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# Non-custodial sentencing alternatives: A South African Experience:

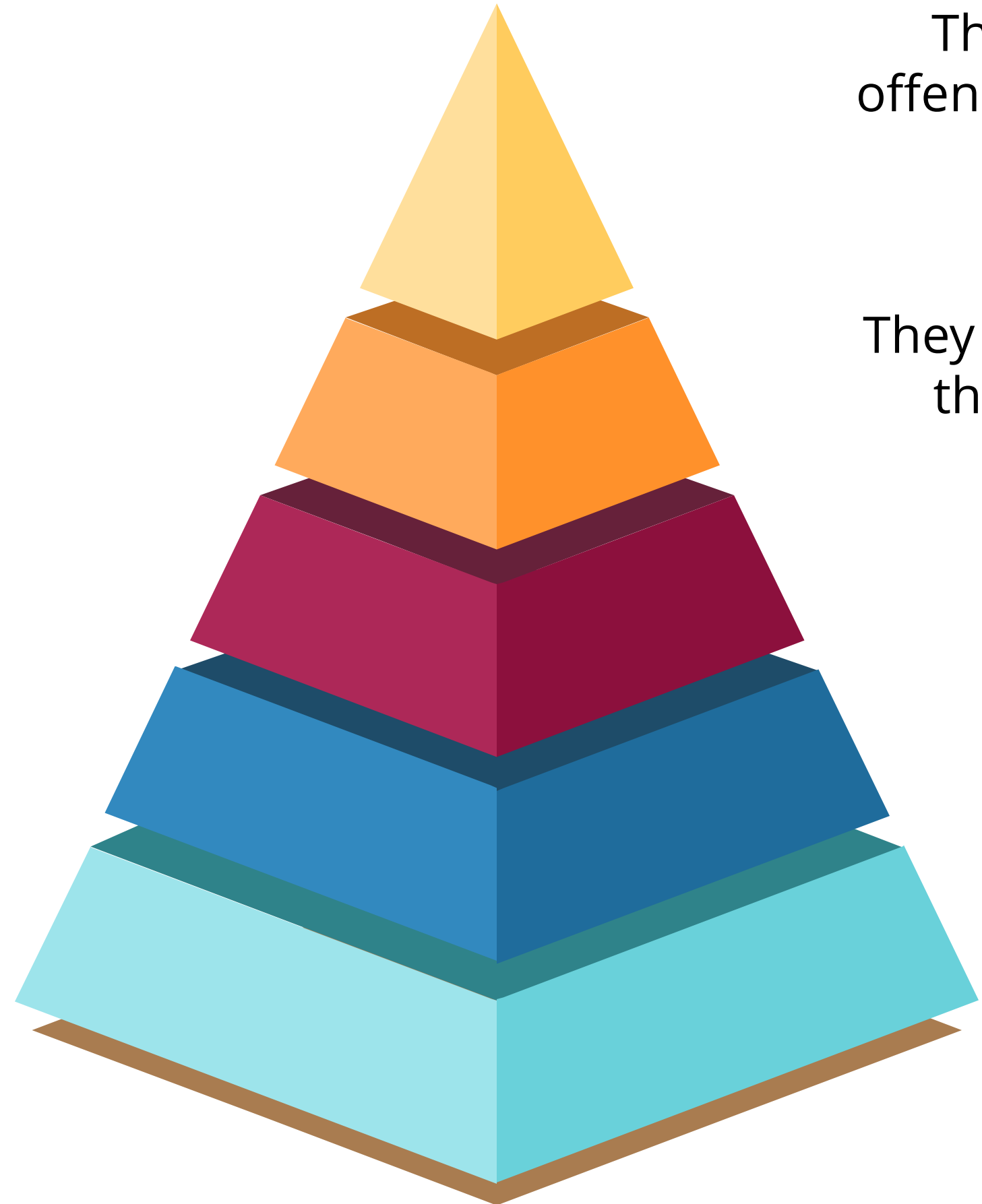
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# Overview:

1. Setting the scene: Why non-custodial offences
2. Juxtaposing the status of custodial sentences in Africa
3. Normative guidance (International and national)
4. Forms of non-custodial sentences in South Africa
  - a) On adults
  - b) On minors
5. Questions for reflection

# Why Non-custodial sentences



## **APPROPRIATENESS**

They are considered more appropriate for certain types of offences and offenders eg crimes against property, victimless crimes

## **NON-PRISONISATION**

They avoid 'prisonisation', they promote integration back into the community as well as rehabilitation, and are therefore more humane.

