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RIGHTS AND RELIGIOUS BELIEF IN MAINTAINING PRISON SOCIAL ORDER

Elijah Tukwariba Yin[1], Peter Atudiwe Atupare[2], Nelson Kofie[3],
Linda Peasah Owusu[4] and Thomas Prehi Botchway[5]

ABSTRACT

This paper argues that it is not the prison rules and regulations that alter the behaviour of inmates but rather the ideological justification of their religious faith. The article draws upon the social constructionist theory of reality to underpin the discussion of the data. Data was gathered through in-depth interviews and the distribution of semi-structured questionnaires. When analysed, the data revealed that although inmates had the right to practice the precepts of their religious faith as defined in law, in practice, these religious rights were not entirely observed. The partial recognition of these rights divulges that the principle of humane treatment underpinning the respect for rights in prison was ignored and reduced to mere formal respect for rules. Besides, the data disclosed that inmates rarely attributed the change in their personality to the impact of prison rules and regulations, but rather to the transformative power of their religion.

Keywords: Rights, Religion, Prison, Social Construction, Social Order

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1 Faculty of Law, University of Cape Coast, Cape Coast
2 Faculty of Law, University of Cape Coast, Cape Coast
3 Northern Virginia Community College, U.S.A.
4 Center for Migration Studies, University of Ghana, Legon
5 Department of Political Science Education, University of Education, Winneba

Introduction

Human rights are rights inherent to all persons, irrespective of sex, religion, race, language, nationality, ethnicity, or any other status[6]. These rights imply a particular view of what a human being is and his/her relationship to the state, community, and other persons. The human rights corpus is not a faith or a set of normative principles suspended in outer space; it borders on matters that affect the daily routine politics of people and institutions. Hence, some legal scholars have argued that all individuals should have the same opportunities to participate in the construction of the institutions and practices of the polity and should be equal before the law[7]. This, of course, is the ideal. Convicted criminals forfeit certain rights such as the right to freedom and liberty, movement, and privacy. Yet, are still entitled to the following: the right to a fair trial, protection from retrospective laws, the right from enslavement, the right to freedom from torture, the right to life, and religion. It is for the case of religion that international[8] covenants and national[9] ordinances and policies make provision for prisoners to practice their religion.

6 Universal Declaration of Human Rights, 2015

7 See Kymlicka, 1995

8 Article 18 of the Universal Declaration of Human Rights provides that: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. Article 18 of the United Nations International Covenant on Civil and Political Rights (Hereafter referred to as ICCPR) also offers for religious rights and freedom. In the second paragraph of the Covenant, it specifically provides that: No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. Article 27 of the same ICCPR provides that: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. The United Nations Standard Minimum Rules for the Treatment of Prisoners (1955) make specific reference to the need for prison authorities to allow prisoners to observe their religion and to have access to a minister of that religion: 41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis. (2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times. (3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected. 42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

9 Part eight (8) of the Prison Regulations of 1958 on divine service states as follows: (49) The Chaplain, or such other person as may be appointed by him with the occurrence of the officer-in-charge of the prison, shall perform the appointed service of his denomination every Sunday, and on Christmas Day, and

The essence of these legal instruments is to provide the practical frameworks for inmates to meet the set mandates of prisons. Also, these prison ordinances[10] aim to control the behaviours of inmates - the clothes inmates should wear, the number of visitors inmates should receive within a week or a month, their diet, and bedding. The idea is to alter the behaviour of inmates for possible reintegration into mainstream society. There are schools of thought that hold that the strict enforcement and implementation of these prison rules and regulation make inmates comply with the prison conditions and to the dictates of prison officers.[11] This paper examines the interplay between inmates' right to their religion and the secular prison bureaucracy and what constitutes the subjugation of inmates to the prison bureaucracy. It is argued that it is not the official prison rules and regulations that alter inmates' behaviour and maintain prison order but rather the ideological justification of their religious faith.

on Good Friday; and moral and religious instruction shall be given to prisoners who are willing to receive it. (50) Ministers of any recognised religion may be admitted at reasonable and proper times to the prison to visit prisoners who may wish their services. Like the Prison Regulations of 1958, Chapter IX of the 1960 Prisons Standing Orders state as follows: (382) Arrangements shall be made by Superintendents and Officers-in-Charge for Divine Services for all the recognised religious denominations to be held on Sunday mornings and afternoons. The times of these services shall be decided by the Superintendent or Officer-in-Charge in consultation with the Minister concerned. (383) Attendance of prisoners at these services is voluntary, but no prisoner shall be allowed to attend the Service of any denomination other than that he declared to be his persuasion on admission. (385) No prisoner shall be allowed to change his religion without reference to the Minister of his declared religion and the Minister of the religion to which he wishes to change. (386) Prisoners attending Divine Service shall be properly clothed. (388) Arrangements shall be made for an additional service or period of instruction to be held for each religion on one evening during the week. The time of such service or instructional period shall be arrange by the Superintendent or Officer-in-Charge in consultation with the Minister of the religion concerned. (389) All such services or periods of instruction shall cease at, or before, 7 p.m. and sufficient officers shall be present to maintain good order and discipline. The Prison Service Decree, 1972 (NRCD) also recognizes the need for religious freedom and religious tolerance as well as access to outside clergies at various times. Section 40 – Religious Observances (1) No prisoner shall be hindered in the reasonable exercise of his religious observances. (2) Every prisoner shall be entitled to attend every religious service of his faith or denomination held within the prison. (3) Ministers, howsoever known, of any religious faith or denomination shall be admitted at reasonable and proper times to visit prisoners who may wish their services. (4) Moral and religious education instruction shall be given to prisoners who are willing to receive it. (5) This section shall apply notwithstanding that a prisoner in undergoing punishment for offence against prison discipline. Hierarchically superior to all these laws, and taking normative priority over them, is the 1992 Constitution of the Republic of Ghana, which guarantees all persons freedom of religion. Article 21 and 26 clearly stipulates that: 21. (1) All persons shall have the right to- (a) … (b) freedom of thought, conscience and belief, which shall include academic freedom; (c) freedom to practice any religion and to manifest such practice; …26 (1) Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution.

10 Prison Regulations 1958, Prison Service Decree 1972, NRCD 46, Prison Standing Orders 1960.

11 See Cullen & Jonson, 2012

The prison (a secular state agency, rational-legal bureaucracy) and religion (Church/ Mosque/sacred space) are separate entities. In principle, they are antithetical. The prison is a confinement centre for people deemed dangerous to society. It is meant to punish and reform offenders.[12] Religion, on the other hand, creates a sense of belonging based on shared norms and moral values.[13] Apart from these norms and moral values, religious codes guide people's behaviour and actions by helping them to become useful members of society.[14] The prison is about "bad" things: criminality and chastisement whilst religion is about good things: sacredness and dedication. The inmate is considered a social outcast, eschewed by the public, "but the religious experience of 'conversion' promises to transform the prison experience from 'you are caught' to 'you are free'".[15] That is, from control over the body to spiritual redemption. It is important to note that, despite the differences, it is the state bureaucracy that provides the space for religious practices. Seemingly juxtaposed in principle and practice, how (and by what means) have the prison administration negotiated the spaces and processes within the boundaries of the state law for inmate's religious activities?

The 1992 Constitution of Ghana grants inmates the free exercise of their religion, but there is nothing in the constitution that stipulates that the government should institute religion as a "tool" of rehabilitation. If religion is a governmental "tool" then it is an ideology - a body of doctrine - aimed to pacify inmates to behave themselves. It is a fact that Ghanaians are overwhelmingly Christians and Muslims in a democratic country, but the nation-state of Ghana is not theocratic. If the practice of religion is a right, then the government needs not use religion as a "tool" of rehabilitation. Government agencies and civil servants must remain neutral in the execution of their services to the public. Ankaful Maximum Security Prison (hereafter as AMSP), which is the study setting, is not in the business of using religion as a "tool" to rehabilitate inmates. Its task – through laws and policies - includes the facilitation of inmates' rights to free exercise of their religious beliefs within reasonable means. It is the government's mandate to provide a religious facility for inmates to willingly, without coercion, to practice (or to abstain from) religion in the facility. To this extent, religion remains in the sphere of civil society within the confines of prison.[16]

12 The work of Clear et al., 1992 detailed this position

13 See Durkheim, 1912

14 See Stansfield, Mowen, O'Connor & Boman, 2017

15 See footnote 10

16 See Yin's PhD thesis on religion as an organizing principle in Ankaful Maximum Security Prison.

Against this backdrop, it is convenient to state that religion and human rights are deemed to have complex and inextricable relationship. According to Witte and Green[17], most religions have supported repression, violence, and prejudice. Despite this, most religions have also played critical roles for universal human rights. These religions have provided the essential scales and sources of dignity and responsibility, respect and shame, restraint and regret, restitution and reconciliation that human rights regime needs to flourish and survive in any culture. This makes the examination of human rights and religious belief in the context of imprisonment timely.

Theory and method

In examining the rights of inmates in the context of their religiosity and what constitutes their subjugation to the prison bureaucracy, the social constructionist theory of reality by Berger and Luckmann[18] was used to underpin inmates' explanation of their imprisonment through their religious realities. The central theme of the theory is that interactions by individuals and groups in a social system generate, over time, concepts of each other's actions. Through this, meanings are created, negotiated, sustained, and modified.[19] In other words, concepts become accustomed to mutual roles played by the actors. Through socialization these roles become institutionalized. Burr submits that our identity originates not from within a person but from the social environment.[20] Through significant others such as family members, friends, and other individuals who intermediate the reality of society, socialization takes place.

Religion is a socially constructed reality. Inmates' view of religion becomes highly dependent on narratives and their social experiences. Inmates may develop their religious identity while being in the 'free' society or prison. This identity is dependent on the meaning and interpretation they give to their object of worship or deity. Out of this, inmates maintain interdependence and their individuality in respect of the deity they pay allegiance to. In addition, inmates' identity originates not from themselves but from their social setting. Through their interactions with significant others, inmates construct their religious reality. That is, how they comprehend and how they think religion contributes to their prison life based on their lived experiences.

The data on which this paper is based comprises primary sources. The primary empirical data were gathered through in-depth interviews, informal interactions, and the review and assessment of the results of semi-structured questionnaires of inmates in

17 See Witte, J., & Green, M. C worked on Religion and Human Rights.

18 Berger and Luckmann introduced the social constructionist theory of reality, 1967.

19 See Schwandt, 2003

20 See Burr, 2003

Ankaful Maximum Security Prison, Ghana. AMSP was established in 2011 to house high sentence and high profile criminals. It was a way of decongesting the overcrowded prisons in Ghana. The facility is on a stretch of land size of 1,800 feet by 1,800 feet. According to Attafuah (2013), the cells of AMSP measures 16 feet 5 inches by 10 feet 10 inches. It was observed that ventilation was not a major problem though the cell temperature (30oC) is higher than the temperature of a normal room (Average of 23oC). Each cell holds between six (6) to ten (10) inmates. However, most cells accommodated not less than 8 inmates. The prison has a capacity of 2000 inmates with six (6) blocks labelled A-F. 'A' and 'F' blocks have a capacity of 200 each whilst 'B' to 'E' blocks have 400 inmates capacity with 40 cells. However, at the time of this research, only three blocks were in use with inmates' total population of 802 (as of 12 December, 2016). The 'A' block houses 79 inmates, 'B' block houses 331 inmates, with 'C' block 392 inmates. At the time of this study, the number of commissioned officers was 24 whilst subordinate officers were 99 summing up to 123 warders, as against 802 inmates. Out of the inmate population of 802, a sample size of 169 inmates was drawn of which 147 returned their semi-structured questionnaire. The respondents (inmates) were selected using simple random and systematic sampling approaches. The number of participants for the qualitative aspect of the study was 34. They included inmates, prison officers, visiting Clergy, and ex-convicts. However, not all responses were used in this study since this formed part of a major study. Only inmates participated in the semi-structured questionnaire. The qualitative data were analysed thematically whilst the quantitative data were analysed using the Statistical Package for the Social Sciences (SPSS) software version 22. Descriptive statistical analysis was done using percentages. The names used to represent participants in the data discussion do not represent the true identity of participants in the prison facility. The Code of Ethics approved by the International Sociological Association Executive Committee was highly considered. This study was given ethical clearance from the University of Cape Coast institutional review board. Clearance was also sought from the Prison Headquarters in Accra, Ghana.

Inmates, religion, and affiliation

This study investigated the religious practices of inmates before and during their imprisonment. This helped to compare inmates' previous religious practices with their present prison religious practices. The data revealed that almost all inmates had some sort of religious affiliation before conviction. The data showed that 56.4% were Christians, 32% were Muslims, whilst 11.6% were traditionalists. However, after conviction 68% identified themselves as Christians, 25.9% as Muslims, whilst 6.1% as Traditionalists. Through casual conversations, inmates stated the reasons for their affiliations as thus;

> I was born into the religion …my environment was dominated by my present religion …the school I attended was a mission school so I followed that faith… I became converted through the preaching of an evangelist in the prison.

This was confirmed by another inmate:

> ….My parents and friends were Muslims… In the town I lived in, most of the residents were Muslims. So I also became a Muslim…. (Fred, inmate, religious leader, 2017)

These findings corroborate with Gaur[21], who found that before inmates' conviction many of the religions followed by these inmates were the religions of their families. The social setting of inmates played a critical role in determining their religious affiliation. Implicitly, these inmates were socialized into the beliefs, teachings, and practices at an early age. Many of these inmates did not change from the religions of their parents, as was evident in their present affiliation. All these authenticate the importance of social structures in determining a person's religious affiliation. An indication that the processes of interaction with social structures are shaped at an early age by some other social structures, particularly education, religion, but subject to family and other social relationships. With Ghana being a religion-saturated society, very few individuals can escape the pervasiveness of religion of all sorts in daily life and living. It is not surprising that many inmates enter prison already knowledgeable about the significance of religion in their lives.

For how frequently inmates attended religious services before conviction, 29.9% said only on High Holy days such as Christmas and Easter, 20.4% said once a week, that is, every Saturday or Sunday, 3.4% said once in a month, 2.7% said always, whilst 43.6% did not attend religious services. This was similar among Muslim inmates as 85.7% only visited the mosque during the month of Ramadan. These data imply that the majority of inmates were infrequent attenders of religious services before their conviction. The state of inmates' religiosity was different in their present predicament as 67.3% said they always attended religious services. The question is, what has accounted for this change? The answer is perhaps found in Agnew's[22] argument that individuals are more vulnerable to a transformative dogma inside the prison environment. This is based on the assumption that the prison setting creates a small population where amalgamation of issues congregate to generate the unique need for and access to change.

21 Gaur examined the role of religion in prison in India.

22 Agnew, 1992

Comparing the data on religious affiliation before conviction with religious affiliation after conviction, it was clear that some inmates had switched faith in prison. This finding is not different from Gaur (2011), that during imprisonment whilst some inmates maintained and strengthened their faith in a deity, others either gave up on the religion or switched their faith to other religions. The underlying factors for these conversions were varied. These include the inmate's encounter with a religious Civil Society Organisation (CSO), prison evangelism, and personal revelation and discovery of a deity. In the course of the in-depth interviews, two inmates had this to say:

> …I was a Muslim when I came to prison. There were some Christians in my cell who used to preach in the cell. I listened to their words and changed from being a Muslim to a Christian. (Fred, inmate, religious leader)

> My parents were idol worshippers so they introduced me to that type of worship. For me, there was nothing like going to church. …I started attending church services when I first came to prison. That was the first time I heard about the word of God. …and listening to the word of God inspired me. (Moses, inmate, religious leaders)

The qualitative data show that inmates' religious affiliation either before or after the conviction was influenced by their previous environment, as well as their present situational interactions. It also indicates that inmates' religious socialization can be attributed to their family and friends or the socio-cultural environment in which they found themselves. The data further revealed inmates' rediscovery of self. This could be the result of a traumatic prison experience. This also shows how religion in Ghana is peripheral to the daily lives of citizens. All these points to how inmates explain away their religious realities through the internalization of previous social experience. It also solidifies the point that religion is a socially constructed reality based on narratives and social experiences.[23] Out of this, inmates develop their own identity dependent on the interpretation and the meaning they give to their object of worship.

The data further suggest that the prison setting provides a social arena of an unavoidable mixture of plural normative religious orders. These normative orders appeared to be overlapping with each other in the prison bureaucracy. This pluralism within AMSP has provided the opportunity to have some kind of a hybrid religious space. The practical implication of this is seen in terms of how inmates with Christian religious affiliation relate and view a Muslim or a traditionalist inmate, and vice versa. It appeared that AMSP

23 See Berger & Luckmann, 1967

comprehends it as necessary to provide a "religious space" for inmates to express their religious beliefs, but no spaces for skills acquisition and development.[24] This makes religion a bureaucratic priority. Why? Perhaps, the prison administration understands how religion contributes to the subjugation of inmates.

Inmates who may not be religiously affiliated but are thinking of becoming so, or inmates with religious affiliation but who wish a change, may ask questions about which religious regime meets their needs and orientation. This provides the opportunity for inmates to choose from the multiple religious bodies at AMSP. This is evident in the conversion of inmates from one religious faith to another and even conversion within the same religion. The challenge posed to any of these religious bodies (Christianity, Islam, and Traditional religions) in prison is that they are rivals to each other as they share and profess dissimilar beliefs. Amidst this rivalry, the members of these faith communities are accommodating each other.

Notably, this religious plurality in AMSP is not about how inmates are co-existing in this social arena but the seemingly fluid diversity that exists in the various religious practices – a day of worship, different religious books, the different approaches to worship and beliefs, etc. in an otherwise carceral institution. Invisibly, these inmates' religious practices and demands proffer a competing claim of authority. Pluralism in this context speaks not so much about the unflinching devotion of inmates to the worship of their various deities but the fact that inmates' initiated religion is the only mode of self-expression in AMSP.

Prison rules, rights, and religious faith

The practice of religion in prison is not a favour conferred on prisoners in Ghana. It is part of the body of rights to be claimed by all inmates and respected by the prison administration. Not because they are prisoners, but because they are human beings who deserve some dignity[25]; no more or less granted to other citizens. The evidence available suggests that there is freedom of worship in prisons in Ghana; different Clergy with dissimilar faiths are permitted to visit their adherents in prison. These are entrenched rights, as the prison cannot impede the practice of religion.[26] However, these rights are not without limits. The exercise of such religious rights must conform to prison regulations, and also not in contravention of the rights of other inmates. In this paper, this type of right is described as a *"right of no right"*. Such rights are exercised under strict control. The following questions are relevant in this context: Is there a link between the rule limiting religious practices and a genuine prison interest? And do inmates have

24 See fn 14.

25 See Zellick, 1978

26 See Stansfield, Mowen, O'Connor, & Boman, 2017

alternative ways of exercising such religious rights?

Per prison regulations, inmate's subscription to religion is enshrined in their legal rights. Though a right, there are restrictions and determinants of such rights. The prison determines the time for worship, and which visiting clergy is qualified to proselytize within the prison. The interview report reveals that the implementation of prison rules was in circumspection of the social order of the prison. This manifested in inmate's switch of faith without recourse to the prison chaplain or prison regulations. Switching of faith and religious affiliation was a normal practice within the prison, accepted by both officers and inmates. An ex-convict stated;

> … I did not tell any officer that I had changed my faith or my church in the prison…

The data appeared contradictory to section 385 of Prison Standing Order 1958, whilst to some extent, it aligned with section 40 (1) of the Service Decree of 1972. This is because, for an inmate to change his faith, it must be subjected to the approval of the prison clergy, but this was hardly so. It was an accepted informal rule for prisoners to switch faith. An informal discussion with the prison chaplain revealed that the switch of faith without following laid down procedure did not amount to any challenge within the facility. It was a normal practice among inmates. This shows the contestation of formal and informal prison rules, and how at times prison administration circumvents the legal arena for penal management. This further shows an uneven legal framework that lacks instrumental cohesion, all operating within the same social field.

Against this backdrop discussed, inmates were asked whether they were aware of their religious rights or not and whether they were able to practice these rights. The quantitative survey revealed that 61.2% of inmates were aware of such rights in prison whereas 38.8% claimed they were not aware. It was revealed that inmates became aware of such rights through their interaction with peers, prison officers, and religious CSOs. With this rate of awareness, 93.9% of inmates were able to practice their religion, whilst 6.1% were unable to do so. The affirmative nature of the data suggests religious liberty in prisons in Ghana. The data further infer that, whether inmates were aware of their religious rights or not, such knowledge did not determine their chances of practicing their religion of choice. This takes cognisance from the *interest* theory of rights by Jeremy Bentham, as against the *will* theory, that a prisoner having the right to practice religion means it is in the interest of the inmate and the prison as a whole, and the prison has a duty to protect and provide such rights. This analysis validates *claim rights* as discussed by Hohfeld[27]

27 See Hohfeld, 1919

and further detailed by Jones.[28] In this context, the prisoner is the right holder whilst the state bureaucracy becomes the right provider. Simply put, the prison is the facilitator of inmate's religious rights. These religious rights expressed by inmates are privilege-rights, in the sense of their non-forbiddenness. Inherently, the empirical data suggest that inmates have a pair of privilege rights – that is, the right to practice religion and the right to stay off religion. These rights are subjected to the legal distribution of freedoms. As the legal orders empower the prison to exercise their authority over inmates, yet at the same time define their limits. This insight provides a meaningful connection between the inmate's re-discovery of self through religion; and the realisation of the human right to freedom of religion within the prison.

Though inmates were able to practice their religion of choice, these practices were without challenges. During the interviews, inmates posited that they worshipped freely, however, there were times their religious observances had to be halted or suspended due to prison administrative issues and rigid rules. This meant that there were times daily prison activities impeded such religious rights. Inmates had this to say:

> I say that whilst I worship in this prison I am unable to worship as I want. The prison rules help us but at times it does not. … My problem with the rules is that when it is even 10am and we are still worshipping we hear the officers shouting at us telling us to get into our cells. …because a high-level government official is visiting. This makes worshipping in the prison quite problematic. When this happens and you don't have faith you may stop worshipping. (Abraham, inmate, religious leader, 2017)

Two ex-convicts reiterated the position of rigid rules by saying that:

> Practicing religion in prison was sometimes very difficult. For example, we the Muslims individually prayed in our cells instead of praying together at dawn. We could not pray together because of rigid rules in the prison. (Bugum, ex-convict, 2017)

> At times you could even be asked to stop a church activity for something else. The restrictions were too much. I remember there was a time our crusade had to be postponed because some prison officials from the prison headquarters were visiting the facility. (Baron, ex-convict, 2017)

The data divulge that although inmates have rights, it does not imply they always have a constitutional right to do things or worship the way they want because of religious faith.

28 See Jones, 1994

The rights of prisoners to practice their religion are balanced against prison rules. These rights, in practice, revealed that the abstract principle of humane treatment underpinning the respect for rights in prison was often ignored and reduced to mere formal respect for rules. Tacitly, the power exercised by the prison diminishes the inmate's full claim of religious rights. This argument, to some extent, denotes that the motives related to an inmate's religious rights are definite within that space, nonetheless are non-definite outside of that space. Though competing rights, as the data suggest, officers place other prison rules, whether formal or informal, above the inmate's religious rights, and by this sidestep the inmate's rights to ensure penal management. This shows that the religious rights of inmates are conclusive within some delimited space. Likewise, it also shows that rights have qualifications that determine when it is applicable and when it is not.[29]

One of the key distinctions between prison religious practices is the adaptability of the adherents. The precept of Islamic practice is to pray five times a day, whilst some evangelicals are also expected to engage in all-night prayers. These practices are certainly not possible under the safe custodial programme of the prison administration. Despite the challenges posed by other contending interests, inmates inspired each other through their religious beliefs to respect prison rules. This is captured in a statement made by two inmates:

> We do not have the freedom to worship Allah the way we want in this prison. The truth is that our freedom has already been denied us so we have to act according to the rules of the prison. We only have to submit to the officers so that we don't have problems with them. …we are under the law of the prison. Our beliefs tell us to respect authorities and laws. …so we have no option than to see to it that their rules are implemented to the latter. This is what Allah expects of us. (Salisu, inmate, religious leader, April, 2017).

> We respect prison rules. I would not even call it prison rules. I would say the rules are God's rules (Yaw, inmate, 2018).

Apart from inspiring each other, some inmates explained their reasons for respecting prison rules in the context of their religion.

> I am a changed person not because the prison is a difficult place but because I have now come into contact with the light (Jesus). (Moses, inmate, 2018).

29 See Shafer-Landau, 1995

> …not because officers are strict with enforcing the prison laws …but because my Quran tells me so. (Musah, inmate, 2018).

The Christian visiting clergy stated;

> The Bible instructs them (prisoners) to obey authorities (Warders). Refusing their (warders) instructions is disobedience to God.

The Muslim clergy reiterated that;

> Islam is a religion of peace and law. Allah commands every person to respect the laws of his/her nation. …you have to strictly follow Allah's rule so that you don't have problems with authority. Following Allah's rule is following the prison rules. And doing this means you are fulfilling Allah's commandments.

From the above, religion, by default, is an agent of social control of the inmates, as it anchors and reinforces the prison rules by which inmates conduct themselves. This shows how religion is knotted into the social order of the prison as it reinforces and gives legitimation to prison values and norms.[30] All these show how inmates are explaining away their religious reality through their social constructs.[31]

In addition, the data reveal inmates' self-conception: hardly any inmates interviewed talked about the impact of the prison rules and regulations changing their personality and their lives. Most explained the changes in their character purely in the context of the transformative power of religion. That is, inmates obeyed the prison rules and regulations simply because their religions warrant obedience to authority. It is indeed not prison rules and regulations that alter the behaviour of inmates but rather the ideological justification of their religious faith. This analysis shows that religion is a strong pillar for inmates and of the prison. It is also seen that with the prison as an ordered 'society', of a legal order, religion is the organising principle of social control. This explains what constitutes inmates' subjugation to the prison bureaucracy. To this extent, what might have been a recurrence of mayhem within the prison has been put under control by religion. In this light, religion as social control should not be examined on its failures - i.e. clouding inmates' ability to fight their terrible prison conditions, but on its achievements; on nothing less than the social order of the prison.

30 See Durkheim, 1954

31 See Berger & Luckmann, 1967

Conclusion

This study examined the rights of inmates in the context of their religion and what constituted their subjugation to prison authority. The pragmatist approach of mixed-method was used for data gathering. Based on the analyses above, this study concludes that the legal regimes on prison recognize freedom of religion as well as freedom off religion; a mark of respect of inmates' civil rights. Regardless of these rights, inmates were at times restricted by prison warders depending on the assumed consequences of allowing such religious practices. The inmate's rights to religious practices do not imply that all kinds of religion can be practiced in prison. This means that whilst there is no anarchy in terms of inmates' religious rights and practices, at times prison officers circumvent the laws and rights of inmates to succeed in penal management.

Inmates take to heart the instructions of their religion to respect prison rules and to show deference to prison officials even where inmates were aware of the violations of their rights. Worthy of note is that it is not the official prison rules and regulations per se that changed any individual inmate. It is the pervasiveness and internalization of religious principles that appeared to have altered the personality of inmates and maintained prison order. If the prison rules aim at subduing the inmates to the prescriptions of the institution, then it is the religion that provides the ideological justifications for why inmates abide by the rules. For some inmates, respecting the prison rules was about upholding the authority of their deities.

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THE CHALLENGES OF INTERNALLY DISPLACED PERSONS AND THE WAY FORWARD: THE NIGERIAN EXPERIENCE

Agbo Friday Ojonugwa[1]

ABSTRACT

Internally displaced persons (IDPs) are usually forced to flee or leave their homes, particularly in situations of armed conflict. They are displaced within their national territories and are generally subject to heightened suffering and vulnerability in many cases. It is also essential to state that the issue of internal displacement has become prominent because of the realisation that peace and reconstruction in conflict-ridden societies depend on the effective settlement and reintegration of displaced persons. Nigeria is a country that has a history of conflicts and displaced people. There has been a challenge in finding lasting peace through the employment of conflict resolution techniques and also the challenge of catering for the welfare of internally displaced persons in the country. However, peace and development without taking into account the settlement, return, and reintegration of IDPs. These desirous objectives are proving quite difficult in Nigeria as many challenges confront the government, policymakers, and humanitarian NGOs in providing the IDPs with their rights and needs. Some of the challenges can easily be overcome while some are more tasking requiring concerted efforts and massive resources to overcome. The aim of this article is to highlights the significant challenges confronting IDPs and provides some solutions to these challenges. In adopting the doctrinal method in discussions, the article finds that enormous challenges abound that confront IDPs in Nigeria, and it finds that there is the need for the government to find urgent solutions to the challenges of IDPs for the wellbeing of IDPs.

Keywords: IDPs, Conflict, Nigeria, Challenges, Government

1 LLB, B.L, LLM,(PhD in view) Legal Practitioner,
ADR Expert, Education Administrator, Principal Partner, Potter's Chambers, Abuja

Introduction

Nigeria is Africa's most populous nation. It is rich in many mineral resources like crude oil, gold, iron ore, tin, uranium, coal reserves, and other minerals. Still, it has a large number of people of its over 200 million population in abject poverty.[2] The poverty problem in Nigeria has been worsened by waves of insecurity and conflicts over its 59-year post-colonial history. This situation has resulted in creating hundreds of thousands of refugees and internally displaced persons within and outside the country, thereby placing the country in an uncertain future.[3] Before the coming of the British, intertribal and interfaith wars had, on many occasions, caused IDP and refugee problems.[4] The inherited colonial structure left behind by the British did not bring about lasting peace, as there were tensions among in regions of the country. By the mid-1960s, Nigeria had witnessed numerous violent communal conflicts.[5] The first of these conflicts was seen in Western Nigeria when Obafemi Awolowo and Ladoke Akintola parted ways. The conflict led to the declaration of a state of emergency to forestall the series of conflicts in the western region.[6] The next crises took place in Kaduna after the assassination of Ahmadu Bello in a bloody coup led by Kaduna Nzeogwu in January 1966. The events that followed this led to the civil war of 1967-1970, essentially between the Ibos and the

2 John Campbell, *Nigeria: Dancing on the Brink* (Rowman & Littlefield Publishers 2013) 10–11.

3 Emmanuel Ike Udogu, *Nigeria in the Twenty-First Century: Strategies for Political Stability and Peaceful Coexistence* (Africa World Press 2005) 208.

4 Robert Sydney Smith, *Warfare & Diplomacy in Pre-Colonial West Africa* (Univ of Wisconsin Press 1989) 28.

5 Theresa U Akpoghome, 'Internally Displaced Persons in Nigeria and the Kampala Convention' (2015) 18 Recht in Afrika 58, 61.61.","plainCitation":"Theresa U Akpoghome, 'Internally Displaced Persons in Nigeria and the Kampala Convention' (2015

6 ibid.416 internally displaces persons currently. It did an overview of the Kampala Convention and other relevant laws in Nigeria. This is necessary because the article discovered that the Kampala Convention has not been domesticated in Nigeria although it has been ratified. The implication of this is that the Convention will not be applicable until it has been domesticated in line with the provisions of the Nigerian Constitution. A critical examination of the relevant agencies involved in the management of internal displacements forms part of the discussion. Their roles and challenges were highlighted by this article. It concludes by encouraging the government to domesticate the relevant laws and to adequately fund the relevant agencies. This will help in achieving durable solutions to displacements. The article suggests that the root causes of displacements in Nigeria should be tackled and that government policies that engender arbitrary displacements should be challenged and concludes by noting that curbing internal displacements should be a collective effort on the part of the government and its agencies, nongovernmental organizations, non-state actors and individuals.","container-title":"Recht in Afrika","DOI":"10.5771/2363-6270-2015-1-58","ISSN":"2363-6270","issue":"1","journalAbbreviation":"Recht in Afrika","language":"en","page":"58-77","source":"DOI.org (Crossref

rest of Nigeria.[7] The Maitasine Crises, the Boko Haram Crises, and other conflicts in the North Central region and other regions have plagued Nigeria ever since, resulting in many IDPs.

Over the years, IDPs in Nigeria have faced many challenges. These include poor housing in IDP camps, hunger, a gross violation of their rights, and many more challenges. In response, various stakeholders, governments, civil society organisations and regional bodies, have made efforts to address these challenges. Efforts have also been made to confront the structural factors that trigger forced displacement. Many of these challenges are borne out of socio-economic, political, and cultural issues, which have increased the rising discontentment and instability in the country, and IDPs are only victims of a broken society where little or no efforts are made to resolve the country's problems. These issues are what this article discusses. The article is primarily focused on discussing the challenges of IDPs and the solutions to challenges. It also concludes that more needs to be done to ease the plight of IDPs in Nigeria.

Definition and Conceptual Clarification of Internally Displaced Persons

Any attempt to define the term 'internally displaced persons' (IDPs) brings up some complex, interrelated issues. One of the difficulties encountered in establishing a more systematic approach to the plight of internally displaced people is the debatable nature of the concept itself.[8] If there is to be a special legal regime for IDP's, then its beneficiaries would have to be clearly defined and identified.[9] Any definition would need to avoid the twin pitfalls of being overly all-encompassing or constricted. The former case tends

7 ibid.416 internally displaces persons currently. It did an overview of the Kampala Convention and other relevant laws in Nigeria. This is necessary because the article discovered that the Kampala Convention has not been domesticated in Nigeria although it has been ratified. The implication of this is that the Convention will not be applicable until it has been domesticated in line with the provisions of the Nigerian Constitution. A critical examination of the relevant agencies involved in the management of internal displacements forms part of the discussion. Their roles and challenges were highlighted by this article. It concludes by encouraging the government to domesticate the relevant laws and to adequately fund the relevant agencies. This will help in achieving durable solutions to displacements. The article suggests that the root causes of displacements in Nigeria should be tackled and that government policies that engender arbitrary displacements should be challenged and concludes by noting that curbing internal displacements should be a collective effort on the part of the government and its agencies, nongovernmental organizations, non-state actors and individuals.","container-title":"Recht in Afrika","DOI":"10.5771/2363-6270-2015-1-58","ISSN":"2363-6270","issue":"1","journalAbbreviation":"Recht in Afrika","language":"en","page":"58-77","source":"DOI.org (Crossref

8 Marguerite Contat Hickel, 'Protection of Internally Displaced Persons Affected by Armed Conflict: Concept and Challenges', *RICR/1RRC* (2001) p 699.

