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less than six months, but less than three years. All other offences, other than felonies and misdemeanours are simple offences.

In a study conducted on children in custody, it was discovered that 84.1% had not been released on bail by the police after their arrest. Of those whose cases had gone on trial, out of a relevant sample of 203 respondents, almost 75% had not been released on bail by the court. The research further analyzed whether those found in custody had rightly been found not deserving of bail. 8.3% and 10.4% were not released on police bail and court bail respectively because the offence was not bailable; 19.5% and 14.6% applied but were refused police and court bail respectively; 13.0% and 7.9% could not meet conditions of police and court bail respectively; 28.9% and 23.8% did not request for police and court bail respectively (Okagbue, 1996). The implication of this is that juvenile offenders are kept in the custodial institutions even when they are supposed to be granted bail.

### *Detention*

Where a person who is under the age of seventeen years who was arrested has not been released on bail, the police officer may put him in a remand home, approved institution or prison. If it is the latter, then he or she will not be allowed to associate with adult offenders.<sup>8</sup>

In practice, these juvenile offenders were detained in police cells, remand centres and prisons (Aduba, 1991). Although pre-trial detention procedures are in accordance with the CYPL and the Nigerian Constitution, the conditions do not accord with decency. Hence, the detention is used punitively without exploring other options. One of the dangers of pretrial detention is that it does not advance the goal of rehabilitation, and in most cases is not necessary to protect the public and/or the juvenile (Tagore, 1992). A court, rightly, in our view sounded a note of warning that when children who are found guilty of committing criminal acts cannot be placed in adult jails, it is fundamentally unfair to lodge children accused of committing criminal acts in adult jails.<sup>9</sup>

A fair criminal process must not only be manifested in the provisions of the law, but also in its interpretation and practice (Mowoe, 1991). As I shall be discussing under the conditions in custodial institutions, the criminal process of arrest and detention under the CYPL is fraught with a lot of abuses of juvenile offenders. These provisions were adult-interpreted. A study found violation of criminal procedures and other constitutional protections in the treatment of adult offenders

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<sup>8</sup> Section 4, 5 and 16 Children and Young Persons Law, Lagos State 2005.

<sup>9</sup> *D.B. v Tewksbury*, 545 F. Supp. 896, 904-07 (D. Or. 1982).

in the larger criminal justice. Arguably, this type of treatment was equally transferred to juvenile offenders (Ajomo&Okagbue, 1991).

## Sentencing by the Courts

In Nigeria, various legislative enactments impose limits upon the powers of the courts to sentence based on its jurisdictional limitation. The Criminal Code 2004 provides penalty for offences, a judge or Magistrate can give sentences taking cognizance of its jurisdiction. In addition, there are three types of limitation imposed by the offence-creating statutes. The first is statutory maximum and this is of two variants: one is the instance where the penalty prescribed for the offence is the maximum which the law in question specifies. The other variant is where the law simply provides a penalty, without specifying whether it is maximum or otherwise. The penalty in the Criminal and Penal Codes are stated in this form. Such penalties are statutory maxima, within it, the courts have discretion on the quantum and form of punishment. The second type is where the law prescribes a statutory minimum for any offence, the court is duty bound not to impose a sentence which is below that minimum sentence<sup>10</sup>. Thirdly, there are situations where the law prescribes statutory maximum and minimum. In this instance, the trial judge has fixed discretion only to sentence in between the minimum and maximum period of imprisonment. He may not go lower than the minimum and cannot exceed the upper limit of the prescribed sentence.<sup>11</sup>

Therefore, a judge or Magistrate has discretion to sentence within the statutorily stipulated limit. According to a judge:

*We must make it clear that so far as sentencing is concerned, every case must turn upon its own facts and because one has proposed a sentence for a certain offence, it does not follow that all other courts must do so, and that is why courts are given a wide discretion when a maximum penalty only is described. (Udoye V The state(1967) NMLR, p.197).*

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<sup>10</sup> Section 319, 37 and 38, 49(A) and 208 of the Criminal Code Cap 38 (LFN) 2004 provide death penalty for murder, treason, treachery, directing and controlling or presiding at an unlawful trail by ordeal from which death results. Armed robbery under Robbery and Firearms (Special Provisions) Decree No 5 of 1984.