## **LESS COSTLY**

They are generally less costly than sanctions involving imprisonment.

## **EASE OF OVERCROWDING**

They ease prison overcrowding and thus facilitate administration of prisons and the proper correctional treatment of those who remain in prison.

# Background:

- 01 KENYA**  
Overcrowding  
Alternative sentencing  
52 979 (2021)
- 02 CAMEROON**  
Overcrowding  
Alternative sentencing  
32 003 (2022)
- 03 ZAMBIA**  
Overcrowding  
Alternative sentencing  
23 062 (2021)

- 04 SOUTH AFRICA**  
Overcrowding  
Alternative sentencing  
144 938 (2022)
- 05 RWANDA**  
Overcrowding  
Alternative sentencing  
76 099 (2021)
- 06 BURUNDI**  
Overcrowding  
Alternative sentencing  
12 323 (2022)



- \* *Alternative sentencing options rather than imprisonment come to the fore*
- \* *Challenge: Requirements for oversight and administration, costs that resource-poor African nations cannot yet meet.*
- \* *As a result, **fin**es and **compensation** have also been proposed as alternative sentences to incarceration.*

# Normative Guidance



## International law: Tokyo Rules

UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990

Should be read together with all other international instruments to ensure dignity and prevent the imposition of cruel, inhuman and degrading treatment and punishment (UNCAT)

Non-custodial measures may not be cruel, inhuman or degrading - corporal punishment  
Sentence must assist the convicted person not to commit another offence

# Normative Guidance



## International law: Tokyo Rules

The Tokyo Rules provide for the following sentencing options:

- Verbal sanctions, such as admonition, reprimand and warning
- Conditional discharge
- Status penalties
- Economic sanctions and monetary penalties, such as fines and day-fines
- Confiscation or an expropriation order
- Restitution to the victim or a compensation order
- Suspended or deferred sentence
- Probation and judicial supervision
- A community service order
- Referral to an attendance centre
- House arrest, Any other mode of non-institutional treatment and a combination of any of the above.

# Normative Guidance



## International law: UNCAT

The United Nations Convention Against Torture provides both normative and jurisprudential guidance on the punishment.

- First, the UNCAT defines torture
- Lack of a qualification for the purposes of obtaining information or a confession,
- The clawback seems to be evident in where the punishment is as a result of lawful sanctions. The UNCAT states that pain and suffering inherent or incidental lawful sanctions.
- Obligation on states to prevent other acts of CIDT- Article 1(7) of the UNCAT.
- Non-refouement - Articles 1 (and 3 and 15). *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening)*,



# Normative Guidance



## International law: ICCPR

- Reiteration of non-subjection to CIDT.
- Use of fair trial guarantees
- It is interesting that the ICCPR recognises the place of punishment as a possible hub for CIDT.
- Use of Reformation and rehabilitation of offenders as the primary goal of punishment.
- The ICCPR also provides for fair trial guarantees that inform the outcome of the trial and the final punishment that is meted on an individual. These include
  - equality before the courts,
  - presumption of innocence and fair trial guarantees.
  - being informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - having adequate time and facilities for the preparation of a defence



# Normative Guidance



**International  
law:  
ACHPR,  
ACRWC**

- Reiteration of non-subjection to CIDT.
- Use of fair trial guarantees
- It is interesting that the ICCPR recognises the place of punishment as a possible hub for CIDT.
- ACHPR: Human rights based approach
- ACRWC: Child Rights Based approach

# Normative Guidance



## International law: children

- Deals with objectives of sentencing and sentencing principles
- Beijing rules (1985)
- The CRC, Articles 37 and 40 of the CRC
- (A 40: calls for child specific justice system which:
- Reinforces child's respect for the rights and freedoms of others
- Takes into account child's age
- Promotes child's reintegration – for a constructive role in society
- Built on principle of diversion (first), Proportionality and idea of restraint)
- ACRWC: Child Rights Based Approach: General principles – 2,3,6 and 12
- CRC General Comment no 10 (CRC Committee)