9 ibid

to employ the concept concerning all those people who have moved within their own country for reasons that are not entirely voluntary.[10] This includes, for example, changes of residence induced by environmental and industrial disasters, as well as the forcible relocation and population distribution programme which governments often employ to counter security threats and to implement large-scale development projects.[11] In this case, practically anyone would qualify as an IDP. Thus the definition of internal displacement generally excludes from its scope those situations in which people are obliged to move as a result of environmental disasters, development projects, and infrastructural schemes.[12] For although such people often suffer from material and psychological hardship, they may also continue to benefit from the protection of the state, and may even receive some form of compensation from it.[13] Better still, the term should be limited to people who have left their usual place of residence in the context of involuntary movements, and in circumstances similar to that of refugees.[14] However, care must be taken to ensure that any definition adopted is not extremely constricted so as not to leave too many people outside the protection net. In that case, the very purpose of having a separate legal regime would be lost. A special legal regime would also need to address the question as to when an individual ceases to be a displaced person.[15] At present, there is no internationally agreed definition of who is an internally displaced person. Achieving one is essential both for the development of accurate statistics and information and for comprehensive and coherent action.[16]

The U.N.'s working definition of IDPs is phrased thus:

> … persons who have been forced to flee their homes suddenly or

10 ibid

11 Abdulrahman Adamuɑ and Zuwaira Haruna Rasheed, 'Effects of Insecurity on the Internally Displaced Persons (IDPs) in Northern Nigeria: Prognosis and Diagnosis' (2016) 16 Global Journal of Human-Social Science: F Political Science 7, p 3.

12 Samson Adesola Adesote and Akin Ola Peters, 'A Historical Analysis of Violence and Internal Population Diplacement in Nigeria's Fourth Republic, 1999-2011' (2015) 2 International Journal of Peace and Conflict Studies, p 5.

13 Eni Alobo and Synda Obaji, 'Internal Displacement in Nigeria and the Case for Human Rights Protection of Displaced Persons' (2016) 51 Journal of Law, Policy and Globalization 26.Policy and Globalization 26.","plainCitation":"Eni Alobo and Synda Obaji, 'Internal Displacement in Nigeria and the Case for Human Rights Protection of Displaced Persons' (2016

14 Promod Nair, 'Towards A Regime For The Protection Of Internally Displaced Persons' (2001) 10 ISIL Year Book of International Humanitarian and Refugee Law 4–10.

15 Hickel, op cit 701.

16 Eneanya Nduka Augustine, *Handbook of Research on Environmental Policies for Emergency Management and Public Safety* (IGI Global 2018) 107.

> unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or human-made disasters, and who are within the territory of their own country.[17]

The quantitative and time qualifiers in this definition make it unduly narrow. Restricting internally displaced persons to those forced to leave 'suddenly or unexpectedly in large numbers would exclude serious cases of internal displacements such as in Colombia, where the displaced often flee in small numbers, making them less conspicuous; or in Iraq, where the government organised the uprooting of Kurds for years in the late 1970s, 1980s and early 1990s.[18] In Nigeria, there is evidence to show that IDPs massively move to places considered safe and not necessary in droves.[19] The term 'forced to flee' is also narrow. Their governments have forcibly moved countless numbers in Burma, Iraq, and Ethiopia on political and ethnic grounds: they did not flee,[20] nor did Bosnian Muslims forcibly expelled from their homes in Banja Luka and other areas of Bosnia on ethnic and religious grounds. Such persons should explicitly be included as internally displaced.[21]

United Nation Guiding Principles affords a working definition which has tried to cure this deficiency. It defines them as:

> People or groups of people who have been forced or obliged to flee their homes or place of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters and who have not crossed internationally recognised state borders.[22]

Considering the above observations, the internally displaced can be seen as persons or groups of persons who have been forced to flee, or leave, their homes or places of habitual residence as a result of armed conflict, internal strife and systematic violations of human rights, as well as natural or man-made disasters involving one or more

17 ibid

18 Hickel, op cit 706–707.

19 Nduka, loc cit.

20 Roberta Cohen and Francis M Deng, Masses in Flight: The Global Crisis of Internal Displacement (Brookings Institution Press 2012) p 17."plainCitation":"Roberta Cohen and Francis M Deng, Masses in Flight: The Global Crisis of Internal Displacement (Brookings Institution Press 2012

21 ibid

22 UN Secretary General, 'Analytical Report of the Secretary-General on Internally Displaced Persons' (1992) E/CN.4/1992/1 11 United Nations <http://digitallibrary.un.org/record/137260> accessed 9 May 2020.

of these elements, and who have not crossed an internationally recognised State border.[23] What should make internally displaced persons of concern should be the coercion that compels their movement, their subjection to human rights abuse as a result of this evacuation, and the lack of protection available to them?[24]

As to when an internally displaced person ceases to be displaced also needs clarification. Conventional wisdom would have it that the voluntary return of the displaced to their homes or their reintegration elsewhere marks the end of internal displacement.[25] But if protection is mainly lacking in these areas and other people occupy their land and homes, can internal displacement be said to be over? In Nigeria, for instance, groups of internally displaced persons voluntarily transported back to their home areas found that they could not remain there because all infrastructure had been destroyed, and they had no means of sustaining themselves[26]. The mere act of return, therefore, did not end their internal displacement. Determining when an internal displacement is ended should go beyond merely registering whether return or relocation has taken place. It should include whether the returns or relocations are reasonably viable and whether basic security and survival are assured. Internally displaced people in Nigeria have been exposed to more direct physical threats. In some cases, camps and settlements for displaced persons have been the target of attacks by the insurgents.[27]

Unlike refugees, who have fled across a border and are therefore no longer under the protection of their country of origin, IDPs are still citizens of their country. Their government is legally responsible for their protection and welfare. IDPs do not always end up in camps – the majority are taken in by host families, some find temporary shelter on the move, and others may settle in urban areas.[28] IDPs often move several times during their displacement.[29] These varied and dynamic patterns admittedly create challenges for tracking IDPs, and as a result, figures are based on estimates. The

23 UNHCR, 'IDP Definition' (UNHCR Emergency Handbook, 2020) <https://emergency.unhcr.org/entry/44826/idp-definition> accessed 9 May 2020.

24 UNHCR, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers* (Brookings Institution Press/ University of Bern 2008) 1–10.

25 Brookings Institution, *When Displacement Ends: A Framework for Durable Solutions* (Brookings Institution Press/ University of Bern 2007) 9–11 <https://www.brookings.edu/wp-content/uploads/2016/07/2007_durablesolutions_full.pdf> accessed 9 May 2020.

26 ibid

27 Management Association Resources Information, *Emergency and Disaster Management: Concepts, Methodologies, Tools, and Applications: Concepts, Methodologies, Tools, and Applications* (IGI Global 2018) p 1336.

28 UNONCHA,'What Is Internal Displacement?'(*UNONCHA*, 2019) <https://www.unocha.org/sites/dms/Documents/OOM_InternalDisplacement_English.pdf> accessed 9 May 2020.

29 ibid.

Geneva-based Internal Displacement Monitoring Centre estimates that in 2008 there were at least 2,583,000 IDPs in Nigeria due to conflict.[30] Many more millions were displaced as a result of natural disasters, including in the context of climate change, or large-scale development projects such as dams.[31] What is known is that the number of IDPs around the world is rising, and having fled their home without time to pack food, belongings, or identity papers, and in circumstances of severe trauma and violence, displaced people can be particularly vulnerable and in need of humanitarian assistance and protection.[32]

The Challenges of Internally Displaced Persons in Nigeria

Internationally, IDPs are classified as special kinds of persons in conflict situations. The challenges of internally displaced persons in Nigeria are many.[33] The lack of solutions to these challenges have, over time, adversely affected Nigerians and national development. Not all the challenges shall be mentioned and discussed, but there shall be a focus on significant challenges. The following are some of the challenges faced by IDPs in Nigeria.

Accommodation/ Housing

The accommodation of IDPs has been a serious challenge. The most common types of accommodation or housing used by IDPs in Nigeria are schools and government buildings.[34] Others include tents and bunkhouses. Shelters for IDPs in Nigeria are insufficient, and most times, are not durable and prone to bad weather, as many have been damaged or destroyed.[35] A report shows that many IDPs live in churches, mosques, town halls, abandoned and uncompleted buildings and where available, other forms of makeshift camps which are grossly inadequate and unsuitable for accommodating the surge in displaced populations.[36] These shelters are not as a result

30 IDMC, 'Global Internal Displacement Database' (*Internal Displacement Monitoring Center (IDMC)*, 2020) <https://www.internal-displacement.org/database/displacement-data> accessed 9 May 2020.

31 ibid.

32 'What Is Internal Displacement?' loc cit.

33 Grace W Akuto, 'Challenges of Internally Displaced Persons (IDPs) in Nigeria: Implications for Counselling and the Role of Key Stakeholders' (2017) 5 International Journal of Innovative Psychology and Social Development 23.

34 ibid 24.

35 International Organization for Migration, 'Nigeria: IOM Builds Quarantine Shelters in IDP Camps as Conflict-Affected Borno State Records First COVID-19 Cases' (*ReliefWeb*, 24 April 2020) <https://reliefweb.int/report/nigeria/nigeria-iom-builds-quarantine-shelters-idp-camps-conflict-affected-borno-state> accessed 19 May 2020.

36 Humanitarian Needs Organisation, 'Nigeria 2015 Humanitarian Needs Review' (ReliefWeb, 2015) <https://reliefweb.int/sites/reliefweb.int/files/resources/HNO%20Nigeria%20-%20Final%20version%20

of government effort but as a result of the individual's effort to survive.[37] The shelters are often overcrowded and unsuitable in terms of water and sanitation facilities, cooking, and privacy, especially for women. There is often no proper waste management and electricity. This explains the regularity of hygiene based epidemics in camps.[38]

Insecurity

The prevalence of insecurity in the country's internally displaced people has become very problematic. Women and girls are being raped daily as a result of insecurity in the camps. Youths indulge in drug abuse, smoking, and other criminal activities.[39] Besides, women and children remain the most vulnerable to sexual and gender-based violence.[40] There have also been reported instances of rape, sexual harassment, forced marriage, infant marriage, sexual diseases, and uncontrolled birth occasioning high infant and maternal mortality in makeshift IDP camps in Nigeria.[41] The needs of children are not prioritised in armed conflict situations, and this is the case in Nigeria. Children are being exposed to an enhanced risk of abuse, forceful conscription by insurgents as child soldiers, suicide bombers, sex slaves, and abrupt discontinuation of their education.[42] Their lives change in a different direction of malnutrition, inadequate amenities needed for their survival.[43] According to NEMA, there are over 750 unaccompanied and separate children.[44] Most of the school-age children in states like Adamawa, Borno, and Yobe have many out of school children as a result of insecurity.[45] The destruction of schools and indiscriminate killing of students and teachers by Boko Haram insurgents has left many schools deserted and deprived children of their right to education. Most of the displaced persons are camped in schools, thereby interrupting learning and other school activities.[46] The education of displaced victims is virtually non-existent in some

15March%202015.pdf> accessed 19 May 2020.

37 ibid.

38 ibid.

39 Eneanya Nduka Augustine, *Handbook of Research on Environmental Policies for Emergency Management and Public Safety* (IGI Global 2018) 116.

40 ibid.

41 ibid

42 Graça Machel, *The Impact of War on Children: A Review of Progress Since the 1996 United Nations Report on the Impact of Armed Conflict on Children* (C Hurst & Co Publishers 2001) 1–10.

43 ibid.

44 Eneanya Nduka Augustine, *Handbook of Research on Environmental Policies for Emergency Management and Public Safety* (IGI Global 2018) 109.

45 Human Rights Watch, '"They Set the Classrooms on Fire": Attacks on Education in Northeast Nigeria' (*Human Rights Watch*, 11 April 2016) <https://www.hrw.org/report/2016/04/11/they-set-classrooms-fire/attacks-education-northeast-nigeria> accessed 19 May 2020.

46 ibid.

camps.

Poor Health Care

As an essential element of national security, public health not only functions to provide adequate and timely medical care but also track monitor and control disease outbreaks,[47] especially in IDP camps. The Nigerian health care system is broken and needs to be fixed, especially in regards to the health of IDPs. Access to health care in Nigeria, generally the North East, in particular, is severely constrained for both the IDPs and host communities as a result of the destruction of health care facilities and health care workers.[48] The outbreak of disease daily increases among IDPs in camps. There is also the case of a lack of access to vaccinations, an increase of cholera cases among IDPs is seriously on the rise. More ailments are undiagnosed as there are no health checks carried out in these camps.[49]

Food Distribution, Hunger, Starvation, and Acute Malnutrition

Poor distribution is another challenge in IDP camps. Some IDPs have access to food distribution every day while others receive irregular food distribution. On the other hand, some IDPs never receive food distribution. Malnutrition in the conflict areas continues to rise as there is limited access to food in this situation.[50]This is mainly because no actual statistics of IDPs exist in Nigeria, as not all displaced persons are accounted for.[51] For those persons who have the resources, at the occurrence of violence, although they become displaced by the attaining circumstance, however, they migrate to other places where there are peace and stability with their available resources. Other IDPs flee to the homes of their extended families or friends in other parts of the country.[52]

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47 Menizibeya Osain Welcome, 'The Nigerian Health Care System: Need for Integrating Adequate Medical Intelligence and Surveillance Systems' (2011) 3 Journal of Pharmacy & Bioallied Sciences 470."plainCitation":"Menizibeya Osain Welcome, 'The Nigerian Health Care System: Need for Integrating Adequate Medical Intelligence and Surveillance Systems' (2011

48 Oluwakemi C Amodu, Magdalena S Richter and Bukola O Salami, 'A Scoping Review of the Health of Conflict-Induced Internally Displaced Women in Africa' (2020) 17 International Journal of Environmental Research and Public Health.

49 SD Taylor-Robinson and O Oleribe, 'Famine and Disease in Nigerian Refugee Camps for Internally Displaced Peoples: A Sad Reflection of Our Times' (2016) 109 QJM: An International Journal of Medicine 831.

50 WHO, 'Global Hunger Continues to Rise' (*World Health Organisation*, 11 September 2018) <https://www.who.int/news-room/detail/11-09-2018-global-hunger-continues-to-rise---new-un-report-says> accessed 21 May 2020.

51 Nduka, *Handbook of Research on Environmental Policies for Emergency Management and Public Safety* (n 15) 110.

52 Van Peter W Arsdale, *Forced to Flee: Human Rights and Human Wrongs in Refugee Homelands* (Lexington Books 2006) 100.' Forced to Flee uniquely looks at the 'pre-flight' environment and the

All these factors make it nearly impossible to obtain an accurate number of displaced persons in Nigeria. IDPs also suffer from hunger, starvation, and malnutrition. Over the years, many IDPs have received solidarity from well-meaning Nigerians, international government, and agencies. Donations in terms of food, water, and other relief materials have been made to this effect. The World Food Programme reports that many children suffer from severe acute malnutrition, and also many children are at risk of dying if not reached with treatment.[53] It was also discovered that money and food and other relief materials donated to take care of displaced persons were being diverted.[54] Cases of malnutrition and deaths continue to rise. Thus, the lack of adequate nutrition affects one's health and causes diseases, especially among more vulnerable children.

Psychological Trauma and Bitterness

Internally displaced persons (IDPs) are among the most vulnerable people in the world today. As a result of conflict-induced forced displacement, they are prone to psychological, emotional, and mental health and issues.[55] There is the prevalence of psychological trauma among IDPs and also socio-demographic factors associated with post-traumatic stress disorder (PTSD) among IDPs.[56] Most IDPs in Nigeria are

factors contributing to human rights violations therein. It is due to these abuses that many people flee their homelands. Author Peter W. Van Arsdale presents first-hand fieldwork conducted over a 30-year span in six refugee homelands ranging from Sudan to Bosnia. This expert research bridges the emergent refugee and human rights regimes, while addressing theories of obligation, justice, and structural inequality. Van Arsdale also deftly tackles the difficult ideas of compassion, suffering, and evil, and introduces the concept of 'pragmatic humanitarianism.' Forced to Flee is a comprehensive study that should be of great interest to scholars and practitioners of anthropology, sociology, social work, political science, and environmental studies.","ISBN":"978-0-7391-5506-6","language":"en","note":"Google-Books-ID: tfdsAAAAQBAJ","number-of-pages":"239","publisher":"Lexington Books","source":"Google Books","title":"Forced to Flee: Human Rights and Human Wrongs in Refugee Homelands","title-short":"Forced to Flee","author":[{"family":"Arsdale","given":"Van Peter W."}],"issued":{"date-parts":[["2006",8,4]]}},"locator":"100","label":"page"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

53 Chinyere Theresa Nwaoga, Anuli B. Okoli and Favour C. Uroko, 'Self-Acclaimed Religious Terrorism, Refugee Crisis, and the Plight of Internally Displaced Persons in Nigeria' (2017) 8 Mediterranean Journal of Social Sciences 191.

54 ibid.

55 Elijah Mironga Getanda, Chris Papadopoulos and Hala Evans, 'The Mental Health, Quality of Life and Life Satisfaction of Internally Displaced Persons Living in Nakuru County, Kenya' (2015) 15 BMC Public Health <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4527222/> accessed 21 May 2020.

56 Taiwo Lateef Sheikh and others, 'Psycho-Trauma, Psychosocial Adjustment, and Symptomatic Post-Traumatic Stress Disorder among Internally Displaced Persons in Kaduna, Northwestern Nigeria' (2014) 5 Frontiers in Psychiatry <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4162378/> accessed 21 May 2020.Northwestern Nigeria\\uc0\\u8217{} (2014

traumatised and frustrated because of the situation they find themselves. The most frequent psycho-traumas are the destruction of personal property, forceful evacuation from homes, and witnessing of violence against others.[57] Consequently, many of the IDPs live in bitterness due to painful separation from their spouses, families, and loved ones.

Lack of Education

Education is described as the aggregate of all processes through which a child develops abilities, attitudes, and other forms of behaviour which are of a positive value to society.[58] Education enables individuals to acquire appropriate knowledge, values, and skills for personal development and also contributes meaningfully to the development of society.[59] Education was also declared a basic human right for every individual in the Universal Declaration of Human Rights of 1948 and has been reaffirmed in the International Covenant on Economic, Social and Cultural Rights of 1966.[60] The African Charter on the Rights and Welfare of the Child of 1990 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003, among other international and regional human rights instruments, also confers the right to education.[61] 1DPs in Nigeria face the challenge of educating their children or family members because they are always in transit or forced to flee their homes. School attendance is usually dependent on many reasons but, very importantly, the security of the child. The present state of insecurity in Nigeria has been traumatic for children as they are forced to flee from their homes in fear, to witness killings, or to live as displaced persons or refugees. As a result of the incessant attacks on schools, school children, and teachers, over one million children have been forced out of school, while their teachers have also been forced to stay away from school.[62] Some schools have been forced to shut down, and the deserted school buildings have been converted into shelters for internally displaced persons.

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57 ibid.a post election violent conflict in Northern Nigeria led to resettlement of internally displaced persons (IDPs

58 Fafunwa A. B, *History of Education in Nigeria* (Allen and Unwin London 1974).

59 ibid.

60 Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Convenant on Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers 2006) 86.

61 ibid.

62 Aisosa Jennifer Isokpan and Ebenezer Durojaye, 'Impact of the Boko Haram Insurgency on the Child's Right to Education in Nigeria' (2016) 19 Potchefstroomse Elektroniese Regsblad 1.

Lack of Knowledge of Rights and Human Rights Abuses

There is a lack of understanding of the rights of IDPs as set out in the U.N. guiding principles on Internal Displacement and the Kampala Convention.[63] These rights include the right to life, freedom of movement, association, the dignity of the human person, personal liberty, right to private and family life, snd other vital rights. This challenge is owing to widespread illiteracy among IDPs and even, surprisingly, some government officials. There are also cases of human rights abuses in IDP camps, usually by government officials, soldiers, and even humanitarian workers.[64] Incidents of human rights abuses include torture, rape, cruel and inhuman treatment in IDP camps. [65] There are reported cases of people arriving in the recaptured towns in Northeastern Nigeria to seek safety had often been treated with suspicion by the Nigerian military.[66] In some cases, female IDPs alleged that they saw their family members being blindfolded and taken away by the army, and they were not seen again for a long time.[67]

Lack of Good Water, Poor Waste Management, and Lack of Electricity

Shelters for IDPs are in Nigeria are usually poorly constructed owing to underfunding and lack of available funds. Many IDP settlements in Nigeria are more or less a cluster of temporary shacks and makeshifts without the necessary utilities for normal daily livelihood.[68] There is a lack of clean water, poor waste management, and lack of electricity in IDP shelters, thereby making their lives very difficult. These situations explain the regularity of hygiene-related epidemics in camps and total darkness in camps.[69] Thus, because of the overcrowded nature of IDP camps, it becomes difficult for the IDPs to access good water for cooking and sanitation facilities.

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63 African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention"), 23 October 2009, Art. 3-11.See also the Guiding Principles on Internal Displacement, 22 July 1998, ADM 1.1,PRL 12.1, PR00/98/109.

64 Ibrahim Seaga Shaw and Senthan Selvarajah, *Reporting Human Rights, Conflicts, and Peacebuilding: Critical and Global Perspectives* (Springer 2019) 142.

65 ibid.

66 Amnesty International, '"They Betrayed Us": Women Who Survived Boko Haram Raped, Starved and Detained in Nigeria' (Amnesty International 2018) AFR 44/8415/2018 9.

67 ibid 9–10.

68 Osagioduwa Eweka and Toluwanimi Oluwakorede Olusegun, 'Management of Internally Displaced Persons in Africa: Comparing Nigeria and Cameroon' (2016) 10 African Research Review 193."plainCitation":"Osagioduwa Eweka and Toluwanimi Oluwakorede Olusegun, 'Management of Internally Displaced Persons in Africa: Comparing Nigeria and Cameroon' (2016

69 Umar S.S, Suleiman M.S and Magaji R.A, 'Assessment of Health Risks amongst Vulnerable Groups of Internally Displaced Persons in Pompomari Camp, Damaturu, Yobe State, Nigeria' (2018) 4 African Journal of Arts and Humanities 92–95.

The Way Forward

The article has so far highlighted the challenges of IDPs. These challenges are not exhaustive as there are more challenges than the ones mentioned above that confront IDPs.The question remains as to what the solutions to these challenges are. Some solutions are discussed below.

The rights of IDPs cannot be compromised or breached in any form. There is, therefore, the need to respect and protect the human rights of IDPs. National security cannot supersede human rights.[70] Therefore, there also is a need to conduct counter-insurgency operations in a manner that upholds the rule of law and abide by international human rights standards. There should be professionalism on the part of the military to minimise collateral casualties and damage to livelihoods. There is a need for legislation on IDPs as the absence of a law and policy framework that clearly defines the roles and responsibilities hampers the coordination of humanitarian and development efforts to mitigate the effects of displacement on children. Local legislation on IDPs should also be complemented with other reforms like proper implantation, good governance, social justice and other factors.

The right to have quality education is a basic right, and proving education in emergencies does provide life-saving information, protect children from trafficking, recruitment by armed groups, and psychosocial trauma.[71] In the long term, education can promote peace and post-conflict reconstruction and help young people develop the skills and qualifications that will equip them to live meaningful lives after the conflict ends. There is, therefore, the need for the government to provide more education for IDPs, most especially children. Basic amenities should also be supplied in IDP camps.

The emotional, social, and physical development of IDPs is significant. Most especially, children in IDP camps need to be in satisfactory psychological and mental conditions, which directly affects their general development. It also determines, to a large extent, the type of adults they will become. There is, therefore, the need to provide enough medical

70 Michaelene Cox, *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Routledge 2016) 229–230.this volume discusses some of the most important current and emerging human rights issues. It takes stock of the initiatives, policy responses and innovations of past years to identify some of the challenges that will likely require bold and innovative solutions. The contributors focus on actors and/or issues that are outside the mainstream of international human rights politics; the chapters address issues that have only emerged as an important part of the international human rights agenda and generated much advocacy, diplomacy and negotiations since the end of the Cold War. These issues include: the International Criminal Court, the norm of Responsibility to Protect (R2P

71 Unesco, *Guidebook for Planning Education in Emergencies and Reconstruction* (UNESCO 2010).

personnel, psychologist, psychiatries in IDP camps to cater to the health needs of IDPs. Also, efforts should be made by the government to invest in all children to provide their future wellbeing. The absence of comfortable shelters, good food, electricity, and clean water are also prevalent in IDP camps. There is, therefore, the need to vote for more funds for the comfort and wellbeing of IDPs in their camps.Funds can be got from national budgetary allocations and donations from well-meaning individuals and international bodies.

There is a need for urgent and well-coordinated intervention by the government in the insecurity situation in the country. This can be effectively achieved by community participation through community policing, government-sponsored dialogue with community members and active coordination of intelligence by government agencies. The present situation in northeastern Nigeria, the northcentral, and other parts of Nigeria are unacceptable. There are certain causes of such problems. It has been alleged that one cause is a covert protraction of the situation by government and other interests for religious, political and socio-economic reasons; hence being complicit in the ongoing issues.[72]Thus, the Nigerian government needs to take proactive steps to end the ongoing insurgency in the northeastern part of the country and continuous conflicts in other regions like the northcentral part of the country so that there can be peace in the country. The use of the military in fighting the insurgency is commendable. Still, there is a need to pursue a broader strategy that addresses the economic and social origins of the crisis. Also, the prevalence of poverty and unemployment and low level of education among Nigerian youths, especially in the north, is a potential for insecurity, as the youth population is a potential weapon in the hands of the insurgents.

There is a need for the country to conduct a complete and transparent overhaul of all public service institutions.[73]There is so much, especially as regards the state of IDPs. Therefore, it is recommended that available state agencies and commissions of inquiry like Economic and Financial Crime Commission (EFCC), Independent Corrupt Practices Commission (ICPC), the Code of Conduct Bureau(CCB), and others should be further funded by government and more focused on investigating, trying, and punishing corrupt officials who engage in corrupt practices. However, in the discharge of their duties, they should be made transparent, upholders of human rights and apolitical, and not agencies

72 See Grace O Okoye, *Proclivity to Genocide: Northern Nigeria Ethno-Religious Conflict, 1966 to Present* (Lexington Books 2014) 215.See also Africaideas, 'Government of Nigeria Is Complicit on Christian Killings' (*Africa Forum - Africa Research - News View weekly*, 12 July 2019) <https://www.africaresearch.org/government-of-nigeria-is-complicit-on-christian-killings/> accessed 23 October 2020.

73 The Transparency International 2019 Corruption Index rates Nigeria 146 out of 180 countries. This is a very poor score on the index. See Transparency International, 'Nigeria' (*Transparency.org*) <https://www.transparency.org/en/countries/nigeria> accessed 23 October 2020.

used by political actors for witchhunts. While this is a noble endeavour, the process would be costly and challenging; it would go a long way to creating trust and credibility in the Nigerian government, and society at large.

Conclusion

The article has so far discussed some challenges of IDPs in Nigeria. The insecurity situation and other related disasters in contemporary Nigeria have forced a large number of Nigerians to be vulnerable and susceptible to all forms of exploitation, abuse, neglect, and many rendered homeless in the northeastern and other parts of the country.[74] As has been mentioned in this article, there are so many challenges confronting IDP camps that need urgent solutions to ease the sufferings of IDPs. The current figure or number of IDPs camps across the country shows that the federal, states, local governments, and the host communities are all suffering from the effect of insecurity in the country, particularly in the north-east.[75] Insecurity in any enviro constitutes a threat to lives and properties, hinders economic activities, and discourages local and foreign investors, and in turn, retards human and economic development of that nation. Moreso, more attention should be focused on the situation of IDPs as depriving them of basic rights to housing, food, medicine, and other necess would be fair to people who find themselves in situations they never envisaged or are responsible for.

Despite the efforts of the Nigerian government, faith-based organisations and other NGOs to address some of the basic needs of these IDPs, their rights and opportunities to accessing healthcare services, education, employment, economic activities, and information for participation in the decision making affecting their lives is still limited. Hence, there is, besides other solutions, the need to have a legal framework that will ensure easy access and opportunities for the IDPs. The National Policy on IDPs is a welcome development, but its lack of legal effect makes it less desirable.

74 Mellissa Simbisai Mlambo, 'Boko Haram and Nigerian Insecurity: Religion and the Failure of Governance as Causal Factors' (MA in Security Studies, University of Pretoria 2017) 44–54.
75 ibid

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UNCHARTED WATERS: AN EXEGETICAL EXPLORATION OF GHANA'S REGULATORY FRAMEWORK IN RELATION TO CRYPTOCURRENCY

Gideon T Gabor[1]

ABSTRACT

The historical evolution of money has taken many forms such as precious metals, cowries, banknotes and coins, with the latest stage of this evolving continuum being digital currency. This evolution has been characterised by the gradual movement to a more cashlite aware society. The transition is being facilitated by constant improvement in financial technologies and services. Ghana is no exception to this development. The emergence of credit and debit cards as well as mobile banking is digitising Ghana's currency whilst extending financial services across the country. Mobile money payment facilitated by the telecommunication companies in partnership with the traditional banks is also fast-tracking Ghana's progress towards a cashlite economy. In 2009, a new cash-like electronic instrument known as Bitcoin emerged. Bitcoin is touted as offering anonymous, fast and irreversible peer to peer transactions, across borders with little or no transactional cost. The introduction of Bitcoin has birthed the cryptocurrency era. The anonymous nature of cryptocurrency transactions is an attraction to criminals and terrorist organisations who use cryptocurrency to facilitate unlawful activities. Despite the enormous financial, social and economic, and even political risk in cryptocurrency use, this financial instrument is largely unregulated in most countries. The potential use of cryptocurrency for purposes outside the law justifies the need for regulation to make cryptocurrency use less attractive for unlawful activities. This article draws on the legal approaches to regulating cryptocurrency by adopting a desk research to theoretically examine and interpret primary and secondary sources of data in order to determine the possible existence of an existing Ghanaian legal framework regulating cryptocurrency in Ghana.

Keywords: Ghana; Regulations; Digital Currencies; Cryptocurrency.

1 Q.C.L. candidate (Ghana School of Law); LL. B (Ghana Institute of Management and Public Administration). I am grateful to Godwin Dzah of the Faculty of Law, GIMPA for his mentorship and guidance. A modified version of this article was previously submitted and has been published in the 2020 Ghana School of Law Student Journal. All errors remain mine.

Introduction

Cryptocurrency is a global phenomenon, demonstrated to offer real and potential benefits such as providing financial services to the unbanked and underbanked, through fast and cheap cross border transactions.[2] Notwithstanding, cryptocurrency is also uniquely suited to facilitate unlawful activities.[3] The illicit use of cryptocurrency has been identified as negligible when juxtaposed with the illicit use of well-established payment methods such as paper money.[4] However cryptocurrency's potential of 'disruptively innovating'[5] the existing financial industry presents the need for regulation to limit the attractiveness of cryptocurrency for illicit use.

In Ghana, public interest in relation to cryptocurrency has been on the rise.[6] This interest was further evidenced when some Ghanaian business leaders urged upon the Bank of Ghana (BoG) to diversify its investments by investing in the cryptocurrency, Bitcoin.[7] However, some banks in Ghana have expressed strong resistance to the adoption of cryptocurrency in Ghana.[8] The banks cited the narrative of an absent regulatory framework, regulating cryptocurrency in Ghana as the basis for their scepticism.[9]

It is inevitable that disputes with all the concomitant legal suits may soon arise in relation

2 Flamur Bunjaku and others, 'Cryptocurrencies–Advantages and Disadvantages' (2017) 2(1) Journal of Economics 31, 37-38.

3 Marian demonstrates how the combination of anonymity, and the decentralisation of financial dealings make cryptocurrency uniquely suited for criminal activity: Omri Marian, 'A Conceptual Framework for the Regulation of Cryptocurrency' (2017) 82(53) The University of Chicago Law Review 53, 56-57.

4 David Carlisle, 'Virtual Currencies and Financial Crime Challenges and Opportunities' (2017) Royal United Services Institute for Defence and Security Studies, 5.

5 Christensen attributed with the coining of this term, describes the term as a process by which an innovation transforms an existing market or sector, initially taking root in simple applications at the bottom of a market, and then relentlessly moves upward and completely redefining the industry as it creates entirely new markets with different value networks: Clayton Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Cambridge 1997); Jonathan Lim, 'A Facilitative Model for Crypto-Currency Regulation in Singapore' (2014) Centre for Banking and Finance Law, 1.

6 Google search interest on cryptocurrency such as Bitcoin has heightened in the past 12 months in Ghana with Ghana placing second in Africa after South Africa.; Google Trends <https://trends.google.com/trends/explore?q=bitcoin> accessed 2 January, 2019.

7 Joseph Appiah-Dolphyne, 'Invest 1% of Ghana's reserves in Bitcoin Ndoum to BOG' (Joyonline, 2 January 2018) <https://www.myjoyonline.com/business/2018/January-2nd/invest-1-of-ghanas-reserves-in-bitcoin-ndoum-to-bog.php> accessed 15 January, 2019.

8 Pius Eduku, 'Banks resist crypto currency use in Ghana' (Citifmonline, 16 March 2018) <http://citifmonline.com/2018/03/16/banks-resist-crypto-currency-use-ghana/> accessed 24 January 2019.

9 ibid.

to cryptocurrency in Ghana.[10] This article, drawing on the narrative of an absent regulatory framework regulating cryptocurrency in Ghana, engages with the literature – primary and secondary – on cryptocurrency to analyses cryptocurrency under a Ghanaian legal scope.

Aside this first section which is the introduction, this article further proceeds in four sections. The second section examines digital currencies, specifically cryptocurrency and its unique advantage in aiding illicit activities. The third section considers the cryptocurrency regulatory discourse, analysing in detail, the literature in relation to the regulation of cryptocurrency. Section four builds on the analysis in section three to further explore the existence of cryptocurrency regulation in Ghana. The fifth and final section concludes the article.