<sup>11</sup> Section 10 (d) National Drugs Law Enforcement Agency Act Cap. N30 (LFN) 2004. States that "any person who, without lawful authority, knowingly possesses or uses the drugs popularly known as cocaine, LSD, heroine or any other similar drugs by smoking, inhaling or injecting the said drugs shall be guilty of an offence and liable on conviction to imprisonment for a term not less than fifteen years but not exceeding 25 years.

The wide area of discretion left by legislation has been rightly described as too general (Bakare, 1990). In the same vein, Milner and Sloan (1994) said that the discretion exercised by trial court is the most socially visible form of criminal justice authority and arguably the most important symbol of fairness in the criminal justice process.

Sentencing guidelines can be used to regulate discretion in sentencing offenders. Hence, the Nigerian Supreme Court over the years has laid down sentencing guidelines through its pronouncement in several cases. These are: age of the accused; the character of the offender as shown by previous convictions; the nature or seriousness of the offence, rampancy of the offence in the community and role played by the accused (Adeyemi, 1990).

Though the above stated guidelines are helpful to judges and magistrates, the Supreme Court decisions are a combination of facts in a particular case, and hence somehow limited. In other words, the decisions did not strictosensu establish a consistent pattern for sentencing. A very significant factor which necessitated lack of coherence, disparity in sentences and some other anomalies in the sentencing pattern is lack of definitive national sentencing policy (Oyero, 2008).

This has culminated in courts exercising wide discretionary powers which may be excessive. The acts of pronouncing sentence has been tagged "the most confused area of our criminal legislation" (Fatayi Williams, 1972). Rationalizing this, a judge once lamented,

*It seems to me a difficult exercise to understand the sentencing objectives of our judges by the quantum of their disposition, since they hardly give reasons for their approach to sentencing (Owoade, 2009, p.8).*

The CYPL did not contain any specific sentencing guidelines for juvenile offenders. Invariably, the Magistrate at the Juvenile court or any other court where the juvenile is appearing is guided by the law creating the offence and the above sentencing guidelines. Over the years, the courts developed a penchant for sending such offenders to custodial institutions without any consideration of the effectiveness of such institutions.

## Conditions at the Custodial Institutions<sup>12</sup>

In Nigeria, apart from the major theory of deterrence, punishment is also premised on rehabilitation or reformation (Adeyemi, 1990). Hence, juvenile offenders are sent

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<sup>12</sup> Nigerian Custodial institutions include remand home, approved institutions, borstal institutions and prisons.

to custodial institutions for treatment (Douglas 1988). The objective is not to discipline the offenders in such a way that they will be resentful but rather, it is calculated to develop new interests to improve society (Ogbolumani, 1972). Two types of treatment are considered necessary in order to fulfill the rehabilitative objective in these institutions. First, for an effective rehabilitation programme, measures such as: education; vocational training; individual and group counseling, psychiatrist and psychological treatment are necessary (Holland & Mlyniec, 1995).

Three comprehensive studies have been conducted on the state of custodial institutions in Nigeria<sup>13</sup>. In the 2001 Centre for Law Enforcement Education in Nigeria (CLEEN) study, institutionalized juvenile respondents were interviewed on their treatment at the various custodial institutions. 329 (85.9%) of the juveniles reported that they had received advice and counseling from the custodial officers. However, less than half 180 (48.3%) of the juveniles had access to education. Also, 197 (52.8%) had access to vocational training. According to the study, these figures did not indicate the quality of training provided. Observations during the field work for this study showed that the workshops lacked serviceable equipment and those available were obsolete and could not be used because of poor maintenance and under-funding (Alemika & Chukwuma, 2001).