# Normative Guidance



## International law: children

- . Constitutional directive on sentencing and imprisonment: Section 28(1)(g) – last resort and shortest ‘appropriate’ period of time
- . Treatment in a manner and in conditions that take account of age (yet to be judicially interpreted)
- . Must be kept separate from persons over the age of 18 years
- . Under s 69 of the Child Justice Act, the child is encouraged to understand the implications of and be accountable for the harm caused
- . Promote an individualised response which strikes a balance between circumstances of the child, nature of the offence, and interests of society
- . Promote the reintegration of child into the family
- . Ensure that any necessary supervision, guidance treatment or services which form part of the sentence assist the child
- . Imprisonment: Last resort and shortest appropriate period of time

# Normative Guidance



## Domestic law

- Critical place of the bill of rights- sec 35 of the Constitution (***different rules for adults and minors***)
- Section 276 provides for the various modes of punishment and sentencing, which include custodial and non- custodial sentences.
- The various sentencing options from which the court can choose to sentence an accused with after conviction include direct imprisonment, periodical Imprisonment, a fine, warning, suspended sentence in various forms, direct imprisonment and a fine which is suspended in whole, direct imprisonment coupled with a fine, and correctional Supervision.
- Fines, correctional supervision and correctional supervision by the Commissioner or parole board

# Normative Guidance



## Domestic law: correctional supervision

- a community-based sentence where a person is sentenced with conditions that suspend the same and (she) is released subject to fulfilment of specific conditions over a specified period.
- As per section 276A; It operates in a triangular model;
- first, it may be invoked by a court as the appropriate punishment at the first instance.
- Secondly, through the conversion of imprisonment to correctional supervision.
- Thirdly, and a point to note, correctional supervision may also lapse at its conversion to imprisonment at a second or third instance.
- The second and third options may be by the court, or the commissioner or the parole board.

# Normative Guidance



## Domestic law: correctional supervision by the Commissioner or parole board

- Correctional supervision may be invoked by the court on its own accord where there is placement of a report by a probation (for children) or a correctional official where:
- the punishment of imprisonment is for a period not exceeding three years (for sexual offences) or five years.
- Imprisonment may also be converted to correctional supervision where, following the conviction of a person to any sexual offence demonstrates the potential to benefit from treatment, and participation in sexual offence specific treatment programmes.
- This conversion may be by the court on one hand, or by the commissioner or parole board on the other hand.

# Normative Guidance



## Domestic law: correctional supervision by the Commissioner or parole board

- Applies where the commissioner or parole board seeks to convert a sentence of imprisonment to correctional supervision.
- Convict may be placed under correctional supervision where the court has handed down a sentence of imprisonment. Following the imposition of the imprisonment (with or without the option of a fine) for a period not exceeding five years or fixed period not exceeding five years.
- Following the admission of such person to prison, the Commissioner or parole board may in its opinion apply to court to reconsider the said sentence.
- The court is still empowered even after converting an imprisonment to correctional supervision to reconsider the latter to another form of punishment, to which imprisonment is not an exception.



# Normative Guidance



## Domestic law: correctional supervision by the Commissioner or parole board

- S 287(4)(a) deals with the situation of where a person has been sentenced to pay a fine with an alternative of imprisonment not exceeding 5 years, and such person is unable to pay the fine. Upon the start of the imprisonment or any time thereafter the Commissioner has the discretion (unless the court directed otherwise at the time of passing sentence) to convert the sentence into correctional supervision, as if the sentence had been imprisonment as referred to in s 276(1)(i), or to make an application to the court a quo following the procedure set out in section 276A(3).

# Normative Guidance



## Domestic law: correctional supervision by the Commissioner or parole board

- S 287 (4) (b) deals with a situation where a person has been sentenced to pay a fine with an alternative of imprisonment not exceeding 5 years, and such person is unable to pay the fine. The matter may be referred back to the court a quo to set a new sentence of correctional supervision.
- S 290 provides for a person under the age of 18 years to be placed under the supervision of a probation officer or a correctional official for a period of two years.
- S 296 allows the court, in addition to or in lieu of any sentence (but not in addition to a sentence of imprisonment), to order that the person be detained in a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992.