Digital Currencies

The advent of the internet has spawned new financial technologies and services that are transforming the global financial sector.[11] This is heralding an era of cashlite aware societies characterised by the increase in use of e-money.[12] E-money, as used in this context, is a digital representation of fiat currency used to electronically transfer value denominated in fiat currency.[13] The electronic nature of e-money transfers means, money can be transferred effortlessly across borders. The increase in use of e-money is rapidly transforming the transfer of money, from the physical exchange of banknotes and coins to the debit and credit of accounts of transacting parties. At the core, the transfer of e-money is simply a transfer of a digital asset[14] similar to the transfer of a text

10 An alleged cryptocurrency Ponzi scheme alleged to be accepting deposits and engaging in investment schemes are being investigated by the EOCO. The legal status of cryptocurrency made be considered if criminal procedures are initiated: Suleiman Mustapha, 'EOCO grills crypto-currency directors over GH¢ 135m customers' cash' (Graphic Online, 29 November 2018) <https://www.graphic.com.gh/news/general-news/ghana-news-eoco-grills-crypto-currency-directors-over-gh-135m-customers-cash.html> accessed 13 March 2019.

11 Asli Demirgüç-Kunt and others, *The Global Findex Database Measuring Financial Inclusion and the Fintech Revolution* (World Bank Publications 2017).

12 Capgemini and BNP Paribas, 'World Payment Report 2017' < https://www.worldpaymentsreport.com> accessed 13 March 2019.

13 Financial Action Task Force, 'Virtual Currencies: Key Definitions and Potential AML/CFT Risk (2014) Financial Action Task Force Report, 4 [hereinafter referred to as FATF Definition].

14 Sherry defines a digital asset as anything stored in a digital file: Kristina Sherry, 'What Happens to Our Facebook Accounts When We Die? Probate Versus Policy and the Fate of Social-Media Assets Postmortem' (2012) 40(1) Pepperdine Law Review 185, 194.

or music file; thus it can be duplicated and spent multiple times.[15] A trusted third party institution such as a bank or credit card entity process e-money transactions at a cost, potentially eliminating the double spending problem.[16] The trusted third party institution is usually represented by a centralised bank which controls the issuance and withdrawal of e-money; and validates and verifies e-money transactions.[17] E-money transactions are thus subjected to the rules and bureaucracies of such trusted third party institutions.[18]

Advent of Cryptocurrency

In November 2008, a seminal white paper, authored under the pen name of Satoshi Nakamoto, described a peer to peer electronic cash system known as Bitcoin.[19] In January 2009, the first Bitcoin was issued. Bitcoin's issuance and transaction is protected by cryptography[20] thus introducing the world's first cryptocurrency. The success of Bitcoin spurred the proliferation of a plethora of alternative cryptocurrency (altcoins) including Litecoin, Ethereum and Ripple, which implement similar yet modified cryptographic features of Bitcoin.[21] The current number of distinct cryptocurrency in circulation is pegged at 2 110, with a significantly combined market capitalisation of about $364 billion.[22]

Cryptocurrency, like e-money, is electronic in nature, thus connects transacting parties across borders. Cryptocurrency distinguishing features includes the nature of

15 This term is described as the double spending problem: Aleksander Berentsen and Fabian Schär, 'A Short Introduction to the World of Cryptocurrencies' (2018) 100(1) Federal Reserve Bank of St. Louis Review, 2.

16 ibid.

17 FATF Definition (n 13) 7.

18 The bureaucracies include restricting transactions during business hours, holidays; limiting transactions and issuing barriers to entry; Satoshi recognises the inherent weakness of such trusted third party institutions and posits the idea of an electronic cash system eliminating such institutions: Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (2008) <https://bitcoin.org/bitcoin.pdf> access 24 January 2019.

19 ibid.

20 Cryptography is use of mathematics to create codes and ciphers that can be used to conceal information: Secretary of the Department of Homeland Security, Risks and Threats of Cryptocurrencies (Homeland Security Studies and Analysis Institute 2014) xii [hereinafter referred to as Homeland Security]; Edward Murphy, 'Bitcoin: Questions, Answers, and Analysis of Legal Issues' (2015) Congressional Research Service, 1.

21 Primavera De Filippi, 'Bitcoin: A Regulatory Nightmare to a Libertarian Dream' (2014) 3(2) Internet Policy Review 43, 46.

22 The market capitalisation of a particular cryptocurrency is the value of the total available number units of a particular cryptocurrency in circulation; CoinMarketCap <https://coinmarketcap.com> accessed 20 October 2020.

cryptocurrency and the way it solves the double spending problem. Cryptocurrency unlike e-money is not a substitute of fiat currency but a form of currency on its own. In mimicking fiat currency units, a cryptocurrency is represented by a distinct unit of account such as BTC for Bitcoin and Ether for Ethereum. It is important to point at this early stage that a unit of cryptocurrency is intrinsically worth nothing. Cryptocurrency derive their value from the belief and confidence that they might be exchanged for goods or services; or converted to an amount of fiat currency. The belief in a subjective value has resulted in the volatility of the value of cryptocurrency.[23]

Beyond volatility, cryptocurrency as a digital asset, is potential susceptible to the double spending problem.[24] It solves the double spending problem by relying on a public ledger system and the group consensus of network participants to verify and validate transactions. This public ledger system, known as the Blockchain,[25] is a ledger recording ownership and transfers of units of cryptocurrency, with each record timestamped and referencing the earlier transaction. The Blockchain relies on cryptography to secure the ledger. This ledger system is characterised as public, as it distributes a copy of the ledger to all network participants connected to that particular Blockchain. The network participants can then track and trace every transaction on the Blockchain and ensure through group consensus that a user is not 'double spending' the same unit of cryptocurrency. A verified and validated transaction is then recorded on the Blockchain. A recorded transaction cannot be reversed. Transactions are also transparent and accessible to every person connected to the Blockchain. Attempts at altering an individual copy of the Blockchain would conflict with the copies of the Blockchain of other users, consequently ensuring the ledger is secure from hacks and unverified changes. The decentralised nature of cryptocurrency has thus eliminated the need for the centralised trusted third party institution with its fees, rules and failures.[26] Cryptocurrency is marked by peer to peer transactions and lower transaction costs, thus users are at liberty to send any units of cryptocurrency anywhere in the world irrespective of public policy and international

23 On 17th December, 2017 the value of the cryptocurrency, Bitcoin, reached an all-time high of about $19,783 for one BTC. This seems to have a ripple effect on most cryptocurrency which traded at all-time highs during that period: David Morris, 'Bitcoin Hits a New Record High, But Stops Short of $20,000' (Fortune, 17 December 2017) <http://fortune.com/2017/12/17/bitcoin-record-high-short-of-20000/> accessed 21 January 2019.

24 Andres Guadamuz and Chris Marsden, 'Blockchains and Bitcoin: Regulatory Responses to Cryptocurrencies' (2015) 20(12) First Monday, 12

25 The Blockchain has been described as 'one of the most fundamental inventions in the history of computer science and the invention at the heart of the fourth industrial revolution': Kobina Hughes, 'Blockchain, The Greater Good, and Human and Civil Rights' (2017) 48(5) Metaphilosophy, 1.

26 Lim (n 5) 5.

economic sanctions.[27] As Bill Gates stated, '[B]itcoin is exciting because it shows how cheap transfer of fund from one place to another can be'.[28]

Furthermore, the Blockchain as already stated is transparent, and at the same time, maintains a level of privacy of owners of units of cryptocurrency. This is done by representing the real identities of users with a pseudonym represented by a string of alphanumerical characters. Hence no personal identifiable information of the user is stored on the Blockchain. Cryptocurrency transactions are anonymous and users are thus cloaked in pseudonymity. It is this perceived anonymity of cryptocurrency transactions that is so often exploit by cybercriminals and terrorist organisations that use cryptocurrency as a medium of payment for illicit goods and services, to facilitate money laundering and promote terrorist activities.[29]

Illicit Use of Cryptocurrency

Europol notes that, '[F]or almost all types of organised crime, criminals are deploying and adapting to technology with ever greater skill and to ever greater effect, with organised crime moving increasingly to the dark web'.[30] Cryptocurrency anonymous, rapid, borderless, cheap and irreversible transfers have thus been beneficial to bad actors such as cybercriminals, terrorist organisations and dealers in illicit narcotics. Carlisle identifies the narrative that, cryptocurrency enables the flourishing of new types of crime such as dark web activity and increased ransomware attacks.[31]

The most well-known criminal use of cryptocurrency is as a payment method for illicit goods and services such as drugs, child pornography, counterfeited documents, as well as, weapons and ammunition offered on hidden online market sites hosted on the dark

27 Reuters, 'Venezuela cryptocurrency to draw investment from Turkey, Qatar-official' (Reuters, 16 February 2018) <https://www.reuters.com/article/us-crypto-currency-venezuela/venezuela-cryptocurrency-to-draw-investment-from-turkey-qatar-official-dUSKCN1G025S?utm_campaign=trueAnthem%3A+Trending+Content&utm_content=5a87c16104d301339b95133f&utm_medium=trueAnthem&utm_source=facebook> accessed 24 January 2019.

28 Charlotte Krol, 'Bill Gates: Bitcoin is 'exciting' because it is cheap' (Telegraph, 3 October 2014) <http://www.telegraph.co.uk/technology/11138905/Bill-Gates-Bitcoin-is-excitingbecause-it-is-cheap.html> accessed 21 February 2019.

29 Homeland Security (n 20); Angela Irwin and George Milad, 'The Use of Crypto-Currencies in Funding Violent Jihad' (2016) 19(4) Journal of Money Laundering Control 407: These articles demonstrate the use of cryptocurrency such as Bitcoin in the financing and funding of terrorist organisations and terrorist acts.

30 Europol, 'Internet Organised Crime Threat Assessment' European Cybercrime Centre, 24.

31 Carlisle (n 4) 27.

web.[32] Marian also demonstrates how cryptocurrency is a potential super tax haven for the evasion of taxes.[33] Terrorist organisations such as the Islamic State are also getting up to pace with the exploitation of cryptocurrency for terrorist activities.[34] As Lagarde further notes, '[T]he fact that the anonymity, the lack of transparency and the way in which cryptocurrency conceals and protects money laundering and financing of terrorism and all sorts of dark trades is just not acceptable'.[35]

Criminal activities with the use of cryptocurrency is not alien in Ghana. There is a high incidence of cybercrime such as credit card fraud in Ghana.[36] The modus operandi of such cybercriminals is to obtain the credit card details of a person purchased on hidden online market sites on the dark web with cryptocurrency as the medium of exchange. The credit card details are used to procure services, and goods such as vehicles, branded clothing and electronic gadgets, among others, which are transported to Ghana and sold at knocked off prices.

Bitcoin, and significantly more sinister altcoins designed to offer far greater anonymity such as Darkcoin, Monero, Dash and Zcash, is gaining popularity as the currency of choice for cybercriminals.[37] Bitcoin however, remains the virtual currency of choice for dark web activity.[38] At this juncture, it is imperative to be wary of the inference that cryptocurrency offers absolute pseudonymity to users. As Bunjaku argues, cryptocurrency transactions are completely anonymous and at the same time fully transparent.[39] This statement however, is not completely accurate. Reid and Harrigan have warned that

32 Online market sites such as Alphabay, Silk Road and Hansa. Access to such sites requires the use of an anonymiser. An anonymiser is a specialised software that provides access to blocked and hidden sites by altering and masking the IP address of an information technology (IT) device with a series of other IP addresses connected to the network. The Onion Router (TOR) is an example of an anonymiser: Homeland Security (n 20).

33 Omri Marian, 'Are Cryptocurrencies Super Tax Havens?' (2013) 112 Michigan Law Review.

34 Irwin and Milad (n 29) 407.

35 Christine Lagarde, 'An Even-handed Approach to Crypto-Assets' (IMFBlog, 16 April 2018) <https://blogs.imf.org/2018/04/16/an-even-handed-approach-to-crypto-assets/> accessed 11 February 2019.

36 Ebenezer Sabutey, 'Ghana to get off PayPal's blacklist in 2019' (Joyonline, 10 May 2018) <https://www.myjoyonline.com/business/2018/May-10th/ghana-to-get-off-paypals-blacklist-in-2019.php> accessed 24 January 2019.

37 Europol (n 30) 11.

38 Steven Brown, 'Cryptocurrency and criminality: The Bitcoin Opportunity' (2016) 89(4) The Police Journal: Theory, Practice and Principles 327, 336.

39 Bunjaku and others (n 2).

Bitcoin's touted anonymity is seriously flawed.[40] They noted that, 'many organizations and services such as on-line stores that accept Bitcoin and exchanges have access to identifying information regarding their users, *e.g.*, email addresses, shipping addresses, credit card and bank account details, Internet Protocol addresses, among others. If any of this information was publicly available, or accessible by law enforcement agencies, then the identities of users involved in related transactions may also be at risk'.[41] Meiklejohn has also demonstrated how the real identities of Bitcoin users can be de-anonymised with the aid of clustering techniques.[42]

Regulating the Faces of Cryptocurrency

Cryptocurrency is intangible in nature, existing only in digital form. Lessig argues that regulation in the instance of technologies that are leveraged on the internet should consider who the user is, where the user is and the acts of the user on the internet.[43] Hence this section considers the physical network participants that facilitate the use, holding and trading of cryptocurrency. This section identifies four main network participants namely; Miners, Users, Exchanges and Wallets.

Miners

Generally, cryptocurrency is created through the process of mining. Mining in the world of cryptocurrency refers to a dual process, that is, the generating of new cryptocurrency by solving complex codes and ciphers that add a block to the Blockchain, and the verification and validating of new transactions. The first process deals with the solving of complex codes and ciphers. Miners who solve such complex codes and ciphers add a block to the Blockchain, and are issued with a specified number of newly created cryptocurrency units, known as a block reward. The second is the verification and validation process. This process functions in a similar manner to a bank ensuring a customer has sufficient funds before honouring a demand by the customer. Hence miners solve the double spending problem in cryptocurrency by verifying and validating cryptocurrency transactions. A verified and validated transaction is recorded into a block of records on the Blockchain. Miners are then rewarded with a transactional fee for performing this task. The block reward and transactional fees serve as an incentive for

40 Guadamuz and Marsden (n 24) 12.

41 Fergal Reid and Martin Harrigan, 'An Analysis of Anonymity in the Bitcoin System' in Yaniv Altshuler and others (eds), *Security and Privacy in Social Networks* (Springer 2013) 197.

42 Sarah Micklejohn and others, 'A Fistful of Bitcoins: Characterizing Payments Among Men with No Names' (Proceedings of the 2013 Conference on Internet Measurement Conference, 2013).

43 Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* (Basic books 2006) 23.

miners to participate in the mining process.

Mining is a voluntary engagement initiated by the downloading of a specialised mining programme on a computer. The programme installed on the computer, with the aid of constant and relatively fast internet connection, mines on a computer.[44] The complex codes and ciphers increases in difficulty as more blocks are added to the Blockchain. Thus mining on a basic personal computer has become impossible and inefficient for some cryptocurrency. Application Specific Integrated Circuits (ASIC) mining equipment have been developed to mine cryptocurrency more efficiently. Some miners also combine their computing power to mine in rigs and pools.[45] Ghana Dot Com, an IT solutions company based in Ghana, is attributed as the very first Bitcoin mining facility in Africa.[46]

User

A user refers to a person who obtains cryptocurrency as a medium of exchange, as a speculative asset[47] or a hybrid of the two.[48] Cryptocurrency rely on cryptographical keys, that is a public key which corresponds to a private key, to encrypt the real identity and transactions of users. The public key is comparable to an email address, whilst the private key is similar to a password used to access an email account. The public key which is represented by a combination of alphanumeric characters identifies users. The public key does not reveal the personal identifiable information of a user. This therefore does not give out explicit information about the real owner of a unit of cryptocurrency. This feature makes users of cryptocurrency pseudonymous. The public key can also be represented by a Quick Response code (QR code).

Exchanges

Exchanges are entities that provide a market place for the trading and price discovery of cryptocurrency in circulation. Some exchanges also store users' cryptocurrency.

44 Paul Gil, 'A Beginner's Guide to Cryptocoin Mining' (Lifewire, 22 May 2018) <https://www.lifewire.com/cryptocoin-mining-for-beginners-2483064> accessed 24 January 2019.

45 A mining rig is a specialised computer system used for mining of cryptocurrency. A mining pools also refers to the collaboration of miners who combine computing power to mine a block, and split the reward among the participants: Homeland Security (n 20) xiii.

46 'Bitcoin Mining in Ghana' <https://ice3x.co.za/bitcoin-mining-ghana/> accessed 24 January 2019.

47 In 2016, it was estimated that 54% of users of Coinbase, a popular digital currency exchange, obtained cryptocurrency strictly as an investment: Garrick Hileman and Michel Rauchs, 'Global Cryptocurrency Benchmarking Study' (Cambridge Centre for Alternative Finance 2017), 26.

48 Douglas King, 'Banking Bitcoin-Related Businesses: A Primer for Managing BSA/AML Risks' (2016) Retail Payments Risk Forum Working Paper, 3.

Users can buy and sell cryptocurrency for fiat currency and, or other cryptocurrency at exchanges. Bitcoin is the most supported cryptocurrency on all exchanges.[49] Users can also obtain cryptocurrency from a cryptocurrency Automated Teller Machines (ATM's). Cryptocurrency ATM's are specialised internet machines resembling ATM's developed to facilitate the trading and conversion of cryptocurrency to fiat currency. Most exchanges, that is an estimated 73% of exchanges, act as custodians of users' private keys thus have access to users funds.[50] Access to the private key means control of the units of cryptocurrency in a wallet. This situation coupled with the surge in market prices of cryptocurrency has made exchanges popular targets for cybercriminals.[51] Cybercriminals thus exploit security flaws in the computer systems of exchanges to obtain the private keys of users in order to appropriate units of cryptocurrency.

A quick google search of indigenous Ghanaian based exchange service providers will provide a list of exchange providers. Users can also trade with other users to obtain cryptocurrency on 'localbitcoins'.[52]

Wallets

A wallet is a software programme that securely stores, and facilitates the sending and receipt of cryptocurrency through the management of private and public cryptographical keys.[53] Wallets provide an interface for users to track all previous transactions, determine their balance and ascertain the estimated transactional fees for transferring units of cryptocurrency. Majority of wallet service providers do not control the private keys of the users.[54] Users have ultimate control of their accounts. Thus, users bare all the risks when it comes to ensuring the security of their private keys. Wallets can be downloaded on to mobile devices or computers. There seems to be no indigenous Ghanaian wallet service provider, although there is no evidence to suggest the nonexistence of one. A user can create multiple wallets with several or the same wallet service provider at the same time. Thus, estimating the exact number of Ghanaian users would prove quite impossible. The existence of other network participants such as indigenous Ghanaian miners and exchanges and the availability of wallet service providers online sufficiently

49 Hileman and Rauchs (n 47) 34.

50 Hileman and Rauchs (n 47) 37.

51 The first quarter of 2018 has been marked by the theft of about $700 million worth of cryptocurrency in Japan and Italy alone: 'This Crypto Exchange Is Offering a $250,000 Bounty for Hacker Tip-Offs' (Fortune, 12 March 2018) <http://fortune.com/2018/03/12/binance-cryptocurrency-hacker-tip-offs/> accessed 24 January 2019.

52 Localbitcoins <https://localbitcoins.com/country/GH> accessed 24 January 2019.

53 Hileman and Rauchs (n 47) 49.

54 73% of wallets do not control the private keys of users: ibid, 55.

demonstrates the existence of users in Ghana.

To Regulate or Not to Regulate?

The call for the regulation of cryptocurrency raises the question whether or not regulation is actually warranted. Some scholars have described cryptocurrency such as Bitcoin, as a bubble, a passing fad and a scam destined for the bins of history.[55] This has raised comparisons of cryptocurrency with the tulip mania and the dotcom bubble.[56] Notwithstanding, cryptocurrency is demonstrated to potentially transform the financial sector by providing cheap financial services to the underbanked and unbanked, and transforming the remittance industry by reducing transactional costs across borders.[57] In the evolving continuum of cryptocurrency, states are also beginning to think more seriously about national forms of cryptocurrency which can result in the reduction of the high costs of printing and distributing banknotes, and the risks of counterfeits.[58] Lagarde notes that, cryptocurrency rapid borderless, cheap and irreversible transfers can significantly transform financial activities in a meaningful and enduring way.[59] Cryptocurrency is thus argued to offer tremendous opportunities for innovation and development, but it is also uniquely suited to facilitate illicit behaviour.[60] Flowing from

55 Former Greek Finance Minister Varoufakis stated, 'There is a Bitcoin aristocracy, the Bitcoin early adopters, who accumulated very cheaply Bitcoins from the beginning. They have every reason to talk this thing up and lure people into like a Tulip-like mania or a pyramid, making extravagant claims […] to (open and use a new Bitcoin ATM). This was all just hype': Evan Smart, 'Bitcoin Debate between Andreas Antonopoulos vs. The Greek Finance Minister' (Crytocoin News, 18 February 2015) <https://www.cryptocoinsnews.com/bitcoin-debate-andreasantonopoulos-vs-greek-finance-minister/> accessed 24 January 2019; Former US Federal Reserve Chairman Alan Greenspan, Nout Wellink, a former President of the Dutch Central Bank, and Nobel Laureate economist Robert Shiller, maintain that virtual currency is a passing fad or bubble, akin to Tulip mania in 17th Century Netherlands. Nouriel Roubini, professor of economics at New York University, described Bitcoin was 'the mother of all bubbles' favoured by 'charlatans and swindlers': Angela Monaghan, 'Bitcoin biggest bubble in history, says economist who predicted 2008 crash' (The Guardian, 2 February 2018) <https://www.theguardian.com/technology/2018/feb/02/bitcoin-biggest-bubble-in-history-says-economist-who-predicted-2008-crash> accessed 24 January 2019.

56 Lagarde (n 35); Lizzy McNeill and Sachin Croker, 'The truth about Tulip Mania' (BBC, 13 May 2018) < http://www.bbc.com/news/business-44067178 > accessed 24 January 2019; Jorn Madslien, 'Dotcom bubble burst: 10 years on' (BBC, 9 March 2010) <http://news.bbc.co.uk/2/hi/business/8558257.stm> accessed 24 January 2019.

57 Homeland Security (n 20) 163-165.

58 Misha Yang, 'Cryptocurrency in China: Light-Touch Regulation in Demand' (2016), 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2792477> accessed 2 March 2019.

59 Lagarde (n 35).

60 Marian (n 3) 56.

this, Marian notes that regulation aids cryptocurrency in achieving its positive potential whilst preventing cryptocurrency from becoming a vehicle for criminal activity.[61]

Drawing on the need to regulate, the Bank for International Settlements has identified five approaches to regulating cryptocurrency.[62] First, regulators could decide to use moral suasions towards users and investors in order to highlight the relevant risks and to influence the market. The second approach borders on the regulation of specific entities such as those that enable interaction between digital currencies and traditional payment instruments. The third, posits that states can interpret existing regulations to apply to cryptocurrency and their network participants. The fourth approach supports the drafting of broader regulation similar to the regulations that applies to traditional payment methods, and last, the banning of the use cryptocurrency. Troeller builds on the approach of broadening the interpretation of existing laws to encompass cryptocurrency.[63] He notes that with this approach, 'it is still within a judge's discretion to include or not include cryptocurrency in the statutory scheme'.[64] This could result in conflicting views limiting the certainty of the legal status of cryptocurrency.

Lim suggests that self-regulatory frameworks, where industry participants operate on agreed norms alongside guidance from regulators, may be more effective than heavy-handed regulatory approaches for regulating cryptocurrency.[65] This suggestion of self-regulation is defined by Guadamuz and Marsden as the process where, 'governments provide support for mechanisms whereby users of virtual currencies can agree upon and enforce their own "community standards" and rules of conduct'.[66] Carlisle toes to this line of argument by noting that when countries find that regulating network participants prove difficult, state agencies may encourage self-governing anti-money laundering approaches rather than formal regulation of network participants. This could include encouraging the cryptocurrency industry to develop voluntarily whilst incorporating meaningful standards that encourage responsible anti-money laundering practices.[67]

Regulating Cryptocurrency in Ghana

The Governor of the BoG in a speech acknowledged that, '[T]he future of money and

61 ibid, 59.

62 Committee on Payments and Market Infrastructures, 'Digital Currencies' (2015) Bank for International Settlements, 12.

63 Lauren Troeller, 'Bitcoin and Money Laundering (2016) 36 Review of Banking and Financial Law 159.

64 ibid, 166.

65 Lim (n 5) 22.

66 Guadamuz and Marsden (n 24) 22.

67 Carlisle (n 4) 32.

finance will be marked by innovation, new technologies and increased competition across borders'.[68] The governor also cited the 2018 World Bank's Global Findex Report which marked Ghana's progress in financial inclusiveness as an improvement from 40.5 percent in 2014 to 58 percent in 2018, driven mainly by digital financial services.[69] This upward movement suggests an increase in the use of financial technologies, in spite of the digital divide in Ghana.[70] The demonstrated nexus between unlawful activity and cryptocurrency also necessitates the need for regulation to pre-emptively protect the Ghanaian financial system from the potential mainstream use of cryptocurrency for unlawful activity. This section considers the possible existence of an existing regulatory framework regulating cryptocurrency in Ghana.

Regulation as a Payment System

On the 22nd of January, 2018, the BoG wary of the unlicensed nature of cryptocurrency under the repealed Payment Systems Act, 2003 (Act 622), issued a notice stating that, '[T]he public is therefore strongly encouraged to do business with only institutions licensed by the Bank of Ghana'.[71] The Notice stated that the BoG has indicated its intention to regulate digital currencies with the drafting of the Payment Systems and Services Bill. [72] This ambiguous indication did not specify which form of digital currencies the BoG seeks to regulate.[73] The Director of Communications of the Bank of Ghana is quoted stating that the Payment Systems and Services Bill is expected to provide a regulatory framework for digital currencies.[74] The Payment Systems and Services Bill has been passed into law.

68 Ernest Addison, Official Launch of Payswitch Company Limited (Payswitch conference, Accra 16 May 2018 <http://bog.gov.gh/privatecontent/Speeches/SPEECH%20DELIVERED%20BY%20DR.%20ERNEST%20ADDISON,%20GOVERNOR,%20AT%20LAUNCH%20OF%20PAYSWITCH%20COMPANY%20LTD.pdf> accessed 19 January 2019.

69 ibid.

70 It is estimated that about 35% of the population representing about has access and is using the internet in Ghana: Kweku Zurek, 'Over 10 million Ghanaians use the internet – Report' (Graphic online, 19 February 2018) < https://www.graphic.com.gh/news/general-news/over-10-million-ghanaians-using-the-internet-report.html> accessed 24 January 2019.

71 Bank of Ghana, 'Digital and Virtual Currencies Operations in Ghana' NOTICE NO. BG/GOV/SEC/2018/02 [hereinafter referred to as the Notice].

72 Anita Arthur, 'BoG unfazed by digital currency inroads in Ghana' (Citifmonline, 3 February 2018) <http://citifmonline.com/2018/02/03/bog-unfazed-digital-currency-inroads-ghana/> accessed 24 January 2019.

73 Digital currency can mean a digital representation of either virtual currency (non-fiat) or e-money (fiat) and thus is often used interchangeably with the term 'virtual currency': FATF Definition (n 13) 4.

74 The Director of Communications stated that, 'We have a new Payment Systems & Services Bill currently in parliament and once that is concluded, I'm sure the way forward will be made clear. It is something that the Bank of Ghana is taking very seriously and if you go through the release that we sent

The Payment Systems and Services Act amends and consolidates the laws relating to payment systems, payment services and regulates institutions which carry on payment service and electronic money business and to provide for related matters.[75]

In the PSS Act, electronic money is defined as, 'monetary value which is stored electronically or magnetically, and represented by a claim on the issuer which is issued on receipt of funds, redeemable against cash and may be accepted by a person'.[76] Electronic money is thus money which may be in the form of accepted legal tender of Ghana or the accepted legal tender of another country. Cryptocurrency such as Bitcoin and Ethereum is not recognised as legal tender in Ghana nor elsewhere. The definition of electronic money in the PSS Act is similar in substance to the definition of electronic money in the Electronic Money Directive of the European Union.[77] The directive defines electronic money also as, 'electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions and which is accepted by a natural or legal person other than the electronic money issuer'. The European Court of Justice in distinguishing between cryptocurrency and electronic money held that, '[V]irtual currencies such as bitcoin, does not have a single issuer and instead is created directly in a network by a special algorithm'.[78] The court further opined that Virtual currencies differ from electronic money, as defined in Directive 2009/110/EC …in so far as, unlike that money, for virtual currencies the funds are not expressed in traditional accounting units, such as in euro, but in virtual accounting units, such as the 'bitcoin'.[79] In analysing the decision of the court, it can be noted that cryptocurrency, as already stated, is issued through the process of mining and not on the receipt of funds. Also, cryptocurrency is not 'stored monetary value' as it is a unique medium of exchange and not accepted legal tender.[80]

The decisions of such foreign courts only have persuasive effects in the Ghanaian courts.

warning the public against doing transactions with Bitcoin , it is clearly stated there that it is something that the Bank has devoted enormous resources to.' He further stated that, 'We are also working with other international financial organizations to make sure that indeed the trend as we are witnessing now globally, if it's being adapted locally, we do have the resources to make sure that they are indeed properly regulated,': Arthur (n 72).

75 Long title of the Payment Systems and Services Act, 2019 (Act 987) [hereinafter know as PSS Act].

76 PSS Act, s 102.

77 Electronic Money Directive of the European Union, Directive 2009/110/EC.

78 *Skatteverket v David Hedqvist* Case C-264/14, 6 (July 2015), para 11.

79 ibid, para 12.

80 Samuel Alesu-Dordzi, 'Digital and Virtual currencies in Ghana: Did the Bank of Ghana miss the road?' (2018) Ghana Law Hub <https://ghanalawhub.com/digital-and-virtual-currencies-in-ghana-did-the-bank-of-ghana-miss-the-road/> accessed 2 March 2019.

As Sowah JA (as he then was) in the case *Pokua v. State Insurance Corporation* held,

It is of course correct that our courts are not bound to follow decisions of foreign courts and are free to chart their own course; and so be it; but where the foreign piece of legislation is in pari materia with a similar enactment in our laws and where the words used are similar, it does seem prudent to have regard to the experience of those who have chartered the same course before and to observe in what manner we are in agreement with them or otherwise; and it is in this spirit that our courts should examine foreign decisions bearing ... I do not consider that English words must necessarily alter their meaning simply because the countries using the language might have different social and economic circumstances.[81]

Regulation under Anti-Money Laundering Law

Money laundering is the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced.[82] The origin of the term lies in the use of laundries and other cash businesses by organised crime to integrate proceeds of their crimes into the legitimate economy.[83] It is estimated that $800billion - $2 trillion is laundered globally.[84] Sadly, law enforcers and regulatory authorities seize only about one percent of money laundered internationally.[85]

Generally, the process of money laundering occurs in three stages, the placement, layering and integration stage.[86] Ellinger describes these three the stages as,

The first stage is the placement stage, where the proceeds of the crime are placed into the financial system. Moving on to the second stage, that is the layering stage, where proceeds are then moved usually through a series of transactions perhaps involving different entities, assets and jurisdictions in order to sever any audit trail hence tracing their origins harder. In the final stage, integration stage, the criminal resumes control of the proceeds free from any link to their criminal source.[87]

81 *Pokua v. State Insurance* [1973] 1 Ghana Law Report 335, 386.
82 Bryan Garner (ed in chief), *Black's Law Dictionary* (9th edn, 2009).
83 Eliahu Ellinger and others, *Ellinger's Modern Banking Law* (5th edn, OUP 2011).
84 United Nations Office on Drugs and Crime, 'Money-Laundering and Globalization' <https://www.unodc.org/unodc/en/money-laundering/globalization.html> accessed 24 January 2019.
85 Homeland Security (n 20) 98.
86 Ellinger and others (n 83) 92.
87 ibid.

It is reported that £3 – £4 billion pounds sterling of proceeds of unlawful activity has been laundered through cryptocurrency in Europe alone.[88] The laundering of cryptocurrency is initiated by first placing the proceeds of illicit sources in the cryptocurrency system through the purchase of cryptocurrency from an exchange or cryptocurrency ATM's. As launderers convert illegally acquired cash to Bitcoin, their identity become pseudonymous and thereby frustrating authorities' ability to track their activity. The tainted units of cryptocurrency are transferred to multiple wallets and layered through series of transactions such as the trading in other altcoins or the purchase of goods and services. The launderer then receives goods or services, or money from an exchange or cryptocurrency ATM's free from the taint of crime. Some exchanges impose identification requirements on some transactions frustrating the obfuscating of the link of illegal proceeds to the real identities of the launderer.[89]

Ghana's Anti Money Laundering Regulatory Framework

Ghana's anti-money laundering legislation is couched in the Anti-Money Laundering Act, 2008 (Act 749) and the Anti-Money Laundering (Amendment) Act, 2014 (Act 874).[90] Ghana's AML Act provides a two-prong regulatory approach to combat the menace of money laundering. The first approach is the criminalisation of the act of money laundering and related offences, and the second is the prevention of the money laundering by placing obligations and requirements on accountable institutions to detect and report suspicious transactions that may form or are proceeds of unlawful activity.

Criminalising Money Laundering

In Ghana, the act of money laundering is a crime punishable by a fine of not more than five thousand penalty units[91] or to a term of imprisonment, not less than twelve months and not more than ten years or to both. The AML Act criminalises the activity of money laundering by stating;

A person commits an offence of money laundering if the person knows or ought to have known that property is or forms part of the proceeds of unlawful activity[92] and the

88 Shiroma Silva, 'Criminals hide 'billions' in crypto-cash - Europol' (BBC, 12 February 2018) <http://www.bbc.com/news/technology-43025787> accessed 24 January 2019.

89 'Exchanges such as Coinbase and Kraken, cloud-based wallet providers, and some ATM operators generally require various levels of identity verification based on transaction velocity and size': King (n 48) 9.