Focus Group Discussions (FGDs) was done with juvenile offenders in the 2003 Constitutional Rights Project (CRP) study. The discussions highlighted gross inadequacies in the provision of educational facilities in Approved Schools, Remand Homes and Borstal. There was inadequate staff to teach and instruct the juveniles. One of the inmates from the North Central Zone responded when asked which of the services they wanted to be improved, "apart from food we need education. I have forgotten all that I was taught since I came here. They should bring somebody to teach us here. We also need books and novels to help us" (Nwanna & Akpan, 2003). Apart from counseling which was reported on a positive note, educational and vocational facilities were inadequate or non-existent. Clearly, the first objective of rehabilitation has failed.

Second, a rehabilitation programme should be conducted in a condition that accords with the concept of decency. For instance, there shall be non use of corporal punishment; no disciplinary isolation, lack of mechanical restraints and

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<sup>13</sup> These were the 1996 Nigerian Institute of Advanced Legal Studies (NIALS); 2001 Centre for Law Enforcement Education in Nigeria (CLEEN) and 2003 Constitutional Rights Project (CRP). There were other researches but the three referred to in this paper covered the six geo-political zones in Nigeria-South East, South West, South South, North Central, North East, North West; all the custodial institutions and were funded by organisations such as Penal Reform International, FORD Foundation and European Union. These were conducted in 1996, 2001 and 2003 respectively.

overcrowding. In addition, provision of adequate medical and dental care (Holland & Mlyniec, 1995).

In the 1996 Nigerian Institute of Advanced Legal Studies (NIALS) study, almost 40% of the custodial institution officers stated that their institutions had no clinical facilities and almost 35% stated that no medical staff was available. Also, the sources of drinking water were identified as boreholes and wells by 15.5% of the respondents; pipe-borne by almost 65% and rivers or streams by 4.2%. Against this backdrop of inadequate medical facilities and uncertain sources of water, it was not surprising that 41% of custodial institution officers reported they had problems with epidemic breakouts (Okagbue, 1996).

In the 2003 CRP study, through FGDs, juveniles offenders expressed dissatisfaction with the feeding and wished it could be improved. Discussions on bedding demonstrated gross inadequacies in the supplies of beddings. The beddings were either too old or unhygienic that they were infested with bed bugs and lice. This was evident on the skins of the inmates which were infested with scabies which indicated poor hygienic environment or beddings. It was noted that the common problem with the institutions was overcrowding. Kaduna Borstal which was built to accommodate 119 inmates, but had 245 inmates at the time of this study (Nwanna & Akpan, 2003).

In the North East zone, the Remand Home was an open place so juvenile offenders were chained and handcuffed for security reasons. The use of corporal punishment was common. The juvenile offenders at the Kaduna Borstal mentioned that offences such as attempts to escape, fight or stubbornness could attract horse whipping, frog jumping, labour or lock up in the guardroom for three days. (Nwanna & Akpan, 2003).

In this regard, there were gross violations of international principles on child offenders. Children who are deprived of their liberty throughout the period of their deprivation shall be treated with humanity and respect for the inherent dignity of the human person and in a manner that takes into account the needs of persons of their age<sup>14</sup>. Conversely, from the above, there was uncertain sources of water; lack of medical facilities, gross inadequacies in the supply of beddings and exposure to corporal punishment.

In addition, no child should be subjected to torture or other cruel, inhuman or degrading treatment or punishment<sup>15</sup>. The notion of inhuman treatment covers at least such treatment as deliberately causing mental or physical suffering which in

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<sup>14</sup> Section 37 (c) Convention on the Rights of the Child 1989.

<sup>15</sup> Section 37 (1) Convention on the Rights of the Child 1989.

the particular situation is unjustifiable. Torture is used to describe inhumane treatment, which has a purpose such as the obtaining of information or confessions, and is generally an aggravated form of inhumane treatment. Treatment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience<sup>16</sup>. Juvenile offenders must not be treated cruelly. Solitary confinement amounts to cruel treatment when applied to children. The conditions of detention such as the quantity and quality of food, space and sanitary conditions form part of treatment or punishment (Van Bueren, 1994). Hence, as shown above, one can conclude that all the features of torture, cruel, inhuman or degrading treatment are present in the custodial institutions. The assertion of Martinson that rehabilitation does not work captures the situation of juvenile offenders in Nigerian custodial institutions (Martinson, 1974). The juvenile offenders are subjected to various horrendous treatments. This warrants a need for legal reform with emphasis on non institutionalization of juvenile offenders.