# Normative Guidance



## Domestic law: Suspended sentences

- The is governed by section 297(1) of the CPA, where the court may (**in its discretion**), following the conviction of a person of **any offence**, provided it does not have a **minimum punishment**
- (a) postpone for a period not exceeding five years the passing of sentence and release the person concerned upon various conditions such as
  - compensation,
  - rendering a benefit to the victim,
  - community service,
  - submission to correctional supervision,
  - treatment, supervision by a probations officer,
  - compulsory attendance of a rehabilitation centregood nature, etc

# Normative Guidance



## Domestic law: children

- Principles in the Child Justice Act
- *DPP v Thabethe*: the use of restorative justice as a critical element of the sentencing process.
- Community based sentences including diversion options (s 72)
- Restorative justice sentences – FGC, VOM (s 73)
- Correctional supervision as provided for in Criminal Procedure Act (s 75)
- BUT only 276 (h) - ie, to be served wholly outside prison
- Amended in 2014 – was possible to sentence child over 14 to correctional supervision to s 276 (i) before that

# Normative Guidance



## Domestic law: children

- Suspended sentences (with or without conditions) for period not exceeding 5 years (s78)
- Postponement of passing of sentence (with or without conditions, eg monitoring by Probation Officer (s 78)
- Fine or penalties in lieu of fine or imprisonment, eg symbolic restitution or compensation
- No fine may be imposed without inquiry into ability to pay
- Must consider whether inability to pay will cause child to be imprisoned (s74)
- Generally non-custodial sentences are similar to those already in existence, but now in a proper legal framework

# Normative Guidance



## The place of diversion: Objectives

- Minimise contact with CJS
- Encourage accountability
- Promote reintegration
- Victims/those harmed enabled to express their views on impact
- Symbolic restitution/benefit to the victim?
- Promote reconciliation between child/person affected/community
- Prevent stigmatisation
- Reduce the potential for re-offending
- Promote the dignity and self-worth of the child and his/her ability to contribute to society

# Normative Guidance



## The place of diversion: requirements

- Child must acknowledge responsibility
- Child must not have been unduly influenced
- Must be a prima facie case
- Child and if available parent/guardian to consent to diversion
- Either prosecutor must consent (s 52(2))
- Or DPP must consent (s 52(3))



# Normative Guidance



## The place of diversion: prosecutorial diversion

- Schedule 1 offences
- Schedule 2 but only after considering the views of the victim, or any person who has a direct interest in the affairs of the victim, unless not reasonably possible to do so AND
- Consult with the Investigating Officer
- See further Regulation G6 which provides further criteria, eg Prosecutor may not divert where child has pending charges, previous convictions or prior diversion

# Normative Guidance



## The place of diversion: authorized by the DPP

- Schedule 3 offences – authorisation in writing, cannot delegate (s 52(3)(d))
- Exceptional circumstances to exist before this is done
- NDPP directives to formulate guidance on when schedule 3 diversions possible: see p 260 at “J”
- Youthfulness; low developmental level of the child; particular hardship; victim prefers diversion to avoid having to testify; compelling mitigating factors such as diminished responsibility; CUBAC; fragile witnesses for the prosecution; trial would be potentially damaging to child victim/witness

# Normative Guidance



## The place of diversion: authorized by the DPP

- Must allow victims to express a view on whether matter should be diverted
- Must also consult with IO
- Matter to be postponed to get written authorisation from DPP
- Prosecutor then requests PI or child justice court to make a diversion order
- If presiding officer does not divert, must refer the matter to court for trial

# Normative Guidance



## The place of diversion: Forms thereof

- Orders:
- Compulsory school attendance
- Family Time
- Good Behaviour
- Peer Association
- Reporting
- Supervision and Guidance
- Intention.....



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1. What alternatives to imprisonment exist in your jurisdiction, in your spaces of work concerning criminal offences?
2. Have you, in your role as a judge, prosecutor or lawyer, advised or resorted to the use of non-custodial measures?
3. In what situations do you think that it would be particularly useful to do so?
4. Are there special groups of people that are more likely to benefit from the use of non-custodial measures than others?