90 Hereinafter referred to as the AML Act.

91 A penalty unit is worth GHS12 (Ghana Cedi).

92 Unlawful activity is defined as conduct which constitutes a serious offence, financing of terrorism, financing of the proliferation of weapons of mass destruction or other transnational organised crime or

person; converts, conceals, disguises or transfers the property; conceals or disguises the unlawful origin, disposition, movement or ownership of rights with respect to the property; or acquires, uses or takes possession of the property.[93]

The AML Act further defines property as, 'assets of any kind situated in this country or elsewhere, regardless of its value, whether corporeal or incorporeal, movable or immovable, tangible or intangible, among others'. [94]

The AML Act does not define incorporeal or intangible assets. The Ghanaian courts have also not been confronted with the task of interpreting incorporeal and intangible assets pursuant to the AML Act to include cryptocurrency. My attention is thus drawn to Black's Law Dictionary which defines intangible assets as 'any nonphysical asset or resource than can be amortized or converted to cash…' and the word incorporeal as, 'having a conceptual existence but no physical existence.'[95] In light of the definitions provided, the ambit of property per the AML Act is wide in scope to include cryptocurrency. Thus a person can be convicted of the crime of money laundering of property in the form of cryptocurrency which is or forms part of proceeds of unlawful activity.

Obligations and Requirements of Accountable Institutions

The second approach is the placing of obligations and requirements on accountable institutions[96] to detect and report suspicious transactions which may be the proceeds of unlawful activity. The AML Act imposes an obligation on such accountable institutions to keep records of transactions and the identities of persons who performed the transactions with the accountable institution.[97] Such accountable institutions are also mandated to file suspicious transaction reports within twenty-four hours of knowledge of suspicious attempts or completed transactions, which the institution suspects the transaction is proceeds sourced illegally.[98] What suffices as a suspicious transaction is not defined in the Act. In the case of *R v. Da Silva*, the court held that, '[T]he essential element in the word "suspect" …is that the defendant must think that there is a possibility, which is more

contravention of a law regarding any of these matters which occurs in this country or elsewhere: AML Act, s 1(2) as amended.

93 AML Act, s 1 as amended.

94 AML Act, s 51 (emphasis mine).

95 Garner (n 82).

96 AML Act, first schedule as amended by s 21, the first schedule provides for accountable institutions which includes banks.

97 AML Act, s 23 as amended by s 8.

98 AML Act s 30 as amended by s 11.

than fanciful, that the relevant facts exist. A vague feeling of unease will not suffice'.[99]

This second approach presents a problem as the network participants that facilitate the use, holding and trading of cryptocurrency are not licensed nor obligated to detect and report proceeds of unlawful activity in Ghana. However, cryptocurrency interacts with the Ghanaian financial system when a user buys or sells cryptocurrency with the national currency or e-money. This can be done through the physical exchange of money, a bank deposit or transfer of e-money at an exchange or with another user. Thus the payment of cryptocurrency with a bank deposit or transfer of e-money creates a nexus between exchanges and financial institutions regulated under the PSS Act.

Confiscation and Seizure of Proceeds of Unlawful activity

The Economic and Organised Crime Office (EOCO), is a specialised state agency that is empowered to seize, confiscate and recover property that a court of competent jurisdiction has adjudged as forming part or is proceeds of crime.[100] The confiscation of cryptocurrency that is or forms part of proceeds of crime presents EOCO with a series of questions; what is the subject of such a seizure order?, where is the subject of seizure? And, how can EOCO enforce a seizure order in relation to cryptocurrency? Cryptocurrency such as Bitcoin is a subjective valuable record on a Blockchain.[101] The property right is represented by a record on the Blockchain.[102] The subject of a seizure order is property in the form of an intangible or incorporeal valuable record. Cryptocurrency, as already noted, is stored in a wallet or exchange. Ownership rights in cryptocurrency is prima facie presumed to be vested in the knowledge of the private key of a wallet.[103] In order to enforce a seizure order of cryptocurrency the state agency exercising the order must have knowledge of the private key of a wallet. As demonstrated custodial exchanges that store users' cryptocurrency, have access to the private key of users. Thus a seizure order

99 [2006] EWCA Crim 1654.

100 Economic and Organised Crime Office 2010 (Act 804), s 2(b); s 24; Proceeds of crimes is defined as any property derived from or obtained through the commission of a serious offence: s 74 [hereinafter refer to as EOCO Act].

101 Witold Srokosz and Tomasz Kopyscianski, 'Legal and Economic Analysis of the Cryptocurrencies Impact On the Financial System Stability' (2015) Journal of Teaching and Education 619, 620.

102 ibid.

103 Brenig and others argue that ownership is established by knowing the corresponding public key to a wallet. but this is just control in my humble view thus we should look at the so I am trying to say I control with the private key directly or indirectly and it is as other ones do not give me access to control it. Hence what I own is a record on the block chain that is worth a number of units of cryptocurrency: Christian Brenig and others, 'Economic Analysis of Cryptocurrency Backed Money Laundering' (Twenty-Third European Conference on Information Systems (ECIS), Münster, 2015), 7.

would be effective if issued against a custodial exchange or wallet. An authorised officer of the EOCO may also by notice in writing request for information from an exchange to assist in an investigation of a user.[104] An authorised officer of the EOCO, in accordance with due process, is also empowered to search[105] for tainted property[106] by entering any land or premises and conduct a search in respect of tainted property to enforce a seizure order.[107] Such a search on any land or premises includes property on the land or premise.[108]

Conclusion: The Way Forward

Ghana's finance minister during the budgetary statement for the year 2018 posited the financial policy of the government aimed at positioning Ghana as a regional financial services hub.[109] Among the policies to strengthen the financial sector in Ghana is the conduct of a comprehensive study on cryptocurrency and Blockchain technology to enable the country position itself against any adverse effect on the economy and to provide an appropriate regulatory environment.[110] This suggests that there is the momentum for the regulation of cryptocurrency in Ghana.

At this juncture, this article has demonstrated that cryptocurrency is not electronic money as defined in the PSS Act. Also, the article has shone light in the gaps, of the AML Act in relation the laundering of cryptocurrency in Ghana. Moving forward, Carlisle argues that anti-money laundering regimes would be most effective at the point where cryptocurrency come into contact with 'real' money and the formal financial system.[111] He further notes that, placing exchanges under anti-money laundering regulation enables exchanges to act as a gatekeeper to the fiat money world and to identify illicit actors who may be transferring funds between legal tender and cryptocurrency.[112] Varriale supporting this argument also recommends that legislation should focus on the gateways, or the points at which people take real currency and transform it into virtual currency.[113] Flowing

104 EOCO Act, s 19.

105 EOCO Act, s 25(4)(b), A search may be under a search warrant or emergency warrant.

106 EOCO Act, s 74: tainted property is defined as property used in or in connection with the commission of a serious offence or derived, obtained or realized as a result of the commission of a serious offence.

107 EOCO Act, S 25 1(b).

108 EOCO Act, S 25 2(c).

109 Ken Ofori-Atta, 'The Budget Statement and Economic Policy of the Government of Ghana for the year 2018', para 838.

110 ibid, para 846.

111 Carlisle (n 4) 13.

112 ibid.

113 Gemma Varriale, 'Bitcoin: How to Regulate a Virtual Currency' (2013) 32(6) International Financial

from these assertions, regulation would be most effective when targeted at exchanges. This article considers the regulation of the exchanges in the cryptocurrency ecosystem. There is however, the risk of drafting nugatory regulatory frameworks for cryptocurrency which can be bypassed by trading online with other international exchanges. The fear of heavy handed regulation stifling the technological innovation of cryptocurrency is also ever present.

Thus, I propose an even-handed approach to regulating cryptocurrency in Ghana. Restating Guadamuz and Marsden, 'governments should provide support for mechanisms whereby users of virtual currencies can agree upon and enforce their own "community standards" and rules of conduct'.[114] Drawing from the restatement, an optimal solution to regulation is for the BoG to persuade exchanges to self-regulate and serve as gatekeepers to monitor and detect property that is or forms part of proceeds of unlawful activity. This even-handed approach solicits the BoG to compel exchanges to adopt a rule of conduct or soft norms to guide their activities. The BoG can exercise its leverage over exchanges whose services are facilitated by the banks and regulated payment systems in Ghana to ensure compliance. Furthermore, the BoG can organise stakeholder meetings for the network participants in the Ghanaian cryptocurrency ecosystem to draft standards to regulate their activities in Ghana. Self-regulatory measures should include anti-money laundering procedures to ensure cryptocurrency is not being laundered through the exchanges in Ghana. An exchange that fails to comply would suffer reputational damage and possible isolation by the Ghanaian regulated financial institution.

Law Review, 2.

114 Guadamuz and Marsden (n 24).

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TOWARDS A CONDUCIVE INVESTMENT CLIMATE WITHIN ECOWAS: THE CASE FOR THE AMENDMENT OF SECTIONS 27 AND 28 OF THE GHANA INVESTMENT PROMOTION CENTRE ACT 865 OF 2013

Francis Kofi Korankye-Sakyi[1] and Kweku Attakora Dwomoh[2]

ABSTRACT

Since the independence of Ghana, she has been at the forefront of the integration of the African continent and for that matter the West African sub-region. Many developing countries are moving towards adapting to international and regional arrangements to enhance their relevance and leverage on trade and investment opportunities for their socio-economic development. Ghana is considered as having one of the safest and most conducive investment climates for doing business in Africa. This stride is attributed to its enduring democratic and legislative environments. The gains made so far in this respect seem to be losing its steam due to the far-reaching conflicting provisions that exist between the Ghana Investment Promotion Centre Act 865 of 2013 which regulates the investment activities in Ghana and that of the Economic Community of West African States (ECOWAS) provisions in the Protocol on Free Movement of People, Goods and Services. Through a qualitative desktop analysis of the legal literature available, this paper argues that some provisions of Act 865 specifically sections 27 and 28 of Act 865 are in violation of Ghana's obligation under the ECOWAS protocols. On the backdrop of article 36(4) of the 1992 Constitution of the Republic of Ghana, this article identified such provisions in Act 865 and proposes an amendment to conform with the Community laws of ECOWAS to engender socio-economic development and political security of the subregion.

Keywords: GIPC Act 865 of 2013; trade and investment; Ghana; ECOWAS; economic development.

1 B. Ed, LL. B, LL. M, MA: Lecturer, Faculty of Law, University of Cape Coast, Ghana
2 LLB, QCL, LLM: Lecturer, Faculty of Law, University Profesional Studies, Accra, Ghana & Private Legal Practitioner.

Introduction

Investment laws point an investor to how and by which means he can apply his capital into an investment in a country; they direct the investor(national and non-national) to his rights, privileges, duties and obligations in the host country; they provide the general regulatory requirements governing such form of investment; and they assure security of investments. Since Ghana's independence, Ghana has been at the forefront of the integration of the African continent with one of the safest and conducive investment climates for doing business.[3] This has been the result of its democratic and profound legislative environment. The foremost legialstive instrument for regulating investor activities in Ghana is the Ghana Investment Promotion Centre Act (GIPCA), 2013 (Act 865)[4] as an enabling instrument to the demand of the 1992 Constitution of the Republic of Ghana (the Constitution).[5]

However, there is far-reaching conflicting provisions that exit between Act 865 and that of the ECOWAS protocol on free movement of people, goods and services.[6] This article identifies such provisions in the Act 865 and argues for an amendment to conform with the ECOWAS' protocol to engender socio economic development and political security of the subregion.

Within the international milieu of investment, many countries are moving towards securing international and regional arrangements to enhance their relevance and leverage on trade and investment opportunities for their socio-economic development.

Bradlow agrees that:

> Every dynamic social system's adaptive capacity is finite. Eventually, the ability of the system's legal and institutional arrangements to adapt to the changing operational context is exhausted. At this point, unless the system is significantly reformed, it begins losing its legitimacy and efficacy.[7]

Flowing from this, it is posited that the current legal framework underpinning Ghana's investment activities has not reached its finite limit yet to warrant non-negotiable engagement for review. To this end, it requires adapting to changing circumstances of the day to defend the legislative legitimacy and relevance of the current GIPCA within the international economic order. Bradlow contends that the challenge to reforms in global economic governance lies

3 Sanusi and Adu-Gyamfi 2017 *JHS* 599-608.
4 Section 3 Act 865.
5 Article 36(4) of the Constitution.
6 Supplementary Protocol A/Sp.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment.
7 Bradlow 2018 *IORJ* 213–236.

with the lack of political will to advertise for the needed changes to institutional legislations.[8] It is indeed a dilemma for many governments in the sub region to muster this political will to give up their domestic interests for supranational alternatives.[9] The absence of this is a recipe for crises in international relation.[10]

The unfriendly legal environment in most African countries have served as a major blockade to the economic integration of the continent. The recent impasse between the Ghanaian business community and its major trading neighbour, Nigeria on retailing in the respective countries is deemed as a consequence of these conflicting legislations upon which the perpetrators of the atrocities take their motivation.[11]

The need for economic integration through regional and sub-regional protocols cannot be over-emphasised. Oloruntoba, Nshimbi et al conceptualised integration as "the cooperation among sovereign states, which leads to the removal of restrictions to facilitate mobility."[12] It is also described as "a process of both deepening and widening relationships amongst actors."[13] Regional integration is considered as a cooperation through the voluntary surrendering of individual national sovereignties of nation-states for supranational institutions to achieve a better development in order to better the condition of lives of their people.[14]

It is confirmed that "existing literature has investigated the benefits and effectiveness of the protocol in the West African Sub-region."[15] Key amongst these reasons include the fact that in majority of the countries, the major primary products for export are basic agricultural produce and unrefined mineral resources that do not support robust international trade.[16] The domestic markets in the subregion are smaller with substantial structural deficits; weak physical infrastructure, inadequate capacity building tools, financial sector deficiencies,

8 Bradlow (n 7) 213.

9 Aryeetey *OECD Development Centre Working Paper* 2001 1-45.

10 Ghana is now involved in brawl with Nigeria which involves each country's cross-border traders pointing to harassments and abuses by opposing citizens for engaging in one sort of trading activity or the other. Nigeria has escalated the confrontation by closing its borders to neighbours in the sub-region to prevent "illegal traders" so to speak till 2020.

11 GhanaWeb 2019 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Nigeria-s-borders-to-remain-closed-until-end-of-January-795921 accessed 27 October 2019; rfi 2019 http://www.rfi.fr/en/africa/20191101-nigerian-owned-shops-ghana-kumasi-forced-close-traders-union-borders-closed .See also BBC 2019 https://www.bbc.com/pidgin/tori-48682143 accessed 28 October 2019; GHOne TV 2019 https://www.facebook.com/156439147743926/posts/257668286320988.

12 Nshimbi, Moyo and Oloruntoba 2018 Africa Insight:4.

13 Opanike and Aduloju 2015 *J. Civil and Legal Sciences* 154.

14 Opanike and Aduloju (n 13).

15 Opanike and Aduloju (n 13).

16 Ijeoma *2007* Africa Insight 62.

underdeveloped manufacturing sector[17] which largely fall on imported commodities to meet the basic needs of the population. Weak infrastructure coupled with non-conducive legal environment has derailed the progress in investment opportunities in the subregion. The core rationale for integration is to promote the free flow of goods, services and people across borders.[18] It is a conduit to facilitate factors of production across boundaries and galvanise inter-border trading. The objective to achieve mutual prosperity for the nations must be contingent on the combination of both the political and economic prospects of the subregion.[19]

It has been emphasised that some African countries through their laws have created the opportunity for the violation of the rights of cross-border traders.[20] This is the situation in which Ghana has inadvertently created, thereby putting at risk the enjoyment of the rights of migrants under the ECOWAS protocol.[21]

Historical brief on Ghana's investment laws

Historically, Ghana's investment policy and regulations directions have metamorphosised under different regimes of governments; all in an attempt to position the country to compete and attract the needed investment to its fold. These changes do not offend the international norm on policy environment regarding trade and investment. Cross-border investment laws go under constant reviews in various countries to adapt to a new economic and international order in so far as it is aimed at influencing the overall investor decisions towards that country.[22] This article is not about the history of Ghana's investment laws but in the preceding sections, we shall provide a background to the Act 865 to lay a foundation on how far Ghana has come with its investment legal underpinnings. We shall group the historical journey into two phases; the non-liberal investment era: 1963–1994 and the liberal investment era 1994-2013 for the purposes of clarity.

The non-liberal investment era: 1963–1994

The concentration of Ghana's investment opportunities centred on few sectors of the economy before its independence in 1957;[23] primarily depending on export commodities like timber, cocoa, gold and other minerals. In 1943, the Tax Ordinance[24] was passed that

17 Ijeoma (n 16).
18 Nshimbi, Moyo and Oloruntoba (n 12).
19 Anon https://www.ecowas.int/about-ecowas/history/.
20 Nshimbi, Moyo and Oloruntoba (n 12)10.
21 Nshimbi, Moyo and Oloruntoba (n 12).
22 Ayangbah and Sun 2017 *Cogent Social Sciences* 1-22.
23 Dagbanja 2014 *AJLS* 253-292.
24 The Income Tax Ordinance No.27 of 1943.

offered tax breaks to investors as a way of encouraging and protecting investments and new ventures in line with the government's development agenda.

Under the First Republic, the Pioneer Industries and Companies Act of 1959 (PICA) was enacted to grant tax holidays to new ventures for a period of up to ten years. This benefitted registered companies that existed before 1950 which were given unimpeded guarantee to repatriate both their profits and capital any time. The Local Industries (Customs Duties Relief) Act of 1959 also enabled indigenous enterprises to benefit from exemptions on taxes that affected their import duties for manufacturing purposes. In an attempt to create a conducive legal regime to boast and safeguard foreign investments in the industry sector, the regime of Dr. Kwame Nkrumah enacted the Capital Investment Act (CIA) 1963 (Act 172)[25] as well as the Companies Act, 1963 (Act 179).[26] Whiles the Act 179 created a space for the growth of local industries, the Investment Promotion Board was put in place by the government to assist foreign companies to flourish in the country as part of its mandates.[27] In the rebuilding effort of the government, it was considered prudent to have a legal environment that defused the adverse notion on the security and viability of private enterprises in the country, hence Act 172.[28] A key feature of the CIA was the creation of the Capital Investment Board (CIB) as the regulatory agency to implement the mandates of Act 172.[29] The CIB's responsibilities included;[30]

- to initiate and organise events to attract the investment of foreign capital,
- to give approval to applications for capital investments,
- to serve as liaison between government agencies and the investors, and
- to be responsible for the dissemination of information on foreign investment profile and recommend for who qualified for the grant of exemption, reduction, facility or licence as a business.

As stated earlier, the CIB was the regulatory institution which had a discretion to decide on the condition precedent for an agreement under the Act 172. Suffice to say that the Act 172 provided that for any foreign investment to be admitted into the country, it needed to be concurrently be regulated by the provisions of the Act 172 and an agreement which defined

25 After Independence from Britain in 1957, the Capital Investment Act 1963 (Act 172) was the first legislation in Ghana on investment drive.

26 As part of its objectives the Act 179 was enacted to create the conditions conducive for both African and foreign companies. This was the period recorded of influx of companies from countries such as South Africa to Ghana for commerce. See Commission of Enquiry "Final Report of the Working and Administration of the Present Company Law of Ghana 1963.

27 Dodoo "1980–981 Parliamentary Debates".

28 Parliamentary Debates" Session 1962–1963" 554.

29 Section 1(1) of the Capital Investment Act 172 of 1963.

30 Section 2(1) of the CIA.

the conditions for admission and benefits to the investor.[31]

The essence of the agreement was to create an opportunity for the investor to negotiate for certain amenities, exemptions, interests and special dispensations which may not individually be catered for under the law. Conferring investor status on a foreign entity in the country required that the business viability was assessed by the state to fit into its own development agenda.

The overriding motivation that underpinned the Act 172 was to garner development and protect the public interest in all government's engagements with foreign investments.[32] It must be noted that Act 172 was not abrogated after the military takeover from the First Republic on 24 February 1966 led by Joseph Arthur Ankrah; neither was it repealed under the Dr. Kofi Abrefa Busia's government under the Second Republic, until the Capital Investment Decree,1973 (NLCD 141)[33] came to repeal it under the military rule of Ignatius Kutu Acheampong.

The Second Republic (1969-1973), however, witnessed one of Ghana's restrictive investment climate to foreign businesses when the Alien Enterprises Licensing Regulations, 1970 (LI 670) was promulgated.[34] The regulation conferred on the Minister responsible for Economic Planning, among far reaching regulations, the powers to restrict foreign sales agents.[35] Not much in substance could be said as an addition to the content in the NLCD 141, except for the change in the name of the law to Capital Investment Decree. However, in 1975 a new decree, Investment Policy Decree 1975 (NRCD 329), came to repeal the NLCD 141.

On the assumption that previous governments had not been successful in their quests to attract the needed foreign investments, the Dr Hilla Limann's administration of the Third Republic enacted the Investment Code, 1981 (Act 437) to repeal the NRCD 329.[36] The new law proceeded on the basis of;

- the absence of a consolidated piece of legislation that governed the generality of foreign investment activities in the country.
- a lack of a framework to assure investors of the security of their investment capital;

31 Section 2(3) of the CIA.
32 Dagbanja (n 23).
33 NLCD 141 came into force on 10 January 1973.
34 This was in pursuant to section 26 (1) of the Ghanaian Business (Promotion) Act 334 of 1970.
35 Regulation 1, L.I. 670 of 1970—Restriction on Foreign Sales Agents. A non-Ghanaian or alien enterprise shall not carry on business as an agent for the sale or promotion of the sale of any product or group of products of any principal not resident in Ghana unless such non-Ghanaian or alien enterprise is licensed by the Minister in accordance with these Regulations.
36 Section 50 of the Investment Act 437 of 1981.

- the prevailing non conducive economic and political milieu for private capital investment; and
- the lack of fiscal legal regime that provided an assurance for risks in productive sectors of the economy.

The objective of the Act 437 was to codify and merge all exiting legislations on investment preceding the administration of the Third Republic to among others;[37]

- redefine the areas and the extent to which non-Ghanaians were allowed to invest in Ghana,
- redefine priority areas of investment and conferring additional and wider range of benefits for investors, and
- to provide for various incentives and protections to foreign investors.

The focus on promoting indigenous Ghanaian investment interests culminated in the promulgation of the Ghanaian Business (Promotion) Act.[38] It redefined and highlighted the areas where non-Ghanaians and Ghanaians were expected to invest. Pursuant to this objective, the Ghana Investment Centre (GIC) was birthed under Act 437 with the mandate to promote and regulate all investment activities in the country.[39]

The Provisional National Defence Council (PNDC) military rule under Flt. Lt. Jerry John Rawlings from 1983 saw Ghana through an International Monetary Fund programme, the Structural Adjustment Programme (SAP),[40] which gave the country an opportunity to liberalise its economy for effective private sector participation in all sectors. To this end, the Act 437 was repealed by the Investment Code, 1985 (PNDCL 116),[41] which identified businesses only allowed for Ghanaians to undertake and incentivised all investments that focused on key sectors of the economy.[42] It must be noted that the GIC never ceased to exist under the new law of PNDCL 116.[43] Again, the emphasis of this legal regime was centred on national development and public interest. Conditions precedent for registration of enterprises for the purposes of investment followed the same requirements under Act 437.[44]

37 Dodoo (n 27)1080.
38 Act 334 of 1970.
39 Sections 1(1) and 10(1) of Investment Act 437 of 1981.
40 Para. 3 of Preamble of Investment Act 437 of 1985; Ackah C, Adjasi C and Turkson F "Industrial Policy in Ghana: Its Evolution and Impact" 1-25.
41 Section 39(1) of Investment Code (PNDCL116) of 1985.
42 Section 12,16 and Schedule 5 of Investment Code (PNDCL116) of 1985.
43 Section 1(1) of Investment Code (PNDCL116) of 1985.
44 Sections 11(1) and 23 of Investment Act 437 of 1981.

In all the legal provisions from 1963 to 1994, the meaning and scope of investment was restricted to assets-based projects. Portfolio investment[45] was less contemplated under these regimes until the repeal of PNDCL 116 in 1994. All the incentives outlined and the programmes in that regard only benefitted the tangible investments.

The liberal investment era 1994-2013

In 1994, under the Fourth Republic, PNDCL 116 was replaced with the Ghana Investment Promotion Centre Act 478 of 1994 The Act 478 established the Ghana Investment Promotion Centre (GIPC) which replaced the GIC of 1985 under Act 172.[46] The objective of Act 478 highlighted the encouragement, promotion and protection of various investments in the country.[47]

Unlike the investment requirements under the first phase, this regime required the satisfactory provision of a minimum capital to qualify as a foreign investor in Ghana.[48] Additionally, the minimum capital under PNDCL 116 was reduced for the dispensation under the Act 478 with the view to reducing cost to encourage joint ventures between foreign investors and local entrepreneurs and enterprises that needed to rely on other expertise and technology.[49] As part of the requirement for admission to invest capital in the economy under the former era, an investor(foreign or local) did not only need a certain capital but was also to satisfy conditions such as giving training to Ghanaian citizens, meeting some environmental control measures and making use of some amount of local raw material.[50] These criteria were missing from the requirements under Act 478 as a deregulatory measure to attract much investment. Of course, development cannot outlive its essence in investments but public interest was deemphasised under the Act 478 as the definition and content of investment shifted towards a theoretical leaning encompassing both direct and portfolio investments.[51]

In 2013, Ghana revised its investment law policy direction with the repeal of the Act 478 and

45 We take portfolio investments to mean investments in intangibles.
46 Section 1 of GIPCA of 1994.
47 Section 2(1) of GIPCA of 1994.
48 Section 19 of GIPCA of 1994.
49 Ghana Investments Promotion Bill: Memorandum (20 November 1993), 2. The capital requirement for joint business between Ghanaians and foreign investors under the PNDCL 116 was reduced from US$ 60 000 to US$ 10 000. For ventures wholly owned by foreigners, the minimum capital was reduced to US$ 50 000 from US 100 000 under the PNDCL 116 and US$ 200 000 under the Investment Code (Amendment) Law, 1992 (PNDCL 292) under the GIPCA.
50 Section 23(2) of Investment Act 437 of 1981; Section 26(2) of Investment Code (PNDCL116) of 1985.
51 Section 40 of GIPCA.

passed the Ghana Investment Promotion Centre Act ,2013 (Act 865). This was attributed to the weaknesses identifies with the GIPCA.[52]

It has been argued that some provisions in the current Act are incongruent with Ghana's investment treaty commitments because the legislature did not adequately contemplate standards required for consistent law with the country's treaty commitments.[53]

The investment climate of Ghana today

Ghana has remained stable with strong democratic governance system for over two decades since 1993, with progressive institutional and legislative credentials within sub-Saharan Africa.[54] The effectiveness of key national legislations and institutional framework has served as impetus for the investor confidence Ghana enjoys.[55] Despite the challenges facing the economies of many developing countries, Ghana's own records with economic performance has been relatively superior to its contemporaries.[56] Presently, the World Bank's Ease of Doing Business Report 2019 rates Ghana as the fastest growing economy in the world and the best place for doing business in West Africa.[57]

Generally the investment laws and regulations have been the basis for Ghana's relatively conducive investment environment in the subregion.[58] As expected, most of these laws have received amendments over the years to conform to the best international standards. The product of such reviews has resulted in the current GIPCA which came into force in 2013. The strengths of Ghana's investment environment depend largely on ACT 865 and other related legal arrangements in force. It is noted that:

First, the Act 865 provides guarantees that assure investors concerning prohibition against discrimination and expropriation.[59] Second, the Foreign Exchange Act, 2006 (Act 723) provides guarantee for unconditional transferability of profits for all enterprises freely in convertible currencies. Third, it is also important to underline that; Ghana belongs to

52 Para. 4 of Memorandum to Ghana Investment Promotion Centre Bill 2013.
53 Dagbanja (n 23).
54 Ayangbah and Sun (22).
55 GIPC date unknown https://www.gipcghana.com/invest-in-ghana/why-ghana.html.
56 Institute of Statistical, Social and Economic Research 2016 http://isser.edu.gh/index.php/sger.
57 The World Bank Ease of doing business Index https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=GH&display=graph--%3E.
58 Ayangbah and Sun (n 22).
59 Laws and Regulations date unknown *Doing Business and Applicable Laws in Ghana*https://www.gipcghana.com/invest-in-ghana/doing-business-in-ghana/laws-regulation.html accessed 4 October 2019.

the league of nations that have pledged to provide investment guarantees against non-commercial risks for investments in developing countries under the Multilateral Investment Guarantee Agency (MIGA) of the World Bank.[60] Fourth, the investment environment in Ghana is further boosted with the government's signing on to the Bilateral Investment Promotion and Protection Agreements (IPPAs) and the number of Double Taxation Agreements (DTAs)[61] with some countries.[62] And lastly, Ghana also has executed a number of (ratified and unratified bilateral) investment treaties with countries in the global North and South. So far, it is estimated that Ghana has executed over twenty-seven (27) of such BITs.

These are deliberate actions toward a secured and safer investment regime.[63] However, it is observed that , in the current circumstances a further review of Act 865 is needed to promote a better condition for the country's international trade and investment relations.

Review of the legal underpinning of Economic Community of West African States and its mandates

The system of laws governing the structures of ECOWAS can be part of the international laws[64] that regulates inter states relations. Per the *par in parem non habet imperium rule,* all member states under a treaty in international law have equal sovereignty which does not allow one to exercise any other power above the other(s).[65] A treaty under international law is aimed at outlining a common force to bind on nations on their rights and obligations.[66] According to Bennett and Strut, treaties "…are not, strictly speaking, sources of law."[67] Whereas laws are made to be binding on its adherents, willy nilly, treaties only become as good as law when it receives consent of the promoters,[68] which will receive the force of the maxim *pacta sunt servanda.*[69] The nature of international relations have been such that treaties have evolved as the acceptable pacts for regulating rights and obligations of states in international law.

60 Laws and regulations (n 61).

61 Ghana has executed DTAs with countries like Belgium, Denmark, France, Germany, Italy, Netherlands, South Africa, Switzerland, United Kingdom(ratified) and Singapore (unratified). It is noteworthy that these agreements have no country from the ECOWAS subregion and in the larger African region except for South Africa(ratified) and Mauritius and Morocco (unratified).

62 Laws and regulations (n 59).

63 Laws and regulations (n 59).

64 International law is defined as a system of rules governing relations among states; Bennett and Strug *Introduction to International Law* 1.

65 Bennett and Strug (n 64)15.

66 Bennett and Strug (n 64)12.

67 Bennett and Strug (n 64)12.

68 Bennett and Strug (n 64)12.

69 The agreement must be obeyed: This is the basic principle underlying treaties.

In 1975, a 16 member-state agreed, under a multilateral treaty-The Economic Community of West African States (ECOWAS) Treaty to form the Economic Community of West African States. The treaty was signed in the Nigerian capital of Lagos on 28 May 1975 by all 16 heads of states of West African sovereign nations in SSA.

To meet the exigencies of the present world development order and aspirations of member states, the 1975 treaty was updated, accepted and executed by heads of states and governments of 15 countries (apart from Mauritius)[70] in Cotonou, Benin Republic in July, 1993.

To commit the member countries to an enhanced regional economic bloc, the 93 articles of the new treaty demanded an agreement to those commitments in the signed treaty. It was to further bound the states to their obligations under the original 1975 treaty and review its successes. It is obvious to underline that; member states of ECOWAS are obliged under duty to renew commitments to seek the general economic and socio-political wellbeing of its members by accelerating its efforts through means that resonate with present development paradigms. The review of its treaty therefore was a genuine effort to this end. It is this commitment that we seek to emphasise as a responsible step towards the achievement of the laudable aspirations of the community. Underlying this consideration was the conviction that all steps to engendering economic development required a concerted and conscious effort by all states to harmonize their policies to make them a competitive block within the comity of nations. Another leg on which the review stood was the fact that,

> the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignty to the Community within the context of a collective political will.[71]

The principal areas of operation of ECOWAS have been;[72]

- expanding the regional market;
- harmonising agricultural and industrial policies through production integration;
- ensuring the harmonious integration of physical infrastructures;
- promoting monetary and financial integration to facilitate trade;
- maintaining regional peace, stability, and security; and
- ensuring free movement of persons, including rights of residence and establishment.

It must be noted that despite the focus by the Community to facilitate rapid development

70 Mauritius has ceased to be a member of ECOWAS.

71 ECOWAS date unknown https://www.ecowas.int/ecowas-law/treaties/.

72 Aryeetey E "Regional Integration in West Africa, No. 170 Research programme on: Integration and Co-operation in Sub-Saharan Africa" 2001*OECD Development Centre* Working Paper), 13-14.

of cross boarder trading, the speed of the liberalisation process has been impeded by the unwillingness of states to adhere and fulfil their obligations under the elimination of key issues on tariff and non-tariff trade barriers.[73]

The Government of Ghana has consistently pledged its commitment to the implementation of the ECOWAS Protocol on Free Movement of Persons, Goods and Services, the Right of Residence and the Right of Establishment.[74] This protocol is geared towards creating a single ECOWAS Regional Community to help remove all hindrances to free movement of people, goods, services and capital in the subregion.[75] The objectives of the mechanisations is to "simplify and facilitate the movement and crossing of land borders and eliminate intermediate road side checks, delays and perceived illegal benefits; while ensuring the safety of people in a safe environment."[76]

An assessment of the ECOWAS protocol on free movement of people and goods

A. **The 1979 Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment**

This is the principal legal regime that concerns and is intended to give a practical meaning to the overall core objective of the ECOWAS as a regional body for the integration of its markets and people toward sustainable development. The mandates set in the Protocol are that it:

- Sets out right of Community citizens to enter, reside and establish in territory of member states as found under Art. 2(1).
- Establishes three-phased approach over 15 years to implementation of (i) right of entry and abolition of visas, (ii) residence and (iii) establishment; under Article 2.

73 Aryeetey (n 72) 22.

74 Ghana News Agency(GNA) 2017 https://www.tralac.org/news/article/12155-ghana-commits-to-ecow-as-free-movement-protocol.html.

75 GNA (n 82); Ghana has moved on to inaugurate the National Steering Committee for the Regional Monitoring Mechanisms for Free Movement of Inter-State Passenger Vehicles, Persons and Goods within ECOWAS in 2017. This was organised within the framework of the ECOWAS-Swiss Agreement for the removal of harassment along ECOWAS highways and the joint ECOWAS EU funded 10th European Development Fund (EDF) Project "Support to Free Movement of Persons and Migration in West Africa". Ghana was one of the eight countries (with Benin, Burkina Faso, Mali, the Ivory Coast, Niger, Nigeria and Togo) selected by the ECOWAS commission to pilot the national steering committee to operationalise the mechanism at the 46th Session of the Council of Ministers and 73rd Session of the Conference of Heads of States and Government.