### **The Child Rights Act 2003**

Nigeria signed the Convention on the Rights of the Child in January 1990 and ratified same in April 1991.<sup>17</sup> One of the cardinal provisions in the Children's Convention relates to the use of diversion. This is the utilization of formal or informal means other than the criminal justice system to deal with child offenders. (Van Bueren, 2006). By Article 40 (3) (b) and (4), diversion can be used for two purposes: one is to provide an alternative to judicial proceedings and the other is as an alternative to institutionalization during post-arrest and post-trial stages (Wen, 2002). The provisions of the Children's Convention were domesticated in 2003 as the Child Rights Act (CRA).<sup>18</sup> Similar to the provisions of the Convention, the CRA contains provision on diversion of child offenders. It provides clearly that the police, prosecutor or any other person dealing with a case involving a child offender has the power to dispose of it without resorting to a formal trial<sup>19</sup>. In essence, this offender does not have to face judicial trial. This provision is innovative and can

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<sup>16</sup> European Commission in Denmark et al v Greece (report of 5 November 1969).

<sup>17</sup> Status of Ratification of the Convention on the Rights of the Child'. Retrieved from <http://www2ohchr.org/english/law/crc-ratify.htm>. (hereinafter referred to as Children's Convention).

<sup>18</sup> Child Rights Act 2003, Act No. 26. There were objections to its domestication on the premise that it contradicts customary and sharia laws. See 'Report on the Implementation of the Convention on the Rights of the Child by Nigeria'. This was prepared for the Committee on the Rights of the Child 38th Session, Geneva 2005. Retrieved from <http://www.omct.org>.

<sup>19</sup> Section 209 (1) (a) Child Rights Act 2003.

bring a sweeping reform to the administration of child justice in Nigeria if properly harnessed. It is in view of this that this paper considers the workability of diversion in the Child Rights Act.

### *International Guidelines on the use of Diversion*

The Beijing rules encourage the use of diversion from formal proceedings to appropriate community programmes. It states that any diversion involving referral to appropriate community or other services shall require the consent of the juvenile or the parent or guardian, provided that such decision to refer a case shall be subject to review by a competent authority upon application. It is an important requirement to secure the consent of the offender (or the parent or guardian) to the recommended diversionary measures (diversion to community service without such consent would contradict the Abolition of Forced Labour Convention). However, the consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or to be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a competent authority upon application (Rule 11.3).

However, elaborate guidelines were articulated by the Committee on the Rights of the Child (CRC). The Committee considers respect for human rights and legal safeguards in Article 40 of the Children's Convention and emphasizes the following:

(i) Diversion (i.e. measures for dealing with children, alleged as or accused of infringing the penal law without resorting to judicial proceedings) should be used only when there is (a) compelling evidence that the child committed the alleged offence, (b) he/she freely and voluntarily admits responsibility, (3) no intimidation or pressure has been used to get that admission and (4) the admission will not be used against the child in subsequent legal proceedings.

(ii) The child must freely and voluntarily give consent in writing to the diversion. A consent should be based on (a) adequate and specific information on the nature, content and duration of the diversion measure and (b) the consequences of a failure to cooperate, carry out and complete the measure. To strengthen parental involvement, states parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years.

(iii) Furthermore, the powers of the police, prosecutor and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination.

(iv) The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities and the possibility of review of the measure.

(v) The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of the diversion for administrative purposes, it should not be (a) viewed as a criminal records and a child who has been previously diverted should not be seen as having a previous conviction (b) if any registration takes place of the diversion, access to that information should be given exclusively for a limited period of time i.e. for a maximum of one year, to the competent establishment authorized to deal with children in conflict with the law.

## **Diversion Options in Nigeria**

The Child Rights Act specifically provides for four types of diversionary measures in Nigeria. These are supervision, guidance, restitution and compensation of victims.

### *Supervision and Guidance*

Since there is no explanatory note to the CRA, the South African Law Commission interpretation of supervision and guidance can be instructive to Nigeria in applying the same provisions. It provides that supervision and guidance can be administered by the parent, social worker, probation officer or even a school teacher. For instance, parents may be enjoined to ensure good behaviour of their children by setting tasks and duties to be undertaken at home as well as constant monitoring. School teachers can monitor compulsory school attendance as this will keep children from criminal tendencies as well as make them responsible citizens. Supervision and guidance can also be taken up by the police officer whereby the child offender reports to the police station maybe once a week to monitor behavioural changes and this can cover a specific period of time (Juvenile Justice Project, 2000). It is our view that these options will be viable in Nigeria as it is relatively cheap to implement because it makes use of existing social structure, that is, the police and social welfare departments.

### *Restitution and Compensation of Victims*

Restitution relates to the return or restoration of moveable property either stolen or otherwise dishonestly acquired or taken without permission. Compensation will ensure that child offenders do not enjoy the fruits of their crimes as it will compel them to return such items. According to a renowned criminologist, in pre-colonial Africa, "compensation was usually available only where restitution was no longer possible, although in exceptional circumstances, it might be ordered in addition to restitution. These were parts of the Nigerian traditional penal philosophy before the advent of the British rule where customary attitudes were in favour of settling disputes by restoring the status quo as far as possible (Adeyemi, 1990). The importance of these options is that the victim is restored to the pre-criminality status quo and the child offender escapes formal justice.

### *Nature of Juvenile Offending in Nigeria*

Studies have shown the nature of juvenile offending in Nigeria. In the 2001 CLEEN study, criminal records of juvenile offenders showed 63.2% for property offences, 20.6% for moral and status offences, 13.3% for personal offences and 2.9% for public order offences (Alemika&Chukwuma, 2001). The juvenile offending pattern revealed they committed more property offences.<sup>20</sup> The 2003 CRP study, the status offence of beyond parental control 26.3% and truancy 34.5%; robbery was 15.2%; public demonstration/riot 7.6%; drug pushing 7.0% and murder 5.3% (Nwanna and Akpan, 2003). Hence, the status offences of truancy and beyond parental control were more than half on types of offences committed.<sup>21</sup> One significant difference in the CLEEN and CRP studies was that though both covered the six geo-political zones in Nigeria, different states were used for the research in some zones. This may proffer some explanation for the prevalence of property and status offences in the results of the different studies.

This difference has been reconciled by the 2003 United Nations Children Fund (UNICEF) study on type of offences committed by juveniles in detention. It showed the following: Property 45%; status offences 38%, personal offences 12% and public order offences 5% (UNICEF Fact Sheet). The significance of this is that property and

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<sup>20</sup> The property offences were theft, fraud, robbery, burglary; moral and status offences were beyond parental control; personal offences were assault, fighting, rape; public order offences were demonstration rioting.

<sup>21</sup> Status offences are offences that would not be considered a crime if committed by an adult but declared so due to the age of the child. It covers truancy, incorrigibility, running away from home, using vulgar language and drinking.

status offences take prominent role in the nature of juvenile delinquency in Nigeria. In view of this, it is hereby submitted, that the diversion methods stated above if properly implemented can curtail child offenders from formal trial. The police, prosecutor or any person dealing with the child can apply supervision and guidance for status offences. Also, restitution and compensation can be used for property offences. Arguably, these diversionary measures, with the necessary institutional changes are workable in Nigeria.