76 GNA (n 74).

- Conditions entitlement to enter territory of member state on possession of valid travel document and international health certificate in Article 3(1).
- Reserves right of member states to refuse admission into territory of Community citizens deemed inadmissible under domestic law as stated under Article 4.
- Establishes some requirements for expulsion under Article 11.
- Confirms that Protocol does not operate to detriment of more favourable provisions in other agreements concluded by member states as under Article 12.

The ECOWAS Protocol on the Free Movement of People and Goods entertains the free movement of citizens of member states within the Community. It confers on such citizens the right to enter and reside in the territory of any member state as long as such citizens had the requisite valid travel documents as required by the country applied to.[77] It does not however, deny a member state to refuse the entry any such citizen on reasons under its own national laws.[78] It can be argued that the rationale for Article 3 is a natural response to a fundamental principle of international law and trade, known as national treatment which underpins almost every treaty across the world.[79] National treatment requires that any time a nation confers any right on or gives any benefit or honour to its citizen, it is obliged to confer same to citizens of other states who reside and operate in that country.[80]

B. **The four supplementary protocols**

Between 1985 and 1990 four supplementary protocols have so far being adopted by the Community which committed member states to the following among other things:

- To make provision for valid travel document to their own citizens;
- To grant and facilitate Community citizens' right to apply to reside in the countries to seek and carry out income-earning employment;
- To ensure appropriate treatment for persons under expulsion from member states;
- To disallow the expulsion of Community citizens en bloc; and
- To limit the basis for individual to be expelled to reasons of national security, public order or morality, public health or non-fulfilment of a critical condition of residence.

77 1986 Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence).
78 Right of Residence (n 77).
79 OECD 2004 *OECD Working Papers on International Investment*.
80 OECD 2004 *Working Papers on International Investment.*

The objectives of the four individual supplementary protocols are set out as follows:[81]

1. **1985 Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment.**

- Obliges member states to provide valid travel documents to their citizens.
- Establishes additional (to Article 11 of Protocol) requirements for treatment of persons being expelled (Article 4)
- Enumerates protections for illegal immigrants (Articles 5 and 7)

2. **1986 Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence):**

    - Requires states to grant to Community citizens who are nationals of other member states "the right of residence in its territory for the purpose of seeking and carrying out income earning employment."
    - Conditions entitlement to residence on possession of an ECOWAS Residence Card or Permit, and harmonization by member states of rules appertaining to the issuance of such cards/permits.
    - Prohibits expulsion en bloc and limits grounds for individual expulsion to national security, public order or morality, public health, non-fulfillment of essential condition of residence.
    - Stipulates equal treatment with nationals for migrant workers complying with the rules and regulations governing their residence in areas such as security of employment, participation in social and cultural activities, re-employment in certain cases of job loss and training.

3. **1989 Supplementary Protocol A/SP.1/6/89 amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment:**

    - Amends provisions of Article 7 of Protocol to confirm obligation on signatories

81 Adepoju, Boulton and Levin 2010 *Refugee Survey Quarterly* 120-144.

to resolve amicably disputes regarding the interpretation and application of the Protocol.

4. **1990 Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right to Establishment):**

- Defines the right of establishment emphasizing non-discriminatory treatment of nationals and companies of other member states except as justified by exigencies of public order, security or health.

- Forbids the confiscation or expropriation of assets or capital on a discriminatory basis and requires fair and equitable compensation where such confiscation or expropriation.

Analysis of sections 27 and 28, and challenges to the implementation of the Act 865

As the analysis above has pointed us, a long journey has been taken both at the ECOWAS level and the national level regarding investment laws. Further as has been noted already, The Ghana Investment Promotion Centre Act 865 of 2013 was passed, in pursuance to article 36(4) of the Constitution, to replace the Ghana Investment Promotion Centre Act 478 of 1994.[82] The provisions of Act 865 covers virtually everything on investment from the entry and admission of investors into any sector in Ghana; the protection of their investment and guarantees; employment; and their compliance to the laws of Ghana.[83] The Act was further passed with an aim to further promoting and encouraging investment in the country.[84] An overview of the Act shows that it seeks to protect the foreign investor against discrimination under section 30 by granting the foreign investor, the employee or worker the same rights and obligations as local investors. [85] This also includes the frowning on of special treatment given to prospective investors based on their nationality or country of origin.[86] Also, the same laws that apply to domestic enterprises in similar enterprises in relation to licenses, permits, maintenance of books and records, insurances and taxes, are also applicable to the foreign investor.[87] The investor is further guaranteed under the act against the expropriation of his/her investment wherein, expropriation can only ensue where it is in the national interest and made under a law which grants the investor a fair and adequate compensation and further

82 Section 44 of Act 865.

83 Some sectors such as Banking, insurance, fishing, securities, telecommunications, real estate, mining, oil, Gas, energy and the non-banking financial institutions have specific laws of which the investor must comply with when making investment into those fields.

84 Section 4 of Act 865.

85 Section 30(a) of Act 865.

86 Section 30(b) of Act 865.

87 Section 30(c) of Act 865.

allows the investor the right to go to court for any determination in relation to the rights of the foreign investor or the compensation payable.[88]

Also, the foreign investor is guaranteed subject to the Foreign Exchange Act, 2006 (Act 723) and the Regulations and Notices issued under the Foreign Exchange Act, of an unconditional transferability in freely convertible currency of the dividends or net profit accruing from the investment, payments of loan servicing with respect to foreign loans which might have been obtained, fees and charges on technology transfer agreements and remittances, net of taxes and such amounts in the event the enterprise liquidates.[89] Also under Section 33 of the GIPC Act 865, dispute resolution mechanisms are laid out to protect the investment of the investor. In order to prevent conflict of interests and to ensure there is a fair outcome in any dispute between the government and the investor, the act provides for a two staged dispute resolution approach. The foreign investor and the government, in the event of a dispute must first and fore-most attempt at settling the dispute amicably through a mutual discussion.[90] Where the mutual settlement is not reached within six months of the negotiations, the party aggrieved may submit the matter for an arbitration in accordance with the procedures of the United Nations Commission of International Trade Law.[91] Alternatively, and where there is a framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties to, the investor may take advantage of it and submit the dispute in accordance with it.[92] The parties are however not limited to any specific procedure of dispute resolution. The parties can agree on any specific dispute resolution mechanism they prefer where locally or internationally.[93] Expatriate quotas are also afforded investors based on the amount of investment invested in the country.[94]

Generally, under the Act 865, investors are afforded a conducive climate to invest. The main challenge rests with the difference in treatment that lies between the Ghanaian investor and the foreign investor and that poses as a grave challenge in implementing the Act. We argue that, these restrictive provisions are afront to Ghana's commitment to the integration protocol of ECOWAS.

Notwithstanding the aim as stated in the Act, some authors have argued that the main aim

88 Section 31 of Act 865.
89 Section 32 of Act 865.
90 Section 33(1) of Act 865.
91 Section 33(2)(a) of Act 865.
92 Section 33(2)(b) of Act 865.
93 Section 33(2)(c) of Act 865.
94 Section 35 of Act 865.

of the promulgation of the Act was to protect the Ghanaian investor from unfair competition from foreign businessmen.[95] This thus meant that the minimum capital requirements for investment by foreigners had to be increased. For instance, the minimum capital required to trade by foreigners under the Act was increased to $1 million in cash or goods[96] from $300,000 under Act 478. Also, for foreigners to invest in any enterprise other than those reserved for Ghanaians or in a trading enterprise, the foreigner must do so with a Ghanaian having at least a 10% equity interest in the joint investment/enterprise and must have at least a foreign capital of not less than two hundred thousand United States dollars in cash or capital goods relevant to the investment or a combination of both.[97] Alternatively, when the foreign investor chooses to invest alone without the $500,000 in cash or capital goods relevant to the investment or a combination of both by way of equity capital in the enterprise.[98]

Looking at the onerous capital requirements differently, it is still observed that the Act seeks to encourage the foreigners to engage in large scale investment and trading in order to protect the petty trading activities of Ghanaians and rightly so, the Act under section 27 reserves some activities for only Ghanaian owned enterprises. Under section 27, foreign investors cannot channel their investments into areas like taxi operation,[99] beauty and barbering salon operation,[100] stationery and book printing,[101] the printing of recharge cards[102] and some other more.

Establlishing the conflict of Sections 27 and 28 of 865 with the Freedom of Establishment under ECOWAS Protocols on Free Movement

The revised Treaty of the Economic Community of West African States (ECOWAS) (COTONOU 1993)[103] in no ambiguous terms states that the aim of the community is to promote cooperation and integration amongst its members so as to lead to the eventual establishment of an economic union in West Africa. The long-term aim of that is to see to the increase in the standards of the people in West Africa as well as to maintain economic stability and good relation amongst the members. To be able to realise this aim, the member states agreed on some practical measures and notable amongst them is that the member

95 Quartey 2013 https://www.theafricareport.com/5512/ghana-revises-investment-laws-to-safeguard-local-traders/.
96 Section 28(2) of Act 865.
97 Section 28(1)(a) of Act 865.
98 Section 28(1)(b) of Act 865.
99 Section 27(b) of Act 865.
100 Section 27(c) of Act 865.
101 Section 27(e) of Act 865.
102 Section 27 (d) of Act 865.
103 Article 3(1) of the revised Treaty of the Economic Community of West African States (ECOWAS) of 1993 (COTONOU 1993).

states are to ensure there is an establishment of a common market through "the removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment."[104]

Moreover, and more recently, under the Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment, under article 17, the right to establishment is recognised wherein member states are given the right of establishment in other member countries. The right of establishment defined there includes the right to set up one's trade or profession or vocation or any economic activity as a self-employed person.

The right to establishment is defined under Supplementary Protocol A/Sp.2/5/90 of the ECOWAS as

> the right granted to a citizen who is a national of the Member State to settle or establish in another Member State other than his State of Origin, and to have access to economic activities, to carry out these activities as well as to set up and manage enterprises, and in particular companies, under the same conditions as defined by the legislation of the host Member State for its own nationals.[105] (Emphasis are ours).

Thus, pursuant to the freedom of establishment, a national of a member of the community has the right to establish his/her business in the territory of another member country in accordance with the laws of that country without discrimination as being a "foreigner". Rightly so, article 4 of the protocol prohibits any form of discrimination to non-nationals. Thus, the states must accord the same treatment to non-nationals as it does to its own national. The state is only given the leeway to create a differential treatment in relation to a specific activity. With that, the state must indicate such activity to the Executive Secretariat.[106] Further under article 12 of the Supplementary protocol, there is a duty on member states to eliminate all forms of administrative procedures as well as internal laws (and this applies to any sector in the economy) which may serve as an impediment to the freedom of establishment.[107]

With the freedom of establishment in mind, vis a vis Sections 27 and 28 of the GIPC Act 865, an apparent conflict in law is evident. The reserve of some economic activities under section 27 for only Ghanaians seem as nothing but a protectionist measure. The provisions of the Ecowas Protocols prohibit such a conduct. All member states under the ECOWAS pledged to

104 Article 3(2)(D)(iii) of COTONOU 1993.
105 Article 1 of the Supplementary Protocol A/Sp.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment.
106 Article 4(2) of the Supplementary Protocol A/Sp.2/5/90.
107 Article 12(2) & (5) of the Supplementary Protocol A/Sp.2/5/90.

ensure economic integration amongst the member states. They pledged to support economic coexistence of which such discrimination as done under article 27 of the current GIPC Act was not contemplated. Further, the minimum capital requirements under article 28 of the Act 865 is also nothing but onerous which is also construed as a protectionist measure to secure the investments for the locals. Since there is a prohibition on treating nationals different from non-nationals under the ECOWAS protocols, if the government of Ghana seeks to impose such hefty amounts as minimum capital requirements before investing by foreigners, then it must be same for the locals too. Anything short of it may amount to discrimination of which violates the freedom of establishment.

Conclusion

Investors have a key role in the management of the affairs of such investments anywhere**.** It has been established that a more secured avenue for financing economic growth and progress is through the means of FDI than through multinational[108] aid or loans.[109] One means to accelerate economic growth for poor nations is by means of increased capital injections into such economies by FDIs.[110]

As discussed in this paper, the Ghanaian investment regime has taken on different phases over the years. It has also been shown that the investment laws in Ghana have a history and it is from that history that many of the current laws have evolved from. Investors enjoy protection under the investment regime from such Acts as expropriation and dispute settlement. The current outstanding *de merit* with the investment laws as identified in this article has been the protectionist measure, rather than the desired liberalisation, as has been adopted by sections 27 and 28 of Act 865. It has been shown that the said sections contravene the ECOWAS protocols on the free movement of people, more specifically the Supplementary Protocol A/Sp.2/5/90 of the ECOWAS.

There is no reason in allowing for such explicit contravention of the Ghanaian laws with the ECOWAS laws especially when the contravention causes mayhem and a lack of implementation. It is settled that international treaty agreements requires a country to conform to it with its municipal laws. As nationals of the ECOWAS countries are allowed free movement across the member states, freedom must also be granted them to find work that suit their skills so as to prevent them from becoming a liability in the country by being unemployed. If the country will also see more investments, then the capital requirements for foreigner investors must not be employed as a protectionist measure.

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108 Example is the international Monetary Fund aid. See also Bradlow 2018 *IORJ* 213–236.
109 Moyo *Dead Aid: Why Aid is Not Working and How There is a Better Way for Africa.*; UNCTAD 2011 https:// www.unctad-docs.org/files/ UNCTAD-WIR2011-Full-en.pdf.
110 Hunter Jr. 2003 *Oklahoma City University Law Review* 28-851.

Amendments of sections 27 and 28 of Act 865 are therefore in order to the extent that it will intersect with Ghana's commitments to its obligation as a signatory to the ECOWAS protocol. As a key voice for economic transformation of the sub-region, Ghana must take the lead to transform its investment environment through a progressive legal environment that conforms to every protocol it has ratified in the ECOWAS subregion. The provisions of the Act 865 have to respond to the growing importance of market integration and both intra and international commerce. Global markets phenomenon requires concerted efforts at integrating smaller markets to compete favourably on the world stage. This throws a daunting challenge to developing economies such as Ghana and its neighbours to look beyond their respective domestic laws and concentrate on building interconnectedness in trade and investment opportunities to that effect to achieve integration.

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REFLECTIONS ON IDENTITY AND TERRORISM: A TALE OF MISFIT

Linda Peasah Owusu[1], Thomas Prehi Botchway[2], Elijah Tukwariba Yin[3] and Constantine Kojo Mawuena Kudzedzi[4]

ABSTRACT

This paper focuses on the relationship between discursive exclusion practices and terrorism. The changing linguistic meaning of civilisation, the structure of modern discourse and the objectivity of knowledge claims undergirding western civilisation have contributed immensely to the construction of the idea of terrorism. The paper argues that these expressions of self and practices define the individual and give credence to their existence. Using some examples of violent acts, the paper illuminates the biases in the usage of the term terrorism and its implications on the apparatuses adopted to minimise it.

Keywords: Identity, Muslim, Civilisation, Terrorism, Counter-Terrorism

1 Center for Migration Studies, University of Ghana, Legon
2 Department of Political Science Education, University of Education, Winneba
3 Faculty of Law, University of Cape Coast
4 Faculty of Law, University of Cape Coast

Introduction: Re-conceptualising the world and intellectual formations

A question as simple as 'who are you, and where are you from?' may be both problematic and revelatory. This mostly stems from the fact that the expected answers to both questions may be premised on the complex issues of identity and power structure. Commenting on the book 'Who are you and should it matter in the 21st century' by Gary Younge, Safraaz Mazoor recounted his experience when he remarked,

> Neither my passport nor my accent nor the fact that I had spent virtually my entire life in Britain qualified me, in this woman's eyes, as British. Since she appeared not to be persuaded by my honest answer that I was British I eventually explained that my family was originally from Pakistan, and this satisfied her.[5]

Indeed one realises his identity when he/she is told of what he/she is. As 'Black Africans', we never had to explain who we were and what we are among our kin and there was 'no need of consciousness' of self until we left the shores of Africa. Thus, we mostly experience our being through other,.[6] Younge[7] correctly notes that identity is dependent not only on the individual but also the behavior of the wider world. Most of the things we have come to know and understand about ourselves like history, sexuality or even our very existence or humanness are narratives told in the classics and history as written by the victors. Like the proverbial African adage goes, 'until the lion finds his own historian or tells his own story, the tale of the hunt will always glorify the hunter.'

A story is never complete until one hears from both sides. The one who does not have the voice is often the loser. The current history has been told and written from the dominating class' perspective in such a way that the victims' voices are silenced. The task of this essay is to shed light on real history; that is history as we have lived it, to deconstruct some of the mainstream assumptions and theories that have occupied the centre stage of our academic discourse and to further appreciate how inter civilisation exchanges and heterogeneity have been very pivotal in human interactions at different epochs in human history. Thus, there are discourses that constrain the production of knowledge, dissent and difference. Also, as indicated by Pennington[8], 'there is a common Aristotelian

5 Manzoor (2010), "Who Are We – and Should It Matter in the 21st Century? By Gary Younge: Sarfraz Manzoor considers a world in flux," Available: https://www.theguardian.com/books/2010/may/29/gary-younge-who-are-we. [Accessed 1 October 2018]

6 Fanon (2000), "The Fact of Blackness," in *Theories of Race and Racism: A Reader*, Abingdon and New York, Routledge pp. 257-260.

7 Younge (2011), Who are We - And Should it Matter In the 21st Centrury?, New York: Nation Books.

8 Pennington (2012), Teaching Religion and Violence, B. K. Pennington, Ed., Oxford, New York: Oxford University Press, p. 4.

structure' and 'a mythic aura' to the stories of violence usually portrayed in the media. Thus, there is usually a kind of bias in reportage on violence conflicts, and terrorism. Thus, the questions that arise within this framework, are to do with how some discourses have maintained their authority, how some 'voices' get heard whilst others are silenced; who benefits and how? We thus seek to analyse the construction of threat perception and how the idea of terrorism has come to represent a certain religious group and its adherents.

Consequently, telling our own story implies rejecting the idea of a single story – that is we reject the discriminatory and oppressive expressions used to describe certain groups and particularities. The Nigerian writer, Adichie[9] rightly sums it up – 'single stories create stereotypes. The problem with stereotypes is not that they are untrue but they are incomplete.' This is especially true for some identities like being a Muslim in the 21st century. The narrative of a Muslim identity has, in recent times, always been associated with mass violence, and terrorist tendencies. The way we came to perceive ourselves since our contact with the West has drastically changed the way we look at reality; as succinctly put by Ryan McIlhenny 'reality is a social construction, and "truth" is nothing more than what our academic colleagues let us get away with.'[10] For instance, the way we see ourselves today as Blacks, Ghanaians, Christians, colonised, poor, Third World citizens, etc. was absent in Africa a century ago; so is the narrative of a Muslim being told. As individuals having all these attributes, not only are we expected to behave in a certain way, but we come to think about ourselves in that way. Thus, our worldviews are somehow tending to be defined by these attributes. This way of portraying ourselves by the dominant culture is a contributory factor to the presumably upsurge of 'Islamic radicalisation' being experienced in recent past.

Like tragedies in the past (the great depression, world wars, etc.), the events of 9/11 are etched in the memories of many people – global security was threatened and a war on terror declared. The increasing upsurge and rampant attacks we experience frequently, the level of mayhem and the destruction of life and property gone down the drain has made terrorism an enigma in this postmodern age. It is no surprise therefore that a lot of resources have been committed into finding a long lasting solution to this canker. Despite these genuine efforts and attempts at solution, the desired outcome has

9 Adichie (2009), "The danger of a single story - Chimamanda Ngozi Adichie," Available: https://ed.ted.com/featured/TXtMhXIA. [Accessed 1 October 2018]

10 McIlhenny (2007), "The Postmodern Condition as a Religious Revival: A Critical Review of William Connolly's Why I am Not a Secularist, Dipesh Chakrabarty's Provincialising Europe, and Alvin Plantinga's Warranted Christian Belief," Nebula, pp. 151-163, p. 152.

been very minimal due to the reactionary response methods applied which is mostly propagated and sanctioned by rational theories and objectivity of knowledge claims. [7][11] However, it is proper to acknowledge the few discourses and academics who recognize the intricacies, multi-faceted and deep rooted source of this menace (as steeply embedded in issues of intellectual formations, identity and power) – that is to suggest that 'a boot for boot' kind of response which could be partly explained in our rational thought as presented and perpetuated over the years by the extraordinary domineering knowledge claims and rational theories have failed to yield the desirable outcome as far as counter-terrorism is concerned.

Despite that the unanimity of thought has stifled any real progress and development, and has resulted in entrenched subject-positions, there is no attempt at re-conceptualising our way of life. The European/Western narrative is still held onto.[12] [13] Grovogui[14] clearly captures this point:

> The idea of a self-contained and superior Europe did not become authoritative until after the seventeenth century when the Christian emporium of Europe was first projected metaphysically as a separate and self-contained civilizational sphere. This professed uniqueness of Europe was upheld by Enlightenment and subsequent ideologies…. Europe alone possessed reason (rationality), science (positivism), and sensibility (pragmatism).[15]

And so, as history records, the eighteenth century marked a watershed moment when the autonomy of human reason and deism in Europe characterised the organisation of knowledge, society and the conduct of politics – an emphasis on objectivity of knowledge as a key pillar to the emergent secular age. Thus, Western Europe became synonymous with the idea of rational thought, a proprietor of rationality upon which all other forms of thought and discursive practices was based.[16] According to Spellman[17], most of the

11 Smith (2004), "Singing Our World into Existence: International Relations Theory and September 11," *International Studies Quarterly,* vol. 48, no. 3, pp. iv+499-515.

12 Ibid

13 Ernst (2003), Following Muhammad: Rethinking Islam in the Contemporary World, Chapel Hill and London: The University of North Carolina Press.

14 Grovogui (2006), Beyond Eurocentrism and Anarchy: memories of International order and institutions, New York: Palgrave Macmillan.

15 Ibid, p. 27.

16 Merriam Jr. (2001), History of the Theory of Sovereignty since Rousseau, Kitchener, Ontario: Batoche Books.

17 Spellman (2011), A Short History of Political Thought, New York: Palgrave Macmillan, p. 86.

thinkers of this epoch regardless of national or social origins were united in the belief that progress can only come by as a result of the application of human reason. Grovogui[18] in a similar line of thought has argued that,

> …. two categories united by the twin belief in the infallibility of "western canons" …. The first category…who envisions Europe as proprietor of legitimate science…. The other category includes critical and reflexive theorists who position themselves against the historic self-representation…. but they assume themselves of western origination of crucial ones.

Modernity and modern theories in sociology became associated with this period – progress became a corollary of modernity. Development therefore implied the jettison of spirituality/superstition and the acceptance of science or facticity.[19] Prominent scholars outlined a linear pathway to progress, a blue print where all must follow to realize progress.[20] Also, Max Weber's thesis about societies and his dichotomy between traditional societies and modern societies and other enlightenment thinkers like Kant, Hegel, Karl Marx further accentuated the superiority of Western civilisation.[21] Although this homogenisation and objectivity of thought, knowledge and culture seem natural to the modern mind, this form of thinking is only about five hundred years old. Menon[22] has opined that the enlightenment and its corollary that is a constellation of features we term modernity were absent in Europe prior to sixteenth century.

It is worth emphasising that in nonwestern societies, these independent criteria of truth and acclaimed objectivity of scientific knowledge and methods have been strongly contested overtime. It is against this backdrop, these internal voices that these countless numbers of questions are asked; can European civilisation and discourse based on its objectivity and rationality be justified and ascertained? Are cultures pure, traditions self-enclosed or identity monolithic? Can the root cause of terrorism be attributed to the changing linguistic meaning of terrorism and the silence of other civilisations? Is there

18 Grovogui (2006), opt cited, pp. 4-5.

19 Merriam Jr. (2001), History of the Theory of Sovereignty since Rousseau, Kitchener, Ontario: Batoche Books.

20 Encyclopaedia Britannica, "Walt Whitman Rostow (2018)," October 2018. Available: https://www.britannica.com/biography/W-W-Rostow. [Accessed 10 October 2018]

21 Mitzman (2018), "Max Weber," 28 September. Available: https://www.britannica.com/biography/Max-Weber-German-sociologist. [Accessed 10 October 2018] See also Feuer and McLellan (2018), "Karl Marx," 28 September. Available: https://www.britannica.com/biography/Karl-Marx. [Accessed 10 October 2018]

22 Menon (2012), Seeing like a Feminist, London: Penguin.

only one blue print to progress and modernity? This essay is thus a moderate attempt at comprehending the upsurge, intensity and frequency of terrorist activities in this time past by connecting these themes to identity construction and how some rational methods and approaches have silenced other modes to thinking and expression of self.

The changing linguistic meaning of civilisation

The idea of civilisation has over the years been linguistically linked to western societies and practices and for which reason nonwestern societies and cultures, together with their practices and beliefs have at some times been compelled to fall in line with supposedly what has been referred to as the practices of civilized nations.[23] With civilisation been associated with the West and all others been expected to learn and follow their lead, anything different may be perceived as abnormal – a perception that has been used by some populists and supposedly nationalist politicians and media practitioners in the West. It is this perception that has particularly fueled the tagging of Islam and other cultures as relatively uncivilized and eventually generalizing about Islam and acts of terrorism.

According to Sudipta Kaviraj[24], there is a changing linguistic meaning of civilisation; that is a shift in the use of the term civilisation itself. Kaviraj notes that before this conceptual and theoretical change, the European Christian civilisation was contrasted with equally and respected forms of civilisations like Islam and Hindu. European civilisation therefore before this watershed moment was one of the many civilisations that existed and not the sole civilisation. This acknowledgement of the existence of more than one civilisation is well explicated in Huntington's 'Clash of civilization?' where he hypothesized that the next pattern of conflict would be far from ideological or economic lines but rather cultural.[25] It is also evident in Sinha's[26] writings where he analyses how various civilisations have governed themselves over the ages.

Thus the idea of a single narrative of civilisation became dominant and the only truism to progress through carefully orchestrated events which adopted both coercive means and trickery in the form of colonialism and neocolonialism. This accentuation was further

23 Sloan (2011), "Civilized Nations," April. Available: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1748#law-9780199231690-e1748-div1-2 [Accessed 14 April 2019]

24 Kaviraj (2005), "An Outline of a Revisionist Theory of Modernity," *European Journal of Sociology,* pp. 497-526.

25 Huntington (1993), "Clash of Civilisaton?," *Foreign affairs,* pp. 22-43.

26 Sinha (1993), Jurisprudence: Legal Philosophy in a Nutshell, St. Paul, Minnesota: West Publishing Co.

possible because of the intensive role of agency, institutions, discursive practices and legal juridical in legitimating these norms as universal and rational. In a nutshell, European civilisation emerged as a paradigm and a quintessential case of how the rest of the world – that is non-west should be and what path to follow, and outlined ways and means to achieving this end. To put it succinctly, non-western countries needed saving from themselves, and European civilisation offered just that (so we are made to believe). This is well enunciated without mincing words by Kaviraj[27]:

> The move to making a universalistic claim about European civilization on the basis of its self-acclaimed universal principles, that the rest of the world, that is non-western world was future recipients of this civilization and this could be achieved by other societies resulted in simultaneous losing of differentiation and towards homogeneity.

Adding to this Chomsky blatantly puts it:

> In fact the main reason why the plague of European civilization was able to spread all over the world in the past five hundred years is that the Europeans were just a lot more vicious and savage than anyone else, because they'd had a lot more practice murdering one another - so when they came to other places, they knew how to do it, and were very good at it.[28]

In other words, through a mixture of several alternative means, European civilisation has been firmly cultivated and that any seemingly deviation from it may usually be seen as an aberration.

Identity, culture and other expressions of Self

The event of September 11 was phenomenal, simply because it marked a watershed in the history of global security. The very conception and construction of terrorism took a different shape and meaning – terrorism seems to have become associated with any violent attack that is perpetrated by people with Islamic identity. Terrorism was catapulted into the realm of high politics and it also took a global shape – global security was re-defined. Differences, particularities, identities were accentuated and they became more

27 Kaviraj (2005) "An Outline of a Revisionist Theory of Modernity," *European Journal of Sociology,* pp. 497-526, p. 503.

28 Chomsky (2002), Understanding Power: The Indispensable Chomsky, P. R. Mitchell and J. Schoeffel, Eds., New York: The New Press, p. 136.

pronounced. The construction of terrorism as an existential threat therefore took the form of campaign against a target group, identity and religion; the danger of what one might call the 'making of terrorism' (MOT). This stems from the fact that virtually all the perpetrators had a common identity. Up until this point, the severity and terrorist organisations had not erupted and fine lines between 'us' and 'them' were not as sharp though terrorism had been around for quite a while. It is very easy to lose sight of how terrorism since time past has been defined and how we derive the boundary and category of what, who and which group are clamped as terrorists or potential terrorists.

With increasing violence and fear, the question has been how to solve this problem of radicalisation and various suggestions seem to concur on the relevance of doing away with particularities and differences by forging stronger national identities. The question this sort of thinking begs is whether particularities, differences and identity necessarily mean conflict? What we should be investigating is how the construction of meanings such as the concept of terrorism is determined by time and space and how certain words mean differently at different epochs in history. If words do change meaning as the Swiss linguist Ferdinand de Saussure tells us about the arbitrariness meaning of words and representations[29], then the real issue is not about getting rid of differences but how universalisation and normalisation of certain kinds of ideas and thought have stifled interaction, engagement and open mindedness about the other.

Europe as we are made to believe, traces its foundation and development to the renaissance and ancient Greece. The term renaissance however suggests, as Marks[30] strongly points out that, it meant philosophy was dead until it was reborn in Europe. Making clearer her point, she argues that there was a time in history where Arabian Philosophy freely engaged with the philosophies of the Jews, Christians, and Turks. Hence European history contain within it live philosophy, science and culture of the Medieval Muslim world. It is said that concepts found in Islamic philosophy were largely relied upon which included the concept of univocity of being borrowed from Abu Ali al Husayn ibn Sina (980-1037), a Persian Philosopher. These exchanges and contributions to European culture and thought especially from Middle Eastern and North Africa were lost through racism although late Medieval Christian scholars recognized what they borrowed from Muslim contributors.[31] Thus, European philosophy was established by

29 Joseph (2017), "Ferdinand de Saussure," June. Available: http://linguistics.oxfordre.com/view/10.1093/acrefore/9780199384655.001.0001/acrefore-9780199384655-e-385. [Accessed 8 October 2018]

30 Marks (2013), "A Deleuzian Ijtihad: Unfolding Deleuz's Islamic Sources Occulted in the Ethnic Cleansing of Spain," in *Deleuze and Race*, Edinburg, Edinburg University Press pp. 51-72.

31 Marks (2013), "A Deleuzian Ijtihad: Unfolding Deleuz's Islamic Sources Occulted in the Ethnic

European thinkers as independent of the many borrowed contributions, additions and subtractions from other civilisations with its foundations from Greek philosophy. Indeed the turmoil of the evolution of cultural achievements would have been forgotten by the time they become sufficiently established in public consciousness as to be taught in schools, thus making room for the concealment of confluences of culture and the eventual installment and homogenization of foundational myths in their place.[32]

Today's Western science is derivative of knowledge developed in the non-Western world, and lacks originality because many people perfected long ago understandings of nature that modern science is only now recognizing. The intellectual and practical accomplishments of traditional societies were distinct, well advanced and exceptional. Thus, Trojanow and Hoskote[33] reveal to us misconceptions about cultural purity and the popularly conceived notion of fixed identities. Before European enlightenment, there were exchanges between cultures and borrowing of ideas from other cultures; confluence is the lifeblood of culture. Going back to original formations or condition of culture and identities illuminates on how distinct civilisations have co-existed and impacted and influenced one other. Thus, "... individuals are plural selves, extending themselves through apprenticeship and camouflage, shifting identities tactically, or as the social context demands...." and that culture and identity should be understood as "that part of human experience and expression which cannot be co-opted into the banality of polar confrontation."[34]

Similarly, Said[35] has argued in Orientalism that culture is developed through the presence of other and defined in terms of the other. Said asserts the fact that the Orient played an instrumental role in the construction of the European cultures. According to Said[36], 'the Orient has helped to define Europe (or the West) as its contrasting image, idea, personality, experience.' There is therefore no single narrative to history. The evil arguments and negative connotations and tag we have been made to believe are inherent in identity politics and needs to be rejected. We have to guard ourselves against excessive homogenisation, identifying particular strands of globalisation and especially identity politics that disregard the reality of difference. However, to be free of identity as promoted by the neo-culture we are presently located in, perspective of the naturalisation

Cleansing of Spain," in *Deleuze and Race*, Edinburg, Edinburg University Press pp. 51-72.

32 Trojanow and Hoskote (2012), CONFLUENCES: Forgotten Histories from East and West, New Delhi: Yoda Press, p. 4.

33 Ibid

34 Ibid, p. 115

35 Said (1979), Orientalism; London: Penguin Book.

36 Ibid, pp 1-2.

that our education system has perpetuated or, the society promotes, the thought, affect and the passions whipped 'in the name of difference' need to be critically assessed and debated as advocated by Pennington and his co-authors.[37]

According to Mignolo[38], there is a growing awakening of these concealed truth and an awareness on the need to think less in terms that universalise, globalise or blanket different colonialities into one cultural formation. A pluralisation of ways of being and knowing is underway.[39] Thus, one can safely argue that there is neither single way of thinking nor a single expression of self. Likewise, our culture, conventions and our knowledge claims are not context free.[40]

Considering the above, there is no clear distinction between context sensitive thoughts and context free thoughts. Thus, recognising the existence of equally valid alternative explanations and knowledge, as well as understanding and appreciation of differences does matter.[41] Real progress and development is only achieved through diversity and recognition of the other's existence. The present hierarchical organisation of the nature of knowledge and of self has bred intolerance and violence among differing groups and cultures. Equal premium and authority should be put on knowledge emanating outside of western thought, expressions of self beyond western ideals and modes.

Religion, Identity, Politics and Power

With advancement in science and technology and the pronouncement in communication, the world has eventually become one small village. Indeed, globalisation has made the world claustrophobic and the resultant effect has included among others exacerbation of inequality, abject poverty and injustices. Group formation, identity politics and social movements are some major characteristics of the modern world. And this is so because many years of subjugation of certain classes, cultures and how some voices and

37 Pennington (2012), Teaching Religion and Violence, B. K. Pennington, Ed., Oxford, New York: Oxford University Press.
38 Mignolo (2011), The Darker Side of Western Modernity: Global Futures, Decolonial Options, Durham: Duke University Press.
39 Ibid, p. 23
40 Anzaldúa (2002), "Now Let Us Shift... the path of conocimiento... inner works, public acts," in *This Bridge We Call Home: Radical Visions for Transformation*, New York and London, Routlege, pp. 540-579. See also Appiah (1992), "Inventing an African Practice in Philosophy: Epistemological Issues," in *The Surreptitious Speech: Presence Africaine and the Politics of Otherness 1947-1987*, Chicago, University of Chicago, pp. 227-237.
41 Mignolo (2011), opt cited.

knowledge over the period have been silenced and concealed have led to the relevance of the need to organise ourselves. However, with an increase in societies organising themselves for proper representation, this has less reflection on deepening democratic processes and practices. The chasm of 'we' versus 'them' mentality has been on the ascendant and motivations for societies organising themselves have mostly been divisive. Acts and threats of violence have been mostly associated with this phenomenon.

Among the various ways of being and knowing, religion is one of the potent means by which individuals express their being and through which some knowledge claims are made. Religion is a way of life and it presumably dictates to people how to live. Culture and religion interact and can be described as mutually constitutive at certain points. For instance, whereas European civilisation is deeply rooted in ideas of Christendom, Western civilisation on the whole is mostly founded on Christian morals, ethics, practices and principles (notwithstanding that secularity is on the ascendancy). Indeed, secularization is a thesis of Christianity.

Though people look towards religion to inspire, guide and bring hope, the pervasive notion that religion divides us and causes more harm than good has yet to diminish in various public conversations. In spite of this popular notion, it is worth emphasising that no religion is inherently good or bad, neither violent nor peaceful – for all religions seek peace, irrespective of how that peace may be construed. It is thus people who by their actions and inactions may cause a certain religion to be deemed by others as violent or peaceful. The point is that those people who may through their actions and inactions misrepresent a certain religion do not make that religion violent – for such individuals may be an aberration of what ought to be.[42] Thus, violence has been with the human race throughout the ages (irrespective of religion). Moreover, the issue of religious violence does not exist in a vacuum – there are socio-economic, political and cultural roots to the problem – roots that are not limited to Islam, but to all other forms of beliefs. For instance, history reveals that the popes through the Crusades were on the quest to strengthening their own political power.[43]

For many years' religion has been relegated to the realm of the private sphere; a major distinguishing feature of secularism and modernity.[44] Most philosophers both in the past and present argued about the inevitable decline of religion and believed in the progressive idea of society, hence, the inescapable decline of religion. These scholars also mostly

42 Armstrong (2014), Fields of Blood: Religion and the History of Violence, London: Knopf Doubleday Publishing Group. See also Pennington (2012), opt cited.

43 Armstrong (2014), opt cited.

44 McIlhenny (2007), opt cited.

called for a strict separation of the private from the public. Thus, matters of faith, affect, passion and other expressions of self like traditions have no place in public space – at least, that is what most scholars assumed. For instance, in his Theory of Communicative Action, Habermas treated religion primarily from a sociological perspective, as an archaic mode of social integration. Yet, the recent resurgence of, and intrusion of religion into public space and politics have caused scholars who strictly adhered to the foundational premise of secularism as a separation of the private from the public like Habermas to have a rethink. Not only has he revised his earlier views, but he has also questioned the idea of public sphere in the West.[45] Religion and its relations with politics, after the September 11 attack became more relevant in public space.

Despite the negative tag on religion, rise of anti-religion, new atheist discourse, religion continues to survive. Previously perceived expressions of tradition hampering the progress of modernity, conceptions of modernity and the complexities of the relationship between modern political life and religion which was rarely investigated have gained currency. As indicated by Khan[46], one of the 'enduring myths of modernity' has been 'the false assumptions of pure politics and pure religion' – that religion and politics are separable. It is said that 'neither the conception of the individual self nor collective self is free from political or religious considerations.'

Indeed, it is not wrong to agree with Khan[47] that 'as long as religion plays a role in the identities of people, it will play a role in politics.' Thus, as stated above, religion is among the many ways of self-expression, meaning and belonging, hence playing an essential role in identity formation. Adopting from social constructivists, the individual is made up of multiple identities among which religion and politics are a part of. Issues of politics and religion affect both the individual and the collective group. Politics is as much religion, as religion is as much politics and both thrive on power-relations. Consequently, tagging any religion with terrorism harbors the implications that every follower of that religion is a potential terrorist.

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45 Habermas (1986), The Theory of Communicative Action: Reason and the Rationalization of Society, vol. 1, Cambridge: Polity Press. See also Habermas (1989), The Theory of Communicative Action: Lifeworld and System: A Critique of Functionalist Reason, vol. 2, Massachusetts: Beacon Press. And Habermas (1996), Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, Cambridge: Polity Press.

46 Khan (2015), "Can Religion Play a Positive Role in Politics?," 29 05. Available: https://www.huffingtonpost.com/muqtedar-khan/can-religion-play-a-positive-role-in-politics_b_7466144.html. [Accessed 2 October 2018]

47 Ibid

Some religions have gained notoriety due mainly to the narratives being presented by dominant groups. So presently, Islamism has gained unpopular and violent tag. But surprisingly, we seem to forget that some of the most horrific violent acts done on the face of this Earth have been perpetuated by some so-called 'Christians' and other religions. The crusades by the Catholic Church, the Holocaust that claimed many Jewish lives, the Lord's Resistant Army in Uganda, the Spanish inquisition, European Colonialism in Africa and the White supremacists (KKK) – all these acts were carried out by people who claimed membership to Christianity or other forms of religion. And in present times Israeli soldiers keep killing 'innocent' Palestinians virtually on a daily basis. The use of violence is therefore not limited to Islam, but also Judeo-Christians, as well as Buddhist-Hindi-Shinto, etc.[48] Yet, probably, not much of this other side of history is being told because Western and European thought is characterised by the 'will of power' and the 'impulse to dominate' – a clear exposition of power differential.

Consequently, modern society is not just making a 'scapegoat of faith' as argued by Armstrong[49], it is actually making scapegoat of the Islamic faith to be specific, particularly when issues of terror are involved. Thus, the exaggeration of differences – in terms of religion, serves as an avenue for creating enmity and widening the gap between the supposedly 'Islamic terrorist' and the wider society in which they live. This in turn does not help in the effective building of trust that will enhance a more positive outcome on the war on terror. In other words, the so-called 'Islamic terrorists', like the ritualistic Jewish scapegoat, 'licking its wounds in the desert… with its festering resentment' would eventually 'rebound on the city that drove it out.'[50]

One of Gary Younge's[51] strongest points, reiterated at various points is that identification with a more powerful group often pretends it is not an identity at all and that people generally do not think much about being straight, European, or male. Thus, for such people, theirs is the default, objective, neutral position. Consequently, it is only after one has been effectively been dislocated from and has come to an understanding of the power associated with their particular identities that they may come to certain realisations. The situation is also not helped by the fact that everyone has a remarkable ability to think themselves the victims. Younge is right when he asserts that 'the more power an identity carries, the less likely its carrier is to be aware of it as an identity at all' and that 'because their identity is never interrogated' some people 'are easily seduced

48 Pennington (2012), opt cited.

49 Armstrong (2014), opt cited.

50 Armstrong (2014), opt cited, p. 24.

51 Younge (2018), "The Politics of Identity: from Potential to Pitfalls, and Symbols to Substance," *Identities: Global Studies in Culture and Power,* pp. 1-11, p. 2.

by the idea that they do not have one.'[52]

There is indeed 'always identity in politics' as none goes into 'politics from a vacuum' since individuals always 'arrive with affiliations' that tends to mould their 'world-view.'[53] There is therefore an obvious relationship between power and identity construction following from the stated argument above. The caveat, however, is that this interaction between power and identity is non-linear. Thus, power is made manifest through notions of identities and social cohesion (a sort of organising phenomenon). Simultaneously, identity is constructed according to the interest of power. So questions of how some discourses and discursive practices have shaped and created meaning systems that have gained the status and currency of 'truth', and dominated how we define and organise both ourselves and our social world subsequently becomes a question of how power and interest are being used and being played through our meaning systems and our understanding of self. On the other hand, other alternative discourses that are deemed as 'decolonial options', yet having the potential to offer grounds where hegemonic practices can be contested, challenged and 'resisted' are marginalised and subjugated.[54] This is notwithstanding the fact that people are 'both many things' and 'just one' – themselves, and that 'identity is in its very nature intersectional.'[55] Thus, being a Muslim, Christian, Black or White or Brown, or what other social construction may be assigned, does not in itself make a person evil (or terrorist).

The point must be reemphasised that 'identity is not seeking a role in politics', nor does it seek 'a role in our lives.' As Younge argues, it is already located in these avenues and that 'for better' or 'for worse and usually for both it is an integral part of how we relate to people as individuals and as groups.' The choice however becomes ours as to 'whether we want to succumb to its perils amidst moral panic and division or leverage its potential through solidarity in search of common, and higher, ground.'[56]

The State and violence

The sociologist, Max Weber in defining the state designated and attributed the legal use of force to the state. Thus, the state is the sole entity sanctioned to use force. In his 'Politics as a Vocation', Weber mentions that one of the defining characteristics of the state is its

52 Younge (2011), Who are We - And Should it Matter In the 21st Centrury?, New York: Nation Books. See also Younge (2018), opt cited, p. 2.
53 Young (2018), opt cited, p. 2.
54 Mignolo (2011), The Darker Side of Western Modernity: Global Futures, Decolonial Options, Durham: Duke University Press.
55 Younge (2018), opt cited, p. 3.
56 Younge (2018), opt cited, p. 11.

ability to employ legitimate violence as a means of control in a given territory.[57] In another definition, he states that the state is a human community where people struggle with one another for what is ultimately a greater share of the legitimate use of power to apply force.[58] This does not mean however, that the state is the only actor that uses violence but rather, the only actor that sanctions or legitimizes the use of violence. As remarked by some scholars[59], this distinguishable feature of the state with its existential need to persist, assigning heroes and villains and for self-definition through inner cohesion and outward enmity, dismisses alternative and mutable narratives. However, this monopoly of the use of physical force can also be challenged by non-state actors. The present upsurge of terrorism and insurrections can be seen as an overt opposition to the state's use of violence.

In recent past, scholars like Michel Foucault, Giorgio Agamben and others have argued vehemently about other forms of state power in complying obedience.[60] They argue that violence or physical force is not the only way; instead, it is one amongst the rest of techniques employed by states to ensure compliance and obedience from its citizens. States ought to use other forms of power to assert their authority and ensure compliance within the international system.[61] By using knowledge, as reasoned by Foucault, the state is able to perpetuate and increase its control over the subjects through the process of normalisation. Thus, through the use of violence and normalising practices, the state coerces subjects into complying with the desires and directives of the elites and the few groups who have stakes and interest in the status quo. Any challenge to the authority of the state is mostly repressed through prohibitions and punishment, and also with continual expression of the existence of the state in friend-enemy terms – a scenario quite reflected in the modern state's relation with terrorism (which has quite unfortunately been linked to 'radical Islam').

Chantal Mouffe[62] draws our attention to Carl Schmitt's concept of the political, that the concept of state presupposes the concept of the political. This implies that a state can

57 Weber (1919), "Politics as a Vocation," Duncker & Humblodt, Munich.

58 Astore (2016), "Defining the Legitimacy and Power of the State through Weber and Foucault," *INQUIRIES,* vol. 8, no. 5, pp. 1-2.

59 Trojanow and Hoskote (2012), opt cited, p. 5.

60 Agamben, Homo Sacer (1998): Sovereign Power and Bare Life, Stanford: Stanford University Press. See also Astore (2016), opt cited, pp. 1-2.

61 Botchway T. P. and Kwarteng A. H. (2018), "Developing International Law in Challenging Times," *Journal of Politics and Law,* vol. 11, no. 3, pp. 53-63.

62 Mouffe (2005), On the Political, New York: Routledge.

only be legitimate if its legal boundaries embody a clear friend-enemy distinction and that every aspect of consensus therefore involves an exclusionary process.[63] [64] Mouffe[65] has indicated that,

> Schmitt is right to bring to our attention the fact that the political is linked to the existence of a dimension of hostility in human societies, hostility which can take many forms and manifest itself in very diverse types of social relations.

Mouffe[66] exploring Henry Staten's idea of 'constitutive outside' notes that the concept helps to highlight the fact that 'the creation of an identity implies the establishment of a difference, difference which is often constructed on the basis of a hierarchy: for example between form and matter, black and white, man and women, etc.' The point of this remark is that, social relations, be it identity or 'othering' can become a site for antagonism and violence. She further opines that political identities are always collective identities and by identifying them as such we are recognizing the existence of an 'us' and 'them.' She cautions however that this does not mean such a relation is by necessity an antagonistic one. But it means that there is always the possibility of this relation of us/them becoming one of friend/enemy. When difference and particularity are perceived as threatening the cohesion and existence of the other, social relations which otherwise were less harmful become toxic.[67] This is evident in the modern state's need to survive coupled with its monopoly on the use of violence and the war on terrorism which basically identify Muslims as the fundamental elements of terrorism.

This categorisation and 'othering' processes accentuate and promote enmity in social relations, allowing certain groups with power to inflict and instill fear in others. For instance, in recent times, some prominent world leaders have waged constant campaigns on branding Islam as evil and the root cause of terrorism. Key among such individuals is the US President – Donald Trump who has on countless occasions made derogatory remarks about Islam including questioning the religious beliefs of his predecessor – Barack Obama, and at a point branding some Muslim refugees as 'ISIS' and a potential

63 Mouffe (2005), opt cited.

64 Vinx (2014), "Carl Schmitt," 1 October. Available: http://plato.stanford.edu/archives/spr2016/entries/schmitt. [Accessed 2 October 2018]

65 Mouffe (2009), "Democratic Politics and Agonistic Pluralism," 18 December. Available: http://consellodacultura.gal/mediateca/extras/texto_chantal_mouffe_eng.pdf. [Accessed 2 October 2018] p.6.

66 Ibid, p. 7

67 Mouffe (2005), On the Political, New York: Routledge. See also Mouffe (2009), "Democratic Politics and Agonistic Pluralism," 18 December. Available: http://consellodacultura.gal/mediateca/extras/texto_chantal_mouffe_eng.pdf. [Accessed 2 October 2018]

'Trojan horse look like peanuts' and eventually introducing an executive order that bans Muslims from entering the US.[68] In France there is the populist major opposition figure Marine Le Pen who has also been making anti-Muslim rhetoric and inciting people against Islam. [69] In Canada mention can be made of Jean-Francois Lisee (the former leader of the nationalist Quebec Party [Parti Québécois]) who once advocated for the banning of Muslim veils in public spaces since according to him Muslim women could hide machine guns underneath their burkas.[70] Several western politicians have also followed this trend.[71]

There have also been several television shows that advocate the killing of muslims and bombing 'their countries.' A clear example is Jeanine Pirro's several accounts that makes hasty generalisations about muslims and call for their mass destruction.[72]

Construction of violence, terrorism and threat perceptions

The discourse of violence has focused mostly on partial and specific notions of violence.

68 Johnson and Hauslohner (2017), "'I think Islam hates us': A timeline of Trump's comments about Islam and Muslims," Available: https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?noredirect=on&utm_term=.b3f7f1b54408. [Accessed 16 2019]. See also Rucker and Phillip (2017), "Trump campaigned against Muslims, but will preach tolerance in Saudi speech," 19 May. Available: https://www.washingtonpost.com/politics/trump-campaigned-against-muslims-but-will-preach-tolerance-in-saudi-speech/2017/05/19/6357c60c-3ca7-11e7-9e48-c4f199710b69_story.html?utm_term=.e6424605904d. [Accessed 16 April 2019]

69 McAuley (2017), "Growing anti-Muslim rhetoric permeates French presidential election campaign," 18 April. Available: https://www.washingtonpost.com/world/europe/growing-anti-muslim-rhetoric-permeates-french-presidential-election-campaign/2017/04/18/1049c928-1ef8-11e7-bb59-a74ccaf1d02f_story.html?utm_term=.7855a0623209. [Accessed 16 April 2019] Also refer to Buchanan (2015), "Marine Le Pen to face court for comparing Muslim prayers in the street to Nazi occupation," 23 September. Available: https://www.independent.co.uk/news/world/europe/marine-le-pen-to-face-court-for-comparing-muslim-prayers-in-the-street-to-nazi-occupation-10513920.html. [Accessed 16 April 2019]

70 Shapiro (2017), "Canadian Leaders: Rhetoric Around Muslim Immigrants Has Grown Too Ugly," 31 January. Available: https://www.npr.org/2017/01/31/512702725/canadian-leaders-rhetoric-around-muslim-immigrants-has-grown-too-ugly. [Accessed 16 April 2019]

71Reinl (2018), "Dozens of US mid-term candidates using anti-Muslim rhetoric, study shows," 22 October. Available: https://www.middleeasteye.net/news/dozens-us-mid-term-candidates-using-anti-muslim-rhetoric-study-shows. [Accessed 30 April 2019]

72 Ohlheiser (2019), "Jeanine Pirro's anti-Muslim comments earned a rebuke from Fox News. They weren't her first.," 11 March. Available: https://www.washingtonpost.com/arts-entertainment/2019/03/11/jeanine-pirros-anti-muslim-comments-earned-rebuke-fox-news-they-werent-her-first/?utm_term=.a6b0ad246f27. [Accessed 30 April 2019]. See also Fox News (2015), "'They're Coming Here to Kill Us!': Pirro, Geraldo Spar on Guns, Radical Islam," 4 December. Available: https://insider.foxnews.com/2015/12/04/theyre-coming-here-kill-us-pirro-geraldo-spar-guns-radical-islam. [Accessed 30 April 2019]

For many years there has been the reign of positivist or rational method of enquiry in social science, natural science – subsuming difference and identity into sameness. Though the demise of the Soviet Union called into question the universal rationality underlying these popular assumptions and called for the need to revisit and reexamine the foundations of these orthodoxies, the writings of Fukuyama's End of History, Samuel Huntington's Clash of Civilizations and Michael Doyle's Democratic Peace and other seemingly skewed international relations scholarships still dominated, influenced and perpetuated the superiority of Western and European ideals.[73] Above all, this has been done in the name of legitimate social science, very narrowly defined.

In the language of terrorism, violence has been defined restrictively to refer to physical harm inflicted by specific group of people or identity. Acts of 'terrorism' are arguably only confined to non-state actors since the state claims the exclusive use and control of violence. Now, the question about what crime is committed has been supplanted by who committed the crime; hence acts of violence and crime are understood in the context of the person; explained in this same fashion. What this means therefore is that, the same crime with probably the same motivation will be eclipsed with different rationalisation thus uncovering the actual failings of society.

The problem with rationalist thoughts and the world today is how we explain social and political phenomena on the basis of intrinsic values and render such judgments as objective. An illustration of this in the construction of violence and the discourse of terrorism is clearly demonstrated by the media's use of terrorism to describe events of violence. For instance, the Boston attack that happened on April 15, 2013 when two homemade cooker bombs detonated during the annual Boston Marathon killing three and maiming several others was properly designated as a terrorist attack. The culprits, Tamerlan Tsarnaev (26 years) and Dzhokhar Tsarnaev (19 years) were identified by the FBI in latter investigation.[74]

73 Smith (2004), "Singing Our World into Existence: International Relations Theory and September 11," *International Studies Quarterly,* vol. 48, no. 3, pp. iv+499-515. See also Grovogui (2006), Beyond Eurocentrism and Anarchy: memories of International order and institutions, New York: Palgrave Macmilan. And Botchway, T. P. (2018), "International Law, Sovereignty and the Responsibility to Protect: An Overview," *Journal of Politics and Law,* pp. 40 – 50.

74 Estes, Abad-Santos and Sullivan (2013), "Explosions at Boston Marathon Kill 3 — Now, a 'Potential Terrorist Investigation'," 15 April. Available: https://www.theatlantic.com/national/archive/2013/04/boston-marathon-explosions-live/316233/. [Accessed 5 October 2018] See also Shane (2013), "Chechen Refugee Questioned in F.B.I.'s Inquiry of Bombing," 16 May. Available: https://www.nytimes.com/2013/05/17/us/boston-bombing-developments.html. [Accessed 5 October 2018]. And Boston (2015), "Boston Marathon Bombing Trial Jury Sees Photos Of Tsarnaev Boat Note," 10 March. Available: https://boston.cbslocal.com/2015/03/10/jury-in-boston-bombing-trial-sees-photos-of-writing-in-boat/. [Accessed 5 October 2018]

Also, it was announced on June 12, 2016 that Omar Mateen, a 29 year old security guard raised as a Muslim had killed about 50 people and wounded 53 others – an act referred to as terrorism.[54][75] Again at Charleston Church, Dylann Roof, a 21-year-old white supremacist murdered nine African Americans on the evening of June 17, 2015 and this was reported as mass violence/hate crime.[76]

On October 1, 2017, Stephen Paddock, a 64 years old American fired more than 1,100 rounds of bullets from his suite on the 32nd floor of Mandalay Bay hotel which eventually killed 36 women and 22 men (58 people), and seriously wounding about 851 others. Notwithstanding the magnitude of the casualty (as compared with terrorist acts such as the Manchester train station stabbing, France's Christmas market attack, Melbourne's 2018 knife attack, etc), this event never qualified to be described as a terrorist act though it has been described as 'the deadliest mass shooting in modern U.S. history.'[77]

When Nikolas Cruz massacred 17 people on Valentine's Day at the Marjory Stoneman Douglas High School in Parkland, it has well been accepted as a 'school shooting.'[78] We are quite certain the descriptions would have been different if the perpetrator had a different name or even different citizenship status. Many of such linguistic biases are propagated and accentuated by the international media enunciating the restrictive use of the descriptor violence and terrorism.

Noam Chomsky[79] has on a number of occasions reiterated that the war on terrorism was actually not declared in the year 2001 but was 'redeclared using the same rhetoric as the first declaration twenty years earlier.' He indicates that the Reagan administration

75 Katersky, Meek, Margolin and Hayden (2016), "What We Know About Omar Mateen, Suspected Orlando Nightclub Shooter," 12 June. Available: https://abcnews.go.com/US/omar-mateen-suspected-orlando-night-club-shooter/story?id=39790797. [Accessed 2 October 2018]

76 Shah, Hanna, Shoichet and Savidge (2017), "Dylann Roof jury: Death penalty for Charleston church shooter," 10 January. Available: https://www.cnn.com/2017/01/10/us/dylann-roof-trial/index.html. [Accessed 2 October 2018]

77 Los Angeles Times Staff (2017), "Las Vegas shooting victims: Portraits of the fallen," 6 October. Available: http://www.latimes.com/projects/la-na-las-vegas-shootings-victims-list-20171002/. [Accessed 7 October 2018] See also CBS News (2018), "Vegas Strip lights dim as shooting's first anniversary marked," 6 October. Available: https://www.cbsnews.com/news/las-vegas-shooting-anniversary-strip-lights-dim-first-anniversary-marked/. [Accessed 7 October 2018]

78 Brown (2018), "Florida school shooting suspect shouted 'kill me' hours after taken into custody," 7 August. Available: https://www.foxnews.com/us/florida-school-shooting-suspect-shouted-kill-me-hours-after-taken-into-custody. [Accessed 8 October 2018]

79 Chomsky (2009), "History of US Rule in Latin America; Elections and Resistance to the coup in Honduras," See also Chomsky (2010), "The Journalist from Mars," 6 October. Available:http://libcom.org/library/journalist-mars-noam-chomsky. [Accessed 3 October 2018]

arrived in office 'announcing that a war on terror would be the core of US foreign policy' and subsequently fated the perceived 'evil scourge of terrorism.' War on terror was one of the two principles the administration hoped to achieve by critiquing Carter's human right policy as utopia which undermined US security interest. Also Reagan declared communism as an act of terrorism.[80] The main focus of terrorism, thus perceived, was state sponsored terrorism in the 'Islamic world.' The implication was the official tagging of terrorism as a branch or a practice pertaining to the Islamic faith. Hence terrorism became synonymous with Islam and vice versa.

Defining terrorism has been cumbersome. US code and army manual defines it succinctly as 'the calculated use of violence or the threat of violence to attain goals that are religious, political, and ideological in nature… through intimidation, coercion or instilling fear.[81] The difficulty stems from the fact that such a definition would include violent activities pursued in the name of interest and national security. This would include state sponsored terrorism and the state use of violence. It is worth emphasizing that the state sometimes manufacture terrorism and thrives on the fear of terror it creates thereby deepening the chasm of us against them. The fear of terrorism serves the interests of many such as businessmen, political ruling classes etc. Is the state's response to perceived and presupposed terrorist acts not more violent considering that the state wields all the apparatuses of violence and power?

In all fairness and justice, a definition of terrorism should meet a proper response by fulfilling the minimal moral truism and a response to an act considered terrorism should commensurate the level of mayhem perpetrated. However, such standards are not met, if ever they are defined. Terrorism is defined parochially to realise objectives – objectives which are mostly influenced by the state's sense of superiority and power. Agamben[82] was right to point out the curious contiguity between democratic and totalitarian states. Agamben also identifies how state violence has been downplayed and ignored – ignored in the sense of legitimating state violence through rhetoric – by powerful leaders and metaphorical expressions by the media which we see in recent times in its hegemonic fashion; explicitly exuded and led by the United States.

The underlying expression of power and its hegemonic influence is apparent if an act of violence could be legitimated but not the other. The moral relativity about terrorism being

80 Carleton and Stohl (1985), "The Foreign Policy of Human Right: Rhetoric and Reality from Jimmy Carter to Ronald Reagan," *The Johns Hopkins University Press,* pp. 205-229.

81 Chomsky (2010), "The Journalist from Mars,"6 October. Available: http://libcom.org/library/journalist-mars-noam-chomsky. [Accessed 3 October 2018]

82 Agamben (1998), Homo Sacer: Sovereign Power and Bare Life, Stanford: Stanford University Press.

motivated by religious fundamentalism and state violence/sponsored terrorism does not hold. State violence and sponsored terrorism seem not to have been captured and identified within the rubric of terrorism or what is to be considered a terror act. Malcolm Bull[83] brilliantly captures this in his review of 'State of Exception' as he points out that,

> We are no longer citizens but detainees, distinguishable from the inmates of Guantanamo not by any difference in legal status, but only by the fact that we have not yet had the misfortune to be incarcerated – or unexpectedly executed by a missile from an unmanned aircraft.

Another important example to buttress the aforementioned is the example of the US activities in Nicaragua.[84] As Chomsky[85] mentions, Nicaragua terrorism was far more devastating than September 11 attack and it would not be wrong for them to declare a war against the United States and the leaders who declared the new war on terror. The only difference is they cannot do that because that would be considered terrorism in itself. But the US can and as we know have indiscriminately abused its power as the so-called super power. The point is that there is virtually nothing or little being said and investigated about these same acts of terror being perpetrated by the United States. War on terrorism therefore does not meet the minimal moral truism – applying the same standard to others as applied to you.[86]

Existential Despair and 'Islamic Radicalisation': The Narrative of a Misfit

We have indeed sang our world into existence.[87] Innocent Muslims are mostly referred to as potential terrorists; a qualifier we find very problematic because it presupposes that the individual Muslim is a terrorist by default, thus the right conditions need to be there and we may see them blowing themselves up. This is the greatest fallacy of the post 9/11 attacks. The irony however is we have never walked out of a classroom or wore bullet proof jackets because we might meet a Muslim at some point in the day.

83 Bull (2004), "State of Exception by Giorgio Agamben, translated by Kevin Attell," 16 December. Available: https://www.lrb.co.uk/v26/n24/malcolm-bull/states-dont-really-mind-their-citizens-dying-provided-they-dont-all-do-it-at-once-they-just-dont-like-anyone-else-to-kill-them. [Accessed 2 October 2018]

84 International Court of Justice (1986), "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)," International Court of Justice, The Hague.

85 Chomsky (2010), "The Journalist from Mars,"6 October. Available: http://libcom.org/library/journalist-mars-noam-chomsky. [Accessed 3 October 2018]

86 Chomsky (2009), "History of US Rule in Latin America; Elections and Resistance to the coup in Honduras". See also Chomsky (2010), opt cited.

87 Smith (2004), "Singing Our World into Existence: International Relations Theory and September 11," *International Studies Quarterly,* vol. 48, no. 3, pp. iv+499-515.

There have been almost two decades long siege, violence, aggression and human rights abuses directed at Muslims and sustained by demonizing Islam in the media. Why is a white American not regarded as a potential terrorist? Why the biases in the linguistic usage of the term terrorism? Simply! We do not consider such a thought. Bruce Hoffman in the new edition of his seminal book 'Inside Terrorism' identifies the threat that white American supremacist pose to the security of the United States.[88] This clearly is an indicative of the essential zing character of the campaign against terror which is defined and directed at a specific group of people belonging to a particular religion. Islamism has become synonymous with violence on the basis of such construction of terrorism. And those who differentiate Islamism from radical Islamism only do so hypocritically, because their variables and explanations end up alluding to the same thing.[89]

Today, many Muslim youth across the globe may be identifying with terrorist networks not because there is an inherent violent in them or the religion, but because of the antagonising environment in which they find themselves and how society has turned out to be violent towards them and their identity. In point of fact, terrorist attacks carried out in the United States and other Western countries have less to do with religion or faith per se. This is not a war between religions or a 'clash of civilizations.' These attacks are outcomes of the limitations of rational choice theory and a universal knowledge claims. Every sort of difference or identity is explained away and a common progression of humanity towards one end – as seen in modernisation and theories of globalisation lauded.[90] Reiterating the above point, Steve Smith[91] remarks,

> This notion, which underlay Fukuyama's notion of the 'End of History', sees subjectivity and difference as temporally defined and as limited to as phase of history's unfolding. Ultimately, human nature is seen as a constant, which both allows statements about regularities and merges difference into sameness. Under this gaze, 'others' are essentially like 'us', and any differences in world views or values are seen as evidence of underdevelopment, or of the fact that these societies are at an earlier stage of development. The notion that they are not in progression towards becoming like 'us', like the West, is rejected and instead these differences are explained away as 'merely' hangovers from some earlier historical form of consciousness.

88 Hoffmam (2006), Inside Terrorism, Columbia University Press.
89 Ibid.
90 Smith (2004), opt cited.
91 Ibid, p. 505.

Today, home grown terrorism has become an enigma due partly to the explanation of the loss of sense of identity and hope. One of the defining propositions of existentialism is that existence precedes essence, which means that the individual is first and foremost an individual – an independently acting and responsible conscious being rather than the labels, roles, stereotypes or whatever category attributed to him/her. By this, through their own consciousness, individuals create their own values, identity and meanings of self to life. Thus, individuals define and express themselves by what meaning and identities they give themselves. This gives a sense of belonging and purpose. Whenever there is a breakdown in one or more of the defining attributes or values of one's self identity, despair sets in and this explains in part why home grown terrorism is rampant and some innocent Muslim youth are seemingly being radicalised in the name of common brotherhood and brotherliness – with Western society and Media constantly vilifying and demonizing Muslims and any person who identifies with Islamism and with Muslims being coerced to integrate and assimilate.

Mainstream Western thought and most policy makers have no way to entertain the thought that victims of terrorism are not only confined to those physically and directly affected by it but, also, those who are insecure, victimised, fearful as a result of the attack, and this illuminates why recruitment is probably on the ascendancy. Terrorism has become synonymous with Islamism and the Muslim identity despite the existence of thorough and enormous literature on the lack of correlation between the two.[92] One's name and religion are no longer semantics in the West regardless of the many decades of cultural assimilation and integration. There is a deep felt alienation of the Muslim community in the West, yet we have failed to recognise and accept that they are also victims of these inhumane and horrific acts.

Highlights on Muslims as victims of terrorist acts brings to light their experiences as Muslims living in the West and how deep rooted alienation and hate living in such communities pushes some to identify with the course of these terrorist groups. Terrorism is therefore on the ascendant, indicative of failure of counterterrorism due partly to the very construction which leads to essentialising and alienation. It is important we note once again that Muslims are as much victims to these acts and feel the fear like any other would. Justice is truly served when perpetrators and offenders are brought to book, but not when innocent people suffer for the wrongdoings of some people who have perverted jihadism and who have taken a portion of the Quran to serve their whims and

92 Pape (2005), Dying to Win: The Strategic Logic of Suicide Terrorism, New York: Random House. See also Pape (2006), Dying to Win: why suicide terrorists do it, London: Gibson Square. And Pape and Feldman (2010), Cutting the Fuse: The Explosion of Global Suicide Terrorism and How to Stop It, Chicago and London: The Chicago University Press.

caprices; a clear case of misrepresentation.

As Noam Chomsky[93] satirically asserts:

> The depraved opponents of civilization itself in the year 2001 were in the 1980s the freedom fighters organized and armed by the CIA and its associates, trained by the same special forces who are now searching for them in caves in Afghanistan. They were a component of the first war against terror and acting pretty much the same way as the other components of the war against terror.

According to Chomsky[94], as far as the US and its allies are concerned, there has been the convention that 'it's only terrorism if they do it to us. When we do much worse to them, it's not terrorism.' Consequently, terrorism becomes only what an 'inferior' person or group of persons have done to a presumably 'superior' entity. Thus, the several attacks mounted by some 'superior' states and entities against others that are deemed relatively 'inferior' cannot be termed as terrorist acts. But when seemingly disaffected individuals and groups, with a certain supposedly religious affiliations or names act in a certain manner, it becomes a terrorist attack. Indeed we will agree with Sir Steven Smith when he opines that 'there is no view from nowhere' and that 'all views make assumptions about actors, identities, and interests, and all of them mix together statements about what is and what ought to be.'[95]

Conclusion

Indeed identity, as asserted by Younge[96] 'is like fire. It can create warmth and comfort or burn badly and destroy. It can make connections over oceans, languages, generations and cultures. But it can also sow division among those who live side by side.' Consequently, the recent practice of identifying and associating all terrorists' acts to the Islamic religion is in a bad taste, unwarranted, despicable, untenable, and a sheer fallacy. This practice does nothing meaningful to society; it instead heightens hate, distrust, and alienation in society. The earlier policy makers, especially in the western developed nations, reconceptualise the meaning attached to terrorism and identity, the better it would be for our world and generations to come. As far as humanity is concerned, 'we are all more alike than we are unalike' and that even 'the ways in which we are unalike' (in terms of

93 Fn 413

94 Chomsky (2010), opt cited.

95 Smith (2004), opt cited, p. 503.

96 Younge (2018), "The Politics of Identity: from Potential to Pitfalls, and Symbols to Substance," *Identities: Global Studies in Culture and Power,* pp. 1-11, 12 September, p. 4.

identity) equally matters.[97]

As can be readily seen from the discussion, the purpose of the authors has never been an attempt to overlook or side-step the essence of identification, be it individual or group identity, nor have we advocated for an identityless society. We have equally not made it our priority to over emphasise the relevance of any single identity over the other, neither have we sought to defend terrorism. Instead, what we sought to do (and believe have done) is to point out to the shameful identification of terrorism with Islam – making it seem as if that is all the religion and it followers teach – this is wrong; a terrorist is a terrorist and as such, labels such as 'Islamic terrorism' and the likes should be discarded. Instead of classifying groups as terrorists and targeting them in their daily lives, we believe more progress can be made by seeking to understand why people do what they do; knowing what motivates them; seeking the root causes of terrorist acts and addressing them appropriately without labels and tags. Efforts should be made to build trust, unity and cooperation among people of different backgrounds. Inequalities that results from perceived identity and other unnecessary social constructs should be tackled head-on.

Indeed, all identities, as indicated by Younge[98] 'are created by us to make sense of the world that we live in.' Thus, if we have come to the realisation that some of these social constructions are harmful, then there is the need to revise and deconstruct them. In other words, there is the need to delink ourselves from the forces and influences of the current structure of the world that has constrained and chained our minds and thoughts to a different understanding of the self, knowledge and history. This we can do better when we come to the knowledge that 'there has never been a time in human history when someone hasn't been trying to rally one group against another on the basis of their difference.'[99] It is this realisation that should ring the wakeup call for deconstructing these tales of misfit, especially on the question of the so-called 'Islamic terrorism.'

In conclusion, we assert that the Boston attack by the Tsarnaev brothers and some terrorist attacks in recent past compared with other equally or even much heinous violent attacks is a clear case of a tale of misfit. Thus, by emphasising the idea of difference, acceptance and greater tolerance for particularities, the notions of an underlying universality of truth and a singular form of modernity being propagated and accentuated by discourses and discursive practices over the century have helped with the rising incidence of these atrocities.

97 Ibid.
98 Younge (2018), opt cited, p. 8.
99 Ibid, p. 10.

There is indeed the need to approach Islam with a 'nonfundamentalist understanding' – an approach that will not make hasty generalizations about terrorism and peoples' religious identity.[100] Thus, 'the modern debate about Islam in America and Europe' which according to Ernst[101] has 'been conducted primarily on sensational journalism and ideological attack' needs a serious rethinking. Indeed, the lack of understanding of other cultures on the part of the western societies (particularly Islam) partly contributes to the seemingly persistence misconception about terrorism and Islamic identity – what Ernst[102] has rightly described as 'the extraordinary mismatch between Euro-American ideas of Islam and the realities lived by Muslims.' Equating Islam with global terrorism is indeed problematic. It is therefore necessary that efforts are made to eradicate ideas that reinforce in some Muslims the conviction that indeed the war on terrorism is a war against Islam. The fact that some extremists 'hijack Islam' and use 'Islamic doctrine and law to legitimate terrorism' does not make all Muslims terrorists.[103] A better understanding of religious violence and how they can be effectively dealt with is only possible once we focus on a more critical 'richly descriptive, analytical, and explanatory' approach while shunning 'simplistic and binary' accounts of violence and conflicts.[104]

100 Ernst (2003), Following Muhammad: Rethinking Islam in the Contemporary World, Chapel Hill and London: The University of North Carolina Press, p. xiii

101 Ibid, p. xv

102 Ibid, p. 4

103 Esposito (2002), Unholy War: Terror in the Name of Islam, Oxford: Oxford University Press, p. 22.

104 Pennington (2012), Teaching Religion and Violence, B. K. Pennington, Ed., Oxford, New York: Oxford University Press, pp. 3-4.

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WEAPONISATION OF THE WAR ON TERROR AND THE SIDESTEPPING OF HUMAN RIGHTS NORMS: SEEKING A BALANCE BETWEEN THE TERRORISM (PREVENTION) (AMENDMENT) ACT 2013 AND NIGERIA'S OBLIGATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

Olusola Babatunde Adegbite[1]

ABSTRACT

In an era of escalation in terrorism and terrorist related criminalities, the international system continues to innovate on how best to contain its scourge, particularly within the confines of established democratic norms. As a response to Security Council resolution 1373 adopted on 28 September 2001, United Nations (UN) member states began to craft domestic counterterrorism legislations to criminalise terrorist activities on their home-soil, as well as extraterritorially. Responding as other nations, Nigeria enacted the Terrorism (Prevention) (Amendment) Act 2013. However, the Act and others like it, have thrown up troubling questions about weaponization of the war on terror, and the need to balance the war with the protection of human rights. This article examines the continued sidestepping of human rights norms in the war against terror. It presents this conflict within the context of Nigeria's domestic counterterrorism law, highlighting some dangerous provisions in the Act which directly impugns on its obligation under International Human Rights Law (IHRL). It advocates an urgent review in the Act that will reflect the current mood of the UN human rights system, as well as the country's obligation under IHRL.

Keywords: Nigeria, Domestic, Counterterrorism Law, Dignity, Personal Liberty, International Law

1 LL.B (Hons) (*Ife*), LL.M, (*Ife*), LL.M (*Cardozo School of Law*, *Yeshiva University, New York*), B.L., Lecturer, Department of Public Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, NIGERIA.

Introduction

The making of a counterterrorism legislation in Nigeria, was a watershed moment in the deployment of legislation to address growing security challenges, fulfil a constitutional mandate, as well as meet an international commitment. Security wise, terrorism largely by Boko haram, a salafist fundamentalist groups had become rife, that it had considerably stretched the country's internal security architecture.[2] Also, the government had a constitutional mandate under Section 14 (2) (b) of the constitution, which states that "*the security and welfare of the people shall be the primary purpose of government*".[3] More so, as a member of the United Nations (UN), the country had a core responsibility to comply with an important UN decision i.e. UN Security Council resolution 1373 which had been adopted on 28 September 2001 as the immediate global response to the terrorist attacks of 11 September 11 2001. The 2011 Act provided for the first time, a comprehensive domestic legal framework for counterterrorism in the country. The Act was subsequently amended following the passing into law, of the Terrorism (Prevention) (Amendment) Act 2013.

Like other legislations of its kith, the enactment and implementation of the Act have been confronted with issues bordering on human rights violations, putting both at loggerheads. Though there exist a general international consensus on the universality and inalienability of human rights, the question is whether governments such as Nigeria, were mindful of this in crafting their domestic counterterrorism legislation? Issues relate to how human rights norms have so far been applied in the country's effort at domestic counterterrorism, to ensure success in the war on terror? Do these two concepts share a symbiotic relationship in Nigeria, or is it case of two parallel lines that can never meet? Majorly, there has been a gap when it comes to understanding the importance of achieving a balance between the country's counterterrorism legislation and its obligation under International Human Rights Law (IHRL).

Against this backdrop, this article will be examining how the provisions of the TPA 2013 is at war with Nigeria's IHRL obligations, concerning the right to dignity and personal liberty. A key objective of the article is to highlight, through an examination of the progress already made under the UN human rights system, of how Nigeria still lags behind in terms of the need to balance counterterrorism and human rights. To achieve this, the article will be divided into eight (8) parts. While part I deals with the introduction, part II

2 O. Osumah, 'Boko Haram Insurgency in Northern Nigeria and the Vicious Cycle of Internal Security', (2013), 24 (3), *Small War and Insurgencies*, 536 - 560 at 550.

3 Constitution of the Federal Republic of Nigeria 1999 (Hereinafter '1999 Constitution').

will examine issues bordering on the tension between human rights and counterterrorism in contemporary times. Part III will explore the development of counterterrorism globally and how Nigeria had to comply with the prevailing international legal framework. Part IV will examine Nigeria's obligations under IHRL as it relates to the rights to dignity and personal liberty, while part V will discuss how the provision of indefinite detention framework under the Act has resulted in a meltdown of the rights to dignity and personal liberty. Part VI will highlight developments under the UN human rights system pointing to a need to balance human rights and counterterrorism, and how this ought to inform a shift in Nigeria's counterterrorism law. Part VII discusses the important legislative step that Nigeria needs to take in this regard, while Part VIII covers the conclusion.

Human Rights and Counterterrorism: A Symbiotic Relationship or Two Parallel Lines?

Human Rights: From then to Now

Though human right is of a rich historical legacy, its current extraordinary presence is more of a contemporary event. From a protracted beginning that can be traced to the Magna carta, as well as the English bill of rights,[4] the metamorphoses of human rights have been startlingly intricate. An irresistibly moving concept, that was initially viewed for centuries as a seemingly ordinary moral concept, human rights began to gain the much-needed attention with the dazzlingly powerful words in the American declaration of independence.[5] This was followed by other important documents such as the American constitution,[6] and French declaration of the rights of the man and the citizen.[7] Despite the significance of these documents, human rights remained of astonishingly light-weight, for centuries. For instance, the world superpowers did not think much of human rights, when in extreme cruelty, they bludgeoned each other in both the first and second world wars. The horrors of these two wars, and the indignities that men, women, children, were subjected to, signaled a new consciousness, as it apparent that the world had had enough. This heralded a new era altering the human rights landscape dramatically. This became instructive given the understanding that threats to human rights is threat to global security, necessitating a responsibility to protect.[8] Capturing this aptly, Makau

4 While the Magna carta was adopted on 15 June 1215, the English bill of rights got royal assent 16 Dec. 1689.

5 The Declaration was issued and adopted on 4 July, 1776.

6 This document was ratified on 21 June, 1788.

7 The Declaration was adopted on 26 August, 1789.

8 D.P. Forsythe, 'The United Nations and Human Rights: State Sovereignty and Human Rights', (2012,) *International Policy Analysis*, 1–13.

Mutua notes, "*the post-world war II period has been characterized as the as the age of rights, an era during which the human rights movement has come of age*".[9]

With the establishment of the UN and the adoption of its charter in 1945,[10] much of what now represents human rights emerged. Though what constitutes human right is still inherently complicated, following its establishment, the UN saw the need to give more bite to a framework of better safeguards, which led to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[11] The UDHR is the flagship document in the body of human rights instruments,[12] and it considers human rights as the basis on which freedom, justice, and peace can be achieved.[13] Through the Universal Declaration, human rights broke forth triumphantly from a undesirable history, to become the most significant discussion of the 20th century. It acquired an allure that its early promoters could not have prospectively imagined. The Universal Declaration in its vociferous condemnation of man's inhumanity to man importantly notes that;

Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.[14]

It further provides direction by adding that;

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".[15]

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9 M. Mutua, 'Hope and Despair for a New South Africa: The Limits of Rights Discourse', (1997), 10, *Harvard Human Rights Journal*, 63 – 114 at 63.

10 Article 1 (3) of the UN Charter provides that, "*to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*". *See* Charter of the United Nations (UN) signed in San Francisco California United States on 26 June, 1945.

11 This document is the foundation of 21st century concept of human rights as well as IHRL. It was adopted following G. A. Res. 217 A (111), UN GAOR 3d Sess., UN Doc A/RES/217A (III) (10 Dec. 1948).

12 C.M. Serna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts', (1994), 16, *Human Rights Quarterly*, 740 – 752 at 740.

13 D. Shelton, 'Challenges to the Future of Civil and Political Rights', (1998), 55, *Washington and Lee Law Review*, 669 – 680 at 669, 670.

14 Preamble to the UDHR 1948.

15 UDHR 1948 (n. 14).

The humble but gripping moment of the UDHR, led to emergence of other fiercer documents, notably amongst which are the International Covenant on Civil and Political Rights (ICCPR),[16] the International Covenant of Social, Economic, and Cultural Rights (ICSECR),[17] the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT),[18] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[19] and the UN Convention on the Rights of the Child (CRC).[20] Through these instruments, human right has successfully run the gauntlet, to become the signpost of freedom in the modern state.

In the contemporary development of human rights, the right to dignity and personal liberty have been dominant themes. While human rights as a concept is founded on human dignity, the meaning and value of dignity has its roots in philosophical thoughts. Dignity views all human beings as equal in all normative respect and that no one should be prided as more equal than the other. It speaks of due recognition, respect, and fair treatment for all men. The idea that every man has inherent in him certain rights and privileges that are inalienable, constant, and proprietary in nature evolved from the understanding that, man as a superior being is an embodiment of values that makes him different from other works of creation, values that cannot be separated from his humanity. Dignity is therefore the source of both negative rights such as life, freedom from discrimination, fair hearing and freedom of movement, as well as positive rights such as education, health, and work. It is what institutes a system of rights. It is only on the basis of dignity that a man's life must not be taken arbitrarily, or his freedom curtailed without justification. Also, it is on the same ground that a man can claim to have his mind refined through education or have a means of livelihood through a decent work. Following the end of the second world war, the right to dignity became a major feature of majorly all national constitutions.[21] One of the primary goals of the UN is to "*to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small*".[22]

16 UN Gen. Ass. Res. 2200 A (XXI) 16 Dec. 1966, (entered into force 23 Mar. 1976).
17 UN Gen. Ass. Res. 2200 A (XXI) 16 Dec. 1966, (entered into force 3 Jan. 1976).
18 UN Gen. Ass. Res. 39/46 10 Dec. 1984, (entered into force 26 June, 1987).
19 UN Gen. Ass. Res. 34/180 18 Dec. 1979, (entered into force 3 Sept. 1981).
20 UN Gen. Ass. Res. 44/25 20 Nov. 1989, (entered into force 2 Sept. 1990).
21 D. Shulztiner and G.E. Carmi, 'Human Dignity in National Constitutions: Functions, Promises, and Dangers', (2014), 62 (2), *American Journal of Comparative Law,* 461 – 490.
22 Preamble UN Charter 1945.

Flowing from this sense of value, not only is man seen as a creation most precious, the full expression of his value can only be attained when he enjoys the right measure of liberty, to be what he was made to be. Based on this notion, the twin concepts of dignity and liberty have remained very strong pillars for the enthronement for human rights. Usually, where there is a violation of one, the other is most likely to be in view, or even happening simultaneously. Both rights are key component units of modern IHRL framework, and remain perhaps the most abused rights, after the right to life. Therefore, human rights in the real sense ought to be the promotion of dignity and liberty manifested in other rights. Right mindedness on dignity and liberty should be at the core of every security measure directly involving humans. That is how important dignity and liberty is to the war on terror, especially within the frame of that which any reasonable person would consider proper.

Human Rights and Counterterrorism

Any discussion on the contest between human rights and counterterrorism, is bound to evoke both poignancy and delirium. Poignancy, given the artificial wedge that has somewhat been brought between the two from the sudden burst of terrorism around the start of the new millennium. Delirium, based on the joy that a conversation on the two, may just be the beginning of some light at the end of the tunnel, towards achieving the long-canvassed cooperation between both concepts. The goal of the article is nestled in the need to find light at the end of this unnecessarily long tunnel, and a good place to start is where the problem in fact began. As brilliantly observed by Fitzpatrick, the human rights landscape essentially rests on the instrumentality of law and legal institutions, towards minimising the injury that the strong can do to the weak.[23] However, recent events such as 9/11 and the surge of counterterrorism that followed, has unearthed its inherent vulnerabilities. Notably, they have been on the offensive, pushing against the human rights architecture.[24] As a matter of fact, the relentless assault has nearly flung the concept over the cliff.

Before counterterrorism assumed this front-row position, the human rights system could be said to have conceded so much, towards balancing human rights and the safeguard of state security, through its several controversial derogations.[25] Despite this, it appears the pro-counterterrorism group would not join the bandwagon of 'half bread is better

23 J. Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', (2003), 14 (2), *European Journal of International Law,* 241 – 264 at 242.
24 *Ibid.*
25 *Ibid*, at 243.

than none'. Counterterrorism promoters, bypassing these derogations, continue to make incursions into the core texts of human rights provisions. It may be a counter-argument that under the same framework, human rights while restraining government's responses to terrorism, did little concerning terrorists.[26] The horror of the 9/11 attacks, the mind-blowing devastations of plunging fully loaded passenger airlines into imposing office complexes, and the cold-blooded cum gruesome mass massacre of close to 3,000 innocent Americans, was a new watershed.[27] This evil occurrence would appear to have done incalculable damage to any defence human rights may have been trying to mount all along. With the onslaught against terrorism post-9/11, leading nations such as the US began to crisscross the globe, searching for suspected terrorists and the need to bring them to book. The expectation was that such suspects, upon being apprehended would be put through a decent system of administration of transitional justice, encapsulated in a judicial process constituted solely to determine their guilt.[28] The reality however has been far from this. In an era of detention camps and the explosion in state actions such as 'targeted killings', it can be said that the hostilities between human rights and counterterrorism may have come full circle.

At the forefront of the pro-counterterrorism coalition is the United States (US) who, as it has often been the case, regards its viewpoint as superior to that of any other nation.[29] With its below par attitude towards human rights values, American policy makers in pursuit of counterterrorism objectives wade through the gaps in International Humanitarian Law (IHL) and the law governing the use of force.[30] Despite this, stakeholders in the human right system have not failed to keep up the push-back, maintaining their position that further destruction of human rights values, will only help terrorist overcome basic principles such as human dignity and rule of law.[31] Though the needless issues between human rights and counterterrorism has greatly overshadowed the huge legislative milestone recorded following the enactment of the TPA 2013, the matter did not start in Nigeria. Nigeria's counterterrorism law is simply a part of the giant 21st century international law jigsaw on counterterrorism. It is important to examine the how this jigsaw came to be, to put in context how Nigeria arrived at this point.

26 *Ibid.*

27 *Ibid*, at 243, 244.

28 O.B. Adegbite, 'The Cloak the Turban and Slippery Slopes: The Cleric as a Direct Participant in Hostilities and the Right to Protected Status under International Humanitarian Law', (2018), 26 (1), *Lesotho Law Journal*, 79 – 104 at 103, 104.

29 J. Fitzpatrick, *supra*, n.22, 245.

30 *Ibid.*

31 *Ibid.*

Counterterrorism under 21st UN Human Rights System: Nigeria in Perspective

Earlier, terrorism was viewed as a matter relating to international criminal conduct, and so international criminal law treaties obliged governments to criminalise terrorism related acts, while also cooperating with other governments towards punishing suspected terrorists.[32] The dastardly events of 11 September 2001 (hereinafter '9/11') however significantly altered the landscape. Reported to have been perpetrated by nineteen members of the outlawed Al Qaeda terrorist network, 9/11 saw two American passenger planes plunge into the twin towers of the world trade centre in New York City, while two other planes targeted the US military headquarters in Pentagon, as well as an area in Pennsylvania.[33] These events nearly brought the whole world to a standstill, with emotions reaching fever pitch, what is however relevant for the purpose of this article, is the legal developments that later followed.

A significant development in this respect is the leadership demonstrated by the UN. On 28 September 2001 the United Nations Security Council (UNSC), pursuant to its powers under Chapter VII of the UN charter, adopted resolution 1373, which was expected to be binding on member states.[34] The resolution, which put in place a fitting framework for counterterrorism, mandated member states to provide for the crime of terrorism in their domestic laws, cooperate towards combatting terrorist financing, share intelligence, and implement international treaties bordering on terrorism.[35] States were also to ensure that they do not accommodate asylum seekers known to have been involved in terrorist activities.[36] The resolution also established a fifteen-member antiterror body called the UN Counterterrorism Committee (CTC), which required member states to submit reports on steps taken towards carrying out the intentions of the resolution, within ninety days of the resolution, and periodically afterwards.[37] In 2004 the UNSC adopted resolution 1540

32 S.P. Marks, 'International Law and the 'War on Terrorism': Post 9/11 Responses by the United States and Asia Pacific Countries', (2006), 14 (1), *Asia Pacific Law Review*, 48.

33 C. Marken, *Counterterrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law*, (Milton Park, Abingdon, Oxon: Routledge Publishers, 2011), 1 – 98 at 1; S. Boyne, 'Law, Terrorism, and Social Movement: The Tension Between Politics and Security in Germany's Anti-Terrorism Legislation', (2004), 12 (1), *Cardozo Journal of International and Comparative Law*, 41 – 82 at 75, 76.

34 J. Santana, 'In the Aftermath of Resolution 1373: Tackling the Protective Veil of Counterterrorism', (2015), 23 (3), *Cardozo Journal of International and Comparative Law*, 663 – 693 at 676.

35 S.B. Adarkwah, 'Counterterrorism Framework and Individual Liberties in Ghana', (2020), 28 (1), *African Journal of International and Comparative Law*, 50 – 65 at 50.

36 S.P. Marks, *supra*, n. 31, 49.

37 C. Marken, *supra*, n. 32; J. Santana, *supra*, n. 33, 676; W.S. Heinz and J. Arend, *The International*

in which states are prohibited from providing support to non-state actors attempting to procure biological, chemical, and nuclear weapons.[38] Resolution 1373 practically gave powers to national governments to go after terrorists within the nooks and crannies of their space.[39] Creating a major *lacuna*, the resolution made no mention of the need for member states to respect their international human rights obligations.[40] Following 9/11, there was an avalanche of legislations enacted to protect citizens against acts of terror by persons and groups.[41] In the sweltering and panic mode of this era, governments obviously reeling under the pressure of the resolution, began to enact rather *draconian* domestic counterterrorism legislations.

Nigeria's reaction to the resolution was not different from that of most UN member states. In 2011, it enacted the Terrorism (Prevention) Act.[42] The Act was later supplanted by the Terrorism (Prevention) (Amendment) Act 2013 (*Hereinafter* the 'Act'), which is currently the country's principal counterterrorism legislation.[43] Before the 2011 move, Nigeria's counterterrorism framework was practically blurry, notwithstanding that the country had earlier recorded incidences that had the signature of terrorism. The country did not have a direct legislation on terrorism, and related acts were simply brought under the Criminal Code Act,[44] the Penal Code Act,[45] and the Economic and Financial Crimes Commission (Establishment) Act 2004 which defined terrorism and accordingly provided for sanctions.[46]

Fight Against Terrorism and the Protection of Human Rights, (Berlin: German Institute for Human Rights, 2005), 1 – 43 at 11; HRW, 'In the Name of Counterterrorism: Human Rights Abuses Worldwide', (March 25, 2003), *A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights (UNCHR)*, 1 -25 at 4.

38 C. Lumina, 'Counter-Terrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice', (2007), 7 (1), *African Human Rights Law Journal*, 35 – 67 at 40.

39 S.B. Adarkwah, *supra*, n. 34, 51.

40 HRW, *supra*, n. 36, 4.

41 A. Shepherd, 'Extremism, Free Speech, and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR', (2017), 33 (85), *Utrecht Journal of International and European Law*, 62 – 83 at 62.

42 Terrorism (Prevention) Act No. 10 2011.

43 Terrorism (Prevention) (Amendment) Act 2013. The Explanatory Memorandum of the Act states that, "*This Act amends the Terrorism Prevention Act No. 10 2011 makes provision for extra-territorial application of the Act and strengthen terrorist financing offences*".

44 CAP 38, Laws of the Federation of Nigeria, (LFN) 2004.

45 CAP 89, Laws of the Federation of Nigeria, (LFN).

46 C.E. Attah, 'Boko Haram and Sexual Terrorism: The Conspiracy of Silence of Nigeria's Anti-Terrorism Laws', (2016), 16 (2), *Africa Human Rights Law Journal*, 385 – 406 at 397.

Despite the generally acclaimed importance of the Act as the vehicle of counterterrorism in the country, a major challenge lies in its contempt for established human rights norms. The provisions of the Act have portrayed it as a legislation, either totally unmindful of the place of Nigeria's human rights obligations under IHRL, or though abreast of these obligations, is really unperturbed as too how much Nigeria complies. For instance, since the enactment of the Act, its implementation has been fraught with issues, particularly as regards how some of its provisions undermines established human rights norms, and carpets Nigeria's obligation under IHRL. Since its operationalization, there have been reported cases of politically exposed persons, simply arrested for making pronouncements that the government frowns at, only for them to be charged with terrorism and other crimes. Not only are these persons arrested, they are sometimes detained indefinitely, without any effort to bring them before a court for the determination of the charges against them. In some instance, even after they are charged and upon successful arraignment, they are immediately re-arrested on new charges, giving an impression that the initial arraignment was just a phony move to douse public pressure.

The gestapo implementation of the Act has particularly impacted on the right to dignity and personal liberty. Through the action of its agents in implementing the Act, Nigeria as a state party to several IHRL instruments, has failed to comply with its treaty obligations on these two rights, which imperils its standing in the international community. As this article will later demonstrate, the Nigerian government via its extreme provisions under the country's counterterrorism legislation, has significantly dropped the ball in terms of its IHRL obligations, an attitudinal disposition extremely dangerous for the overall sustenance of democratic values and the rule of law. To understand how the Act has been antagonistic to these two rights, it is important to proceed to examine what Nigeria's obligations in this regard are, under IHRL.

Right to Dignity and Personal Liberty: What is Nigeria's Obligation under International Human Rights Law?

IHRL: Nigeria's Obligations

To lay a demand on a State to protect human rights, is to proceed from the standpoint that the State has such responsibility to start with. Such proposition cannot be whimsical, but must be a product of relevant laws, crafted in clear terms. Such are the nature of IHRL treaties that States such as Nigeria are signatories to. Human rights treaties generally establish an objective framework for the protection of rights and fundamental freedoms.[47]

47 K. Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil

They also create obligations between states as well as individuals, who are deemed the direct beneficiaries.[48] Since independence, Nigeria has been a signatory to the UN charter and other binding IHRL treaties dealing with the protection of dignity and personal liberty. The UDHR takes human dignity very seriously and in its openings statement, it states that, "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world*".[49] It then proceeds to situate correctly the obligation of each member nation by stating that;

The peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women, and have determined to promote social progress and better standards of life in larger freedom.[50]

On the protection of this right, there is an expectation on all signatories to uphold and implement provisions of the UDHR and other relevant treaties. Nigeria for instance is expected to uphold Article 1 which provides that, "*all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*".[51] Aside the UDHR, Nigeria is a signatory to other relevant instruments such as the ICCPR and CAT, both already mentioned above. At the regional level, it is also a signatory to the African Charter on Human and Peoples' Rights (ACHPR).[52]

Right to Dignity of the Human Person

Interestingly, more than 50 years before the Act was even imagined, the kinds of inhumane behaviour that has since been associated with its implementation was already envisaged by the committee of nations through Article 5 of the UDHR which states that, "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or*

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and Political Rights', (2002), 13 (2), *European Journal of International Law*, 437 – 477 at 439.

48 *Ibid.*

49 Preamble to the UDHR,1948.

50 UDHR, 1948.

51 UDHR 1948.

52 African Charter on Human and Peoples' Rights (ACHPR), adopted 27 June, 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October, 1986); E. Babatunde, 'Torture by the Nigerian Police Force: International Obligations, National Responses and the Way Forward', (2017), 2 (1), Strathmore Law Review, 169 – 187 at 169.

punishment".[53] This provision was later affirmed in Article 7 of the ICCPR, providing that;

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[54]

Generally, it is agreed that "*cruel, degrading, and inhuman treatment*", is a direct attack on the dignity of a person. However, though the influence of the UDHR in advancing the idea of dignity has been quite impressive over the years, given that it is merely a declaration, it really has not been the right authority, to bindingly compel nations to behave properly. Instruments that imposes more binding authority on Nigeria are the ICCPR and the ACHPR. Article 7 of the ICCPR prohibits torture, cruel, inhuman or degrading treatment of punishment.[55] The same right is captured under Article 5 of the ACHPR which provides that;

Every individual shall have the right to the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degrading of man particularly slavery slave trade, torture, cruel, inhuman and degrading punishment and treatment shall be prohibited.[56]

This provision was given voice in *Commission Nationale Des Droits De l'Homme et des Libertes v. Chad*,[57] where the commission held that that the failure of the Chadian government to protect its citizen from torture was a violation of Article 5.[58]

When it comes to the international legal regime safeguarding 'dignity', the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (*Hereinafter* the 'CAT'),[59] is the principal instrument. This instrument upholds the provisions of both the UDHR and ICCPR. It calls the attention of the human community, to the earlier commitment of the international community in the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or

53 UDHR 1948.
54 International Covenant on Civil and Political Rights (ICCPR), 9 Dec. 1966, 999, U.N.T.S. 171, (entered into force 23 Mar. 1976).
55 ICCPR 1966.
56 ACHPR 1981.
57 *Commission Nationale Des Droits De l'Homme et des Libertes v. Chad*, AfrComm HPR, Comm No. 74/1992, Activity Report (1995), quoted in E Babatunde, *supra*, n. 51, 181.
58 E. Babatunde, *supra*, n. 51, 181.
59 10 Dec. 1984, 23 I.L.M. 1027.

Degrading Treatment or Punishment.[60] In order that every person may be clear on what would amount to torture, Article 1 of the CAT provides a well-rounded definition which states that;

For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[61]

Making the point that the prohibition on torture flows from the UN's understanding that "*those rights derive from the inherent dignity of the human person*",[62] and the need "*to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world*",[63] the CAT lays down ground rules to prohibit torture in every part of the world. Article 2, for instance states that;

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture.[64]

Article 4 (1) & (2) further adds that, "*each state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature*".[65] Article 5 of the CAT enjoins state parties to thoroughly

60 Adopted by the UN General Assembly 9 Dec. 1975.
61 UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), Gen. Ass. Res. 39/46, 10 Dec. 1984, (entered into force 26 June 1987).
62 Preamble to the CAT 1984.
63 Preamble to CAT 1984.
64 CAT 1984.
65 *Ibid.*

investigate all cases of torture in its immediate domain,[66] or any of its territories as provided in Article 12.[67] Article 6 and 7 provides that where a case has been established concerning such investigation, criminal prosecution should be commenced against such accused persons,[68] and Article 8 provides for extradition, where such is appropriate in the instant case. [69] In the course of prosecuting such a person so extradited, Article 9 of the Convention admonishes States to cooperate in terms of sharing of information and evidence, that would ensure conviction.[70]

For victims of torture, Article 14 imposes a duty on State parties to ensure that victims are able to access redress and adequate compensation, and where a victim has unfortunately passed away by reason of the torture, the dependents must be compensated for their loss.[71] Article 15 renders invalid any confession that may have been extracted by subjecting persons to acts of torture,[72] a position that is consistent with established principles of the law regarding evidence. In addition to these established IHRL obligations, further safeguards of these rights have been constitutionalized in Nigeria.[73] For example, Section 34 of the Constitution provides that, "*every individual is entitled to respect to dignity of his person; accordingly, no person shall be subject to torture or to inhuman or degrading treatment…*".[74] The above provision has a corollary in Section 17 which states that, "*in furtherance of the social order, the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced*".[75] It is clear that both the Nigerian Constitutional framework and IHRL obligations through the CAT, considers torture not only as a violation of the right to human dignity, but indeed a grave one.

66 *Ibid.*
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*
72 *Ibid.*
73 1999 Constitution.
74 *Ibid*,
75 *Ibid.*

Right to Personal Liberty

Regarding, the right to personal liberty, Article 3 of the UDHR provides that, "*Everyone has the right to life, liberty, and the security of person*",[76] while Article 9 also states that, "*no one shall be subjected to arbitrary arrest, detention, or exile*".[77] Giving support to the UDHR, Article 9 of the ICCPR provides in an extensive form how personal liberty should be guarded;

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[78]

In safeguarding the right to personal liberty, the ACHPR provides in Article 6 that;

Every individual shall have the right the liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.[79]

The clause, '*In particular, no one may be arbitrarily arrested or detained*', is very instructive in the context of counterterrorism legislations which often seek to detain suspects without restraints. Additionally, under the Nigerian Constitution Section 35 states that;

76 Article 3, UDHR 1948.
77 Article 9, UDHR 1948.
78 Article 9, ICCPR 1966.
79 ACHPR 1981.

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law…[80]

Nigeria ratified the ICCPR on 29 July 1993, the CAT on 28 June 2001, and the ACHPR on 22 June 1983.[81] This makes all the above provisions binding on Nigeria, to the end that successive governments are expected to respect the country's international obligations in this regard. In terms of legal standing, the ACHPR may be said to edge out both the ICCPR and the CAT, in the sense that it has been domesticated in Nigeria, and thus has the force of law.[82] Necessarily, and by the decision of the supreme court in *Abacha v. Fawehinmi*,[83] this means that it has the same standing as any validly made Act of the national assembly.[84] One can also add, that by implication, it ought to instruct lawmaking bodies at all levels of government as regards Nigeria's obligation under the ACHPR, and the important need to be guided by this obligation in crafting the any law. Such mindedness ought to have trailed the enactment and eventual implementation of the Act, however Nigeria's obedience in this respect, as would be seen in the next part of this article, leaves so much to desire.

The Meltdown of the Rights to Dignity and Personal Liberty under the Terrorism (Prevention) (Amendment) Act 2013: Analysing the Indefinite Detention Framework.

Acts of terror are generally regarded as violations of human rights, with rights such as life, physical integrity, security, etc. often greatly impacted.[85] What however appears stark is that with counterterrorism management comes terror-stricken legislations which also violates human rights. Notwithstanding their centrality to the war against terror, domestic counterterrorism legislations have become perhaps the biggest threat to human rights with in terms of offences, detention powers, proscription of terrorist organisations, as well as curtailment and investigative powers.[86] Thus, the evil that counterterrorism legislations seek to combat end up being the same it creates. Nigeria's counterterrorism legislation is

80 1999 Constitution.

81 E. Babatunde, *supra*, n. 51, 169.

82 African Charter on Human and Peoples' Rights (Ratification and Enforcement), Act CAP 10 Laws of Federation of Nigeria, (LFN) 1990. E. Babatunde, *supra*, n. 51, 181.

83 (2000) 6 NWLR (part 660).

84 Section 12, 1999 Constitution.

85 C. Lumina, *supra*, n. 37, 59.

86 O.A. Arebamen, P.E. Oamen, and B. Abegunde, 'The Impact of Counter-Terrorism Laws on the Protection of Human Rights and Fundamental Freedoms', (2015), 3 (1), *Akungba Law Journal*, 131 – 149 at 138.

an example in this regard. This article takes the view that the Act represents an arbitrary violation of the right to dignity and personal liberty, two rights globally recognized as significant to the overall humanity of any individual. The two rights are caught in the vortex of the 'indefinite detention framework' provided under the Act.

Certain deleterious provisions of the Act, having the appearance of 'absoluteness', have been perfect excuse for human rights violations by agents of the state. Analysis of these dangerous provisions is imperative at this point. To start with, section 27 (1),[87] provides that;

The court, may pursuant to an ex parte application grant an order for the detention of a suspect under this Act for a period not exceeding 90 days, subject to renewal for a similar period until the conclusion of the investigation and prosecution of the matter that led to arrest and detention is dispensed with.[88]

Section 28 (4) further adds that;

Where a person arrested under this Act is granted bail by a court within the 90 days detention period stipulated by this Act, the person may, on the approval of the Head of the relevant law enforcement agency be placed under a House arrest shall (a) be monitored by its officers; (b) have no access to phones or communication gadgets; and (c) speak only to his counsel until the conclusion of the investigation.[89]

Section 27 (1) and 28 (4) of the Act reflects what can be described as 'preventive detention of suspected terrorists'.[90] This was one of the controversial measures that emerged in post-9/11 counterterrorism legislation making, which allowed the governments to detain suspected terrorists without criminal trial, pending the conclusion of investigation.[91] In countries such as Brazil, Colombia, France, Germany, Greece, Norway, Spain, and Turkey, there is a pre-trial detention framework.[92] On the one hand, the detention is meant to allow security agencies obtain evidence towards prosecution, while on the other hand it helps to disrupt the network of the terrorists.[93]

87 Terrorism (Prevention) (Amendment) Act 2013.
88 *Ibid.*
89 *Ibid.*
90 C. Marken, *supra*, n. 32, 2.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.

Ordinarily, preventive detention is expected to strengthen counterterrorism effort and ensure that government not only gain valuable evidence to prosecute terror suspects, but also effectively truncate the chain of acts of terror that may still be in process. However, under the Nigeria's counterterrorism law, this supposedly effective tool has been taken to the extreme, with the Act's seemingly indefinite detention framework. For one, the wording of sections 27 (1) and 28 (4) are so wide and absolute, that it appears to grant unlimited powers to relevant law enforcement agencies to detain anyone alleged of terrorist act indefinitely. A particularly worrisome clause is that in section 27 (1) which says;

The detention of a suspect under this Act for a period not exceeding 90 days subject to renewal for a similar period until the conclusion the investigation and prosecution of the matter.[94]

There is a suspicion that the drafters of the Act may have felt at ease when constructing this provision given the unsavoury safety net that would appear to have been provided in the constitution. Section 35 (1) of the Constitution, in providing an exception to the right to personal liberty states that;

Every person shall be entitled to his personal liberty, and nobody shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law…provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.[95]

The implication of this constitutional provision is that where the DSS arrests anyone suspected under certain provisions of the Act, in addition of section 27 (1) of the Act above, the agency is permitted to continue to hold the suspect as long as the period of detention does not exceed the stipulated period of imprisonment under the Act. This means that where for instance the Act prescribes 10years imprisonment for an offence, anyone arrested in relation to such offence can be detained without trial for up to ten years. However, it would appear that the right to personal liberty still enjoys some safeguard under the constitution. In this respect, section 35 (4) (b) states that;

Any person who is arrested or detained in accordance with subsection 1 (c) of this section shall be brought before a court of law within a reasonable time and if he is not

94 Terrorism (Prevention) (Amendment) Act 2013.
95 1999 Constitution.

tried within a period of three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for a trial at a later date.[96]

This provision of the constitution provides that the maximum time any person can be detained for any offence is for a period of three months, and nothing more. At the end of the three months such a person is expected to be released unconditionally where no trial is brough against him/her, or released upon conditions that would enable trial be commenced against such at a later date. The Constitution neither recognizes nor permit a renewal of the three months period of detention as slated in section 27 (1) of the Act. It is clear that introduction of this provision in the Act by the drafters is geared towards undermining an important part of the Constitution that safeguards fundamental rights. The Constitution in section 35 (5) has also defined 'reasonable time' to mean any of the following "*in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometres, a period of one day*", or "*in any other case, a period of two days…*".[97] The court may also determine what reasonable time means. Therefore, the drafters of the Act cannot hide behind the vagueness of 'reasonable time' as the basis for indefinite detention under section 27 (1) of the Act. However, harmony between the Section 27 of the Act and section 35 of the Constitution, appears to have been achieved in the provision of Section 35 (7) (a) which provides that;

Nothing in this section shall be construed in relation to subsection (4) of this section, as applying in the case of a person arrested or detained upon reasonable suspicion of having committed a capital offence.[98]

For the most part, insufficient attention has been paid to this part of the constitutions which seeks to aid and abet the Act. Worryingly, these provisions are not only anachronistic and draconian, they are totally inconsistent with established human rights norms accepted globally a well as Nigeria's obligation under IHRL, as regards respect for the right of personal liberty. Also, the fact that section 28 (4) attempts to provide a route for government to qualify a bail validly granted the defendant by a competent court of jurisdiction, leaves so much to be desired. It is important to make the point that provisions of section 28 (4) appear to have been cleverly inserted in the Act, to oust the

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

powers of the court. Yet, section 6 (b) of the Nigerian Constitution provides that;

The judicial powers vested in accordance with the foregoing provisions of this section – shall extend to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[99]

The phrase '*determination of any question as to the civil rights and obligations*' referred to here concerns the right to personal liberty provided for under section 35 of the Constitution.[100] The same right is protected by Article 9 of the UDHR which states that "*no one shall be subjected to arbitrary arrest, detention, and exile*". A similar provision is also found in Article 9 of the ICCPR which provides that;

Everyone has a right to liberty and security of his person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[101]

The key phrase here is '*arbitrary arrest and detention*'. It is clear that not only are section 27 (1) and 28 (4) of the Act retrogressive, both violates the Constitution, as well as relevant provisions under IHRL. Both provisions also represent a clear and present danger to whole idea of rule of law, as they espouse the smuggling of arbitrary exercise of powers into an otherwise important counter-terrorism legislation. It is inconceivable that the law will permit such impunity.

It may be made an argument that the 'indefinite detention framework' is required given a sort of 'state of emergency' that terrorism imposes, and the need to apply all measures necessary to protect national security. Though a convenient argument, yet it still falls short of the prescribed standards. Nigeria's obligations under IHRL does not permit this sort of defence, which comes under permitted derogations. The provision of derogations is a part of IHRL, except that it is only allowed in certain instances. As regards the right to human dignity and personal liberty, IHRL is clear on what is allowed and what is prohibited. The ICCPR perhaps having countries like Nigeria in mind, affirms this point, stating that;

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take

99 *Ibid.*
100 *Ibid.*
101 ICCPR 1966.

measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision....[102]

It is clear therefore that both right to dignity and personal liberty are non-derogable rights. It is not an exculpatory ground that the provisions analysed above i.e. sections 27 (1) and 28 (4) of the Act, are meant to ensure national security. Indeed, national security ought to proceed from the protection of the people and their rights, and not the other way round.

Balancing Human Rights and Counterterrorism: Developments in the Post-UNSC Resolution 1373 era and Lessons for Nigeria.

A major objective of constitutional democracies, is to safeguard their people against the scourge of terrorism while correspondingly upholding human rights and the rule of law.[103] This is however no easy matter, given that persons suspected of terrorism and undergoing trial, are also expected to be able to enjoy their rights pending conviction. So how is this pot of rights to be adequately stirred, and yet not crash into the fire? The place to start, is the understanding that human rights are today recognized as intrinsically important when it comes to domestic counterterrorism legislative measures. Describe as a 'war without rules',[104] it cannot be that counterterrorism will be carried out, without limitations particularly those imposed by human rights norms. The early quarrels between counterterrorism and human rights were made possible by the UNSC which did not consider human rights violations by countries, or try to determine how UNSC Resolution 1373 would affect the protection of human rights.[105] This deprived the international community of a uniform framework, and allowed the implementation of the resolution to differ from country to country, in areas such as definition of terrorism as well as counterterrorism approach and system.[106]

102 Article 4 (1) (2) & (3), ICCPR 1966.

103 N. Mavronicola, 'Protecting Human Rights while Countering Terrorism: The Role of National Human Rights Institutions', (2016), *Brainstorming Meeting organised by Office of the Council of Europe Commissioner for Human Rights and the European Network of National Human Rights Institutions*, 1 – 16 at 5.

104 J. Fitzpatrick, *supra*, n. 22, 248.

105 J. Santana, *supra*, n. 33, 676.

106 Ibid, at 676, 677.

The sidestepping of IHRL obligations by resolution 1373, was a main concern for successive UN high commissioners for human rights.[107] On October 21, 2002 the then UN high commissioner, Sergio Vieira de Mello in his meeting with members of the CTC, noted these concerns and reinforced the need for the CTC to have a human rights advisor, as well as put necessary information on the non-derogation of some rights on its website.[108] Though the CTC did not as much as make any effort to implement these suggestions,[109] other events that later followed did remedy the errors of resolution 1373. For example, in November 2002 Mexico was able to get the UN General Assembly to adopt resolution 57/219, requiring countries to make sure that their domestic counterterrorism legislation was compatible with international law, especially human rights, protection of refugees, and international humanitarian law.[110] It reemphasized the need for some non-derogable rights to be respected at all times, and where states default, they must comply with the requirements of international law.[111] It also asked the UN Secretary-General to submit reports to the UN Commission on Human Rights (UNCHR), as well as the General Assembly on the implementation of the resolution.[112]

Subsequently, UNSC resolution 1456 of 20 January 2003 provided that, "*states must ensure that any measure taken to combat terrorism comply with all their obligation under international law, in particular international human rights, refugee and humanitarian law*".[113] Further to this, the UNSC adopted resolution 1624 of 2005, which stated that counterterrorism and human rights are not only complementary, but that both are important aspects of counterterrorism measures, and all steps taken in line with its paragraph 1, 2, and 3, should be in compliance with obligations relating to international human rights law, refugee law and humanitarian law.[114] Also, the UN global counterterrorism strategy added that;

The promotion and protection of human rights for all and the rule of law is essential to all components of the strategy, recognizing that effective counterterrorism measures and promotion of human rights are not conflicting goals, but complementary and mutually

107 HRW, *supra*, n. 36, 4.
108 *Ibid.*
109 *Ibid*, at 5.
110 A/RES/57/219; W.S. Heinz and J. Arend, *supra*, n. 36, 11; HRW, *supra*, n. 36, 5.
111 HRW, *supra*, n. 36, 5.
112 *Ibid.*
113 *Ibid*; W.S Heinz and J. Arend, *supra*, n. 36, 11.
114 G.A. Res 1624, U.N. Doc. A/RES/1624 (14 September 2005), quoted in J. Santana, supra, n 33, 677, 678.

reinforcing".[115]

It further reemphasizes the nexus between human rights and security, to the end that both human rights and rule of law must be at the centre of every domestic and international counterterrorism framework.[116] The above positions have been reinforced by Adarkwah, who cites the position of the UNSC, which is that countries must ensure that their domestic counterterrorism responses match their obligations in international law.[117] This has been interpreted to mean that domestic counterterrorism legislations must respect human rights.[118] Speaking on the conflict between human rights and counterterrorism in West African countries, he re-echoes the position of the CTC, which is that, "*most states have used comparatively broad definitions of terrorism in their definition. This may pose a significant problem when interpreting terrorist conduct in compliance with human rights obligations*".[119] According to the committee, most countries also lack proper accountability framework for human rights violations by security operatives.[120] The meaning is that with accountability missing, abuse becomes commonplace.[121]

The implication of the above developments is that, notwithstanding the initial stance of resolution 1373, the UN Human rights system has come to recognise the futility in fighting terrorism, without incorporating human rights. As a matter of fact, it has been noted that safeguarding human rights in counterterrorism is more than just a legal prerequisite, but incidental to the overall success of the war against terror.[122] As the UN Secretary-General remarked before the CTC, "*to pursue security at the expense of human rights, short-sighted, self-contradictory, and, in the long run, self-defeating*".[123] Though human rights and counterterrorism are not really cognates in term of origin, the fact that both, under the present circumstances, relates to the protection of the human society, imposes an obligation on member states of the UN to strive to strike a balance between the two in their domestic legislations.

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115 UNHCHR, 'Human Rights Terrorism and Counter-Terrorism', (2008), *Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 32* 1 – 72.
116 *Ibid*, at 21.
117 SC Res 1456, UN SCOR 58th Sess. 4688mtg, UN. Doc. S/RES/1456 (2003), quoted in S.B. Adarkwah, *supra*, n. 34, 62.
118 S.B. Adarkwah, *supra*, n. 34, 62.
119 *Ibid.*
120 *Ibid.*
121 *Ibid*, at 63.
122 HRW, *supra*, n. 36, 3.
123 *Ibid.*

This balance is important, for a number of reasons. To start with, respect for human rights in counterterrorism secures the same norms that the terrorists are trying to destroy and garners support for the state.[124] This point has been noted by a former UN special rapporteur, Martin Scheinin who stated that;

Compliance with all human rights while countering terrorism represents a best practice because not only is this a legal obligation of states, but it is also an indispensable part of a successful medium – and long-term strategy to combat terrorism.[125]

This balance does not protect the terrorist, but ensures that states do not abuse their powers and become tyrannical. Under a balanced framework, suspected terrorists after been apprehended, can be detained as a preventive measure, and within a reasonable time brought before a court of competent jurisdiction, to ensure that they are accordingly convicted. This way, leaders with tyrannical dispositions will not be gifted with an opportunity of exploiting the law to punish their opponents. More so, achieving such balance will help to directly attack the issues that are at the root of terrorism.

In comparative terms, such a balanced system is already being developed in the United Kingdom (UK), a jurisdiction that has succeeded in gradually bringing human rights values into its fight against terror. Post-9/11 legislative development in the UK led to the enactment of the Anti-Terrorism, Crime, and Security Act (ATCSA) of 2001, which provided for a rather expansive counterterrorism framework, that directly infringed on human rights.[126] A sore part of the ATCSA was the provision for 'indefinite detention without trial' of non-Britons, which was viewed not only as discriminatory but also a violation the UK Human Rights Act of 1998.[127] Under the ATCSA, the UK Secretary of State for Home Affairs had the power of certifying whether a detainee, was a terror suspect or national security threat.[128] The ATCSA was however repealed following the decision in *A v. Secretary of State for the Home Department*,[129] where it was held that part 4 of the ATCSA was in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[130]

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124 N. Mavronicola, *supra*, n. 102, 5.
125 *Ibid.*
126 C.A. Honeywood, 'Britain's Approach to Balancing Counterterrorism Laws with Human Rights', (2016, 9 (3), *Journal of Strategic Security*, 28 – 48 at 21.
127 Section 33, part 4, ATCSA, cited in C.A. Honeywood, *supra*, n. 125, 32.
128 HRW, *supra*, n.36, 20.
129 (2004) UKHL 56.
130 C. Marken, supra, n. 32, 2, 3.

In the UK, pursuant to the Prevention of Terrorism Act, 2005 and Terrorism Act, 2006, a maximum number of twenty-eight (28) days is provided for the detention of a terrorism suspect, with the proviso that such order is to be granted by a High Court Judge.[131] Overall, the current UK standard is commendable as it inches towards better human rights standards. The current renewable 90 days detention period under the Nigerian Act is not only draconian, it is importantly a perfect recipe for abuse of power, particularly as the article has established.

The Way Forward

The current brutality and high-handedness sublimated into Nigeria's counterterrorism law, is an expression of lack of regard for human rights norms. The assault on the right to dignity and personal liberty under Nigeria's counterterrorism framework, is beyond human standards. As Hornle and Kremnitzer has noted, "*the right to have one's human dignity respected is a defensive and individual right*".[132] Terrorist wreak havoc; the State must not also be found wreaking worse havoc, using the law as a cover. As a country continues in its democratic journey, it is imperative that all the essential components necessary for the sustenance of democratic values are in place. One of such is respect for the rule of law, under which fundamental human rights features as a major pillar. It has been rightly noted that when it comes to advancing democracy and human rights, rule of law is an important implement.[133] A similar point has also been made by former UN Secretary-General, Kofi Annan who observed that the rule of law and human rights are two important ingredients for developing state capacity to combat terrorism.[134]

One inference that can be drawn is that the fact that the Act features a number of retrogressive provisions is a fallout of Nigeria's rigid and frenzied adherence to UNSC Resolution 1373. It is however important to state that accountability would have been take care of where the Act is worded, taking into consideration Nigeria's IHRL obligations. This obviously was the intention of the UN with the subsequent adoption of resolution 1624. Nigeria ought to have reviewed its counterterrorism legislation in this light and accordingly fallen in line. The 2013 amendment even though a job well-done, through its brilliant incorporation of the crime of terrorist financing, is still significantly insufficient

131 *Ibid.*

132 T. Hornle and M. Kremnitzer, 'Human Dignity as a Protected Interest in Criminal Law', (2011), 44 (1), *Israel Law Review*, 143 – 167 at 148.

133 A.D. Bostan, 'The Right to a Fair Trial: Balancing Safety and Civil Liberties', (2004), 12 (1), *Cardozo Journal of International and Comparative Law*, 1 – 40 at 1.

134 H.W. Gebreegziabher, 'The Right to Privacy in the Age of Surveillance to Counterterrorism in Ethiopia', (2018), 18, *African Human Rights Law Journal*, 392 - 412 at 398.

by not incorporating the noble intentions of Resolution 1624. This necessarily calls for a further review of the Act. To demonstrate its commitment to balancing the war on terror with its human rights obligations, the government must move towards bringing certain provisions of the Act into compliance with its IHRL obligations and current developments under the UN human rights system. Article 2 (2) of the ICCPR provides this obligation stating that;

Where not already provided for by existing legislative or other measures, each state party to the present covenant undertakes to take the necessary steps in accordance with its constitutional processes and with the provisions of the present covenant to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant.[135]

It is important to stress that the operative part of Article 2 (2) of the ICCPR are the clauses "*where not already provided for by existing legislative or other measures,*" and "*to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant*". Nigeria acceded to the ICCPR on July 29 1993, is therefore under an obligation to give effect to the rights in the covenant in any existing legislative document such as the Terrorism Prevention (Amendment) Act 2013. To this end, there is an urgent need to review certain provisions of the Act that undermines the country's IHRL obligations.

Importantly, the provision for 'indefinite detention of terrorism suspects' under section 27 (1) and 28 (4) of the Act, is a provision earnestly in need of review. In amending this section, valuable lessons can also be drawn from the UK 28 days detention rule already alluded to above. The assault on the powers of the court in granting bail pending the completion of trial which the Act seeks to challenge, must also be reviewed as it violates the powers of the court to determine the liberty of persons at all times. The Nigerian government in its war on terror cannot always be a judge in its own cause; being the accuser as well as usurping the powers of the court. It cannot continue to wrestle with the court on who should, or should not be granted bail pending conclusion of trial. All of these clearly discredits the government's counterterrorism effort and deprives it of the needed citizen support. The government must know that human rights treaties are binding on countries that ratify them. Additionally, advancements in human rights regimes, subjects a government's treatment of its citizen to scrutiny and intervention by external parties.[136]

135 ICCPR 1966.

136 W.M. Cole, 'Sovereignty Relinquished? Explaining Commitments to the International Human Rights Covenants 1966 – 1999', (2005), 70, *American Sociological Review*, 472 – 495 at 473.

The current approach of unguardedly apprehending suspected enemies of the government on trumped up charges of terrorism and subsequently casting their rights into the bin, must be done away with. Such will not only continue to weaken the credibility of the government both home and abroad, it will inordinately continue to allow the main terrorist escape with their evil deeds. As long as those obnoxious provisions already discussed in this article, are left to remain as they are, the government's counterterrorism effort is likely to remain steeped in needless controversies and avoidable judicial reprimanding. Much responsibility is therefore placed on the shoulders of noble men of right and deep thinking to appreciate the interconnectedness between the human rights and counterterrorism, and do what is right devoid of the promises or perils of the moment. The pathway to development lies not in pursuing a direct closed answer to satisfy one side, but to understand the place of both in national governance, towards ensuring the right balance. It is important to alertly confront this together as those in government and those been governed.

Conclusion

This article has examined Nigeria's war on terror and how it violates the country's IHRL obligations in respect of the right to dignity and personal liberty. The article finds that the Terrorism (Prevention) (Amendment) Act 2013, accommodates sweeping provisions that do not take Nigeria's international human rights obligations into consideration. All of this may have been due to the pressure on the government, to realise UNSC resolution 1373 as manifestly as possible. The article therefore calls for a review of sections 27 (1) and 28 (4) of the Act, to reflect the good intentions of resolution 1624.

It is worth reaffirming that domestic counterterrorism does not exist in a vacuum. The fact that terror suspects are deemed as high network individuals, posing great risk to national security, does not provide a justifiable basis to sidestep established human rights norms. The erosion of human rights, is not only a gradual descent to tyranny, but most importantly a creeping erosion of humanity in any society. The need to provide a bulwark against the tyranny of men, was a major factor in the development of human rights treaties. It was the basis on which human rights was deemed a universal phenomenon, following which UN member states began to commit themselves accordingly. The obligations which later followed, being not decorative, were expected to be binding on states, to the end that they take domestic steps consistent with these obligations. The prime position of human rights cannot be substituted with the weaponization of the war on terror. In the event that

human right is made to abdicate its position all in the name of counterterrorism, then the war on terror itself must be seen as an act of terror.

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STATISTICAL EVIDENCE AND SUDDEN INFANT DEATH SYNDROME

Alexander Fiifi Ghartey[1] and Michael William Stockdale[2]

ABSTRACT

Statistical evidence is one of the *prima facie* tools used in the courtroom in common law jurisdictions. This paper is a case study aimed at describing the role of expert statistical evidence and how it influenced the outcome of the *Sally Clark* case. Sally Clark, a solicitor by profession, who was wrongly convicted and imprisoned by the Chester Crown Court in England in 1999 for the alleged murder of her two children. The prosecution's expert witness Professor Sir Roy Meadow, a consultant paediatrician, claimed in his statistical evidence that "the probability of two sudden infant death syndrome cases (SIDS) in one family matching the profile of the appellant was 1 in 73 million." Though upon appeal the Court of Appeal (Criminal Division) quashed the appellant's conviction in 2003, it brought to the fore the application of statistics in the courtroom and its overall impact on the justice system. It is revealed that statistical evidence should not be used to establish the truth of an ultimate issue with scientific certainty. Expert witnesses should not adduce evidence recklessly. The use of any far-reaching statistics as evidence requires the services of experts with competence in medical statistics. The criminal justice system has a huge task of exposing true child abusers. But the socio-economic cost of wrongful conviction of accused parents of SIDS cases is immense. Tragically, Sally Clark never came to terms with her wrongful conviction and in 2007 drank herself to death.

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1 University of Cape Coast, Department of Population and Health, Cape Coast, Ghana

2 Professor of Law, University of Northumbria, Law School, Newcastle-Upon-Tyne, England

Introduction

Statistical evidence is one of the *prima facie* tools for litigating parties in criminal and civil trials in common law jurisdictions. Though the general principle of evidence is that witnesses are to testify only to fact known to them, over the course of time, the courts have encountered cases that require analysis and explanations by expert witnesses who have scientific or specialized knowledge or experience in matters in issue. Scientific, mathematical or statistical evidence may not normally be within the purview of the juror or even the judge's knowledge. It is humanly impossible for the judge or the juror to be knowledgeable in all specialized fields and therefore the need for expert evidence in medico-legal cases.[3] However in the 1990's many parents, mainly mothers who had lost their children unexpectedly through cot deaths were wrongly imprisoned, some apparently on the basis of misleading expert evidence. Among cases of such wrongful convictions included *Clark*,[4] *Cannings*[5] *Anthony*[6] and *Patel*[7]. In those cases, notably in *Clark*, expert witnesses particularly Professor Sir Roy Meadow[8] gave 'misleading' statistical evidence.

Historically, both Jeremy Bentham and Lindley suggested that in order to accurately state facts and make precise inferences in court, evidence need to be quantified. In other words they need to be expressed in statistical form[9]. In 1782, Lord Mansfield stated that "men of science within their own science might give expert opinion on science"[10]. When in 1897 Oliver Wendell Holmes made the statement that 'the man of the future is the man of statistics and the master of economics,'[11] statistics as a discipline played a very insignificant role in court. It was largely unknown in legal proceedings. He emphasized the need for expert statistical evidence to be given by men of statistics within their own field for statistical evidence to be more useful to the administration of justice. The legal

3 Stockdale 2005

4 R v Sally Clark [2003] EWCA Crim 1020; 1200312 FCR 447

5 R v Cannings Angela [2004] EWCA Crim

6 R v Anthony Donna [2000] Court of Appeal, Criminal Division

7 R v Trupti Patel [2006] EWCA Crim 2689

8 Professor Meadow was born in Wigan, Lancashire in 1933, studied medicine at the University of Oxford and subsequently practised as a GP in Banbury. In 1970 he became a senior lecturer at the Leeds University and in 1980 he became a Professor of Paediatrics at the St. James University of Leeds Hospital. He was a former president of both the British Paediatric Association and the Royal College of Paediatrics and Child Health. Sir Roy's fame began in 1977 when he published a paper in the Lancet Medical Journal, a condition he called Munchausen Syndrome by Proxy (MSbP). For his 'services to child health', he was knighted in 1998.

9 Bernard Knight, 1982

10 Bentham: 1825 (refer Redmayne 2001 p.57; D.V. Lindley: Probability and the Law (1977).

11 Phillip Good, 2001

storms of sudden infant death cases in England, particularly in *Clark*, brought to the fore the controversial role of expert witnesses in such cases, thus making them important medico-legal challenges in common law jurisdictions.

Materials and Methods

The purpose of this paper is to describe and explain the role of expert statistical evidence and how it influenced the outcome of the *Sally Clark* case. Relevant medico-legal issues are identified and discussed in relation to their impact on the justice system at common law. Legal sources including search engines, websites and literature searches in legal journals and documents were used or consulted. The method used is a descriptive analysis of the role of quantitative statistics applying essentially a document research approach. Expatiated below are the conceptual facts at the heart of this paper namely nature of evidence, theory of statistical methods and sudden infant death syndrome (SIDS).

Nature and Essence of Evidence

The primary role of the court is to hear the arguments and assess the evidence of the litigating parties who bear the evidential burden and pass a ruling on the issues of facts and law with the aim of arriving at a just conclusion. Evidence is "any material which has the potential to change the state of a fact-finder's belief with respect to any factual proposition which is to be decided and which is in dispute..."[12] It is a re-construction of a given past event. The use of evidence in court is on the basis that current human knowledge of past events can be made possible and that the use of evidence is the best possible way of achieving that knowledge and establishing the probability of the occurrence of an event. Evidence must be *relevant* and *admissible* in order for a court to receive it. Irrelevant evidence is *prima facie* inadmissible because it is deemed not to carry the necessary evidential weight.[13] An expert witness is "a person qualified to give an opinion on a particular matter [before a court] within his or her own field of expertise."[14] Expert evidence, and for that matter expert statistical evidence is primarily an opinion evidence, a contentious area of the rule of evidence. The role of any expert witness is to give expert evidence in court in order that the court may reach just and fair conclusions. In principle, unlike facts, opinion evidence may not be admissible in court to prove the truth of a matter. This is because opinion is inference-based, derived from subjective perceptions and beliefs. Opinion evidence has the potential of being relevant or could even mislead the court. By definition the *ultimate issue* principle is one of the

12 Murphy 2005
13 Moenssens et al, 1995
14 Hill, Wood and Fine (2005 p.253)

opinion evidence rules. It seeks to limit the statement of facts to expert witnesses and the drawing of inferences from facts to the tribunal of fact, the latter being the jury in criminal cases and the judge. In civil proceedings witnesses are generally not permitted under the rule to make inferences from facts, or make speculations with respect to the causes of the facts or pronounce judgement about them.[15] This effectively prevents the usurpation of the functions of the jury and further lays the foundation for the *hearsay rule* which prevents a witness from "giving evidence of a statement made by another person… if the purpose of adducing the statement is as evidence of the truth of its factual content"[16]. Expert evidence may be adduced in various specialized medical fields such as forensic science, pathology, clinical medicine, psychiatry, epidemiology and pediatrics.

Sudden Infant Death Syndrome

Sudden infant death syndrome is the generic term for the sudden and unexpected death of a seemingly healthy child under one year of age. The US National Institute of Child Health, defined SIDS (also called cot or crib death), in 1991 as a "sudden death of an infant under one year of age, which remains unexplained after a thorough investigation, including performance of complete autopsy, examination of the death scene, and review of the clinical history"[17] A key feature of cases of SIDS is that the death occurs in a seemingly healthy baby during sleep and that no cause of death can be identified after thorough case investigation including autopsy. Risk factors for SIDS identified through epidemiological studies demonstrate a strong correlation between infant sleeping positions, sleeping environment and SIDS.[18] SIDS became a registrable cause of mortality in England and Wales in 1971. In Ghana however statistics on SIDS as a cause of infant deaths is at best scarce. Studies on hospital-based data shows that the main causes of infant mortality in Ghana are malaria, severe anemia, and neonatal sepsis.[19] It must be noted that historically SIDS is an ancient tragedy.[20]

Damn Lies and Statistics

Expert statistical opinion may be based on statistical information, published or

15 Stockdale & McAlhone (1993)

16 Stockdale (n 14) 1

17 The International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10)-WHO Version for 2016 classifies SIDS with the code R95.

18 Polina Gelfer & Michelle Tatum, Sudden Infant Death Syndrome (Journal of Pediatric Health Care, Volume 28, Issue 5) 470–474.

19 Awolu Adam, Gender Differentials and Disease-Specific Cause of Infant Mortality: A Case Study in an Urban Hospital in Accra, Ghana (African Journal of Reproductive Health June 2016; 20 (2): 104)

20 Biblical record of the Judgement of Solomon in Kings I Chapter 3.

unpublished.[21] Sources of statistics may include professional journals, research papers or experiments, materials written by professional peers and the general body of knowledge that fall within the scope of the relevant expertise of the expert witness. An expert statistical witness may be said to be an expert witness qualified to adduce in court expert evidence involving the principles of statistics and probability by virtue of his knowledge-base and competence derived from his training, qualifications and professional experience.

Traditionally, statistics is a "scientific methods for collecting, organizing, summarizing, presenting and analyzing data as well as with drawing valid conclusions and making reasonable decisions on the basis of such analysis"[22] Statistics as a discipline involves converting data into information that may be used in decision - making. Statistics may be quantitative (numbers) or prose (words) in form and nature. A number of reasons justify the use statistical methods in court. Statistics are by nature picturesque and precise in measurement. Their inherent measuring attribute provide a reasonable standard for comparison and for making inference and predictions. Furthermore, legal concepts such as 'balance of probabilities', 'more likely than not' and 'beyond a reasonable doubt' are all subject to statistical representation and interpretation. In practice statistics may be expressed in court by the application of the principles of probability, a measure of how confident and sure a person is about a proposition. It is an objective measure of the degree of belief in the truth of a hypothesis. In quantitative statistics, experts may express probability using mathematical symbolism namely statistical probability rules and theorems such as the *Bayes Theorem*[23] and the *Odds Ratio* rule.[24] On the other hand, qualitative or prose-based statistics involves the use of words such as possibly, probably, very probably, almost certainly and certainly may be used in lieu of quantitative statistical values. And they may lend themselves to quantitative interpretation. Statistics themselves could be imperfect, in that they could be bias, confusing, or even contentious. The uncertainties surrounding the subject, explain Mark Twain's famous statement in 1924 that "There are three kinds of lies: Lies, Damn Lies and Statistics." That notwithstanding there is a wide spectrum of disciplines including the medical sciences that may find the use of statistical evidence in court useful. Essentially, the methodology used in this case study is a descriptive analysis of the role of quantitative statistics in the *Sally Clark* case, the choice of which was by purposeful selection and the method used essentially a document research approach.[25]

21 Clark (n 4) 2
22 R v Abadom [1983] 1 WLR 126
23 Spiegel M.R 1992, p.1
24 People v Collins (1968) 438 P 2d 33
25 Bowling (2014 p.436-448)

Case Study: R v Sally Clark [2003] EWCA Crim 1020; 1200312 FCR 447

The facts of the case is that a Chester Crown Court in England presided over by trial Judge Harrison and assisted by a jury, convicted Mrs. Sally Clark on 9 November 1999 for the alleged murder of her babies, Christopher and Harry when they were aged 11 and 8 weeks respectively. The 35-year-old Mrs. Clark, a solicitor by profession, lived in Winslow, Cheshire with her husband, Stephen Clark also a solicitor. They married in 1990, and had their first child Christopher on 26 September 1996. But despite being apparently healthy, the child died in the evening of 13 December 1996. A post-mortem carried out by a Crown pathologist, Dr. Alan Williams initially diagnosed the cause of death as a lower respiratory tract infection and thus treated it as a case of SIDS. The second child Harry born on 29 November 1997 also died on 26 January 1998. Dr. Williams performed the post-mortem and recorded the cause of death as non-accidental injury. He followed it up by altering the cause of death for Christopher as smothering. Subsequently Sally Clark was arrested on suspicion of the murder of both Christopher and Harry. Sally Clark denied the charge, and was strongly supported by her husband Steve. Interestingly, Sally gave birth to a third son in the course of the case.

Facts in issue that needed to be determined by the jury in the original trial were whether the death of the children were due to natural or unnatural causes and whether it was a case of SIDS or murder. Expert medical opinion for both parties was divided as to the cause of death. Whereas the prosecution suspected that