### *Diversion and Minor offenders*

As earlier said, diversion is workable in Nigeria against the backdrop of nature of juvenile offending in Nigeria. However, the CRA emphatically provide conditions precedent to the use of diversion. Section 209 (2) states, the offence involved is of a non-serious nature. Other conditions are in the alternatives. These are: (a) there is need for reconciliation or (b) the family, the school or other institution involved has reacted or is likely to react in an appropriate manner or (c) in any circumstance it is deemed necessary in the interest of the child offender and parties involved. The CRA proposition is that diversion should be applied for 'minor' offences.

This may lead to the negative consequences of bifurcation. Bifurcation is a system whereby serious penalties notably imprisonments are reserved for serious or persistent offenders whilst minor offences are dealt with in a more welfare oriented way in the community. This has several implications. Programme providers will concentrate efforts on developing diversion programmes for minor offenders and this may lead to a situation where children who commit serious offences are not provided with suitable interventions (Stout 2006).

Presently, the CRA provides that notwithstanding any provision in the Act to the contrary, where a child is found to have attempted to commit treason, murder, robbery or manslaughter, or wounded another person with intent to do grievous harm, the court may order the child to be detained for such period as may be specified in the order. Where such an order is made, the child is liable to be detained in such place and on such conditions as the court may direct, and the child whilst so detained shall be deemed to be in legal custody.<sup>22</sup> It is my proposition that in the interpretation of the CRA, apart from the above listed offences, all other offences should be deemed to be minor offences to benefit from the provision on diversion.

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<sup>22</sup> Section 222 Child Rights Act 2003.

## Non Custodial Disposition Measures

In addition, for the above reform to be meaningful, there is need to widen the use of non custodial disposition methods for the protection of child offenders that will face trials. The following are the non custodial disposition methods in the Child Rights Act: the court may dismiss the charge against the child offender or discharge the child offender on his entering into a recognizance; the court may place the child offenders under the care order, guidance order and supervision order; including (i) discharging the child offender and placing him under the supervision of a supervision officer; or (ii) committing the child offender by means of corrective order to the care of a guardian and supervision of a relative or any other fit person.<sup>23</sup> The parents or guardian of the child offender can be (i) ordered to pay a fine, damages, compensation or costs; (ii) give security of his good behaviour or (iii) enter into recognizance to take proper care and exercise proper control over him.<sup>24</sup> Apart from the latter, all the other provisions are contained in the CYPL. The germane issue in this regard is how to change the mindset of the judges and magistrates to use these options.

There are two other novel provisions, their effective implementation as a non custodial disposition methods is another crux of this paper. The child offender can be ordered to participate in group counseling and 'similar activities'; undertake community service under supervision. This paper intends to expound the workability of these two non custodial measures in the CRA.

### *Counseling/Group Counseling*

Counseling is defined as:

*a principled relationship characterized by the application of one or more psychological theories and a recognized set of communication skills, modified by experience, intuition and other interpersonal factors, to clients' intimate concerns, problems or aspirations. Its predominant ethics is one of facilitation rather than of advice giving or coercion. It may be very brief or long duration, take place in an organisational or private practice setting and may or may not overlap with practical, medical and other matters of personal welfare. (Feltham & Dryden 1993, p.40).*

Dryden et al, emphasize the distinction between the spontaneous giving of help and professional intervention write:

<sup>23</sup> Section 223 (1) (c) (i&ii) Child Rights Act 2003.

<sup>24</sup> Section 223 (1) (e) (I,ii,iii) Child Rights Act 2003.

*Counselling is a more deliberative activity and in its definition of the term the British Association for Counselling (BAC) spells out the distinction between a planned and spontaneous event 'People become engaged in counselling when a person, occupying regularly or temporarily the role of counselor, offers or agrees explicitly to offer time, attention and respect to another person or persons temporarily in the role of client' (1989, p.4 quoting from BAC 1985).*

However, children are different from adults and need an entirely different counseling strategy. They require verbal counseling skills as well as other strategies such as storytelling, taking them on an imaginary journey with the objective of creating a participatory environment for the child. The counselor must understand the nature and purpose of counseling, that is, the goals to be achieved. These include: fundamental goals- the child releases painful emotions, accept strengths/limitations and pursue developmental goals; parental goals based on their agenda and child current behaviour; counselor's goals which is a consequence of his hypotheses of the child's behaviour; child's goals based on the materials the child presented at the counseling session. It has been suggested that for an effective counseling, the counselor must not hold on to pre-determined agenda but allow for flexibility to give priority to the child's goals (Geldard & Geldard, 2005). In Nigeria, this option needs to be urgently explored. First, from the nature of juvenile offending, status offences are prominent. Counseling sessions can be used for both the offenders and their parents. Second, the social welfare officers will undertake this service; hence there is a ready institutional framework with minor adjustments.

### *Community Service under Supervision*

A community service is a sanction of the court requiring the offender to undertake the performance of a certain number of hours of unpaid work for the good of the community. It views the community as a victim, hence requires reparation and restitution in kind. In addition, there are specific provisions regarding the prerequisite under which a community service order can be made: it includes the type of offence and consent of the offender. This writer aligns with the view that an essential element of community service schemes is the opportunity it creates to promote a wide range of projects and personalized individual placements through which the offenders have the opportunity to enhance their feelings of self-worth and self-respect. It makes full use of the offender's potential and skills, with possible visible positive results being achieved which is the essence of rehabilitation (Klaus, 1998).

As earlier said, this provision was not in the CYPL. In addition to the above mentioned benefits, the effective use of community service will reduce the use of custodial sentences, avoid the various abuses of child offenders in the institutions and ultimately accord with the international standards of earliest reintegration of such offenders into the society. Since there is a legal framework, it is necessary to consider the use of this option for child offenders in Nigeria. This writer is aware that a state in South West Nigeria (Lagos), introduced community service into the criminal justice administration law. Though this was for adult offenders, it is our proposition that these provisions can also be adapted for child offenders.

The Administration of Criminal Justice Law 2011, section 347 provides: the court shall make a community service order which shall contain requirements for effective supervision and rehabilitation of the offender; the order shall be in the nature of environmental sanitation or assisting in the care of children and elderly in Government approved homes or any other type of service which in the opinion would have a beneficial and salutary effect on the character of the offender; the Community Service officer and the person against whom the order is made shall enter into a written agreement specifying the number of hours of service that would be rendered on a daily or weekly basis and a community service officer shall be appointed in each Magisterial District in the State by the Attorney General of the State after consultation with the Commissioner responsible for Social Development.<sup>25</sup>

In addition, the Child offender can undertake community service in the Government hospitals and Approved Homes for the Elderly, various Local Governments in the State and Libraries. Presently, the Social Welfare Officers act as Supervision officers, similar to the provision in Lagos State, such officers can also be appointed as Community Service Officers. The existing institutional structure will reduce additional costs of implementation.

Due to the peculiarity of the vulnerability of child offenders, the community service should as closely as possible relate to the particular offence and the harm resulting from that offence to the community. The visibly close connection between community service and the offence makes it more likely that the child offender and the community will both understand that such an offender is sorting out what he or she had done wrong and not simply punitive. Community service assignment needs to respect the offender. The service must reflect the age and abilities of the child. It should not be carried out in such a way that it demeans or endangers individual well being (Van Ness & Nolan, n.d, ).

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<sup>25</sup> Administration of Criminal justice (Repeal and Re-Enactment) Law 2011

## Conclusion

The Child Rights Act has heralded reforms in the penal policy of child offenders. Diversion is an innovative provision which allows the earliest reintegration of child offenders into the community to take constructive roles. Hence, it should be used for all offences apart the exceptions provided for by the Child Rights Act. These are instances of treason, robbery, murder and manslaughter where the child offender can be detained subject to international standards. Against the backdrop of nature of juvenile offending and existing institutional framework, diversion is workable in Nigeria. The international guidelines will assist in establishing a standard process. It is imperative for the police, social welfare officers and the Family Courts to receive continuous training on their evolving roles for effectiveness. The implementation of the new two non custodial disposition measures that is, counseling and community service will enhance the self-worth of the offenders and reduce the use and escalating cost of maintaining custodial institutions.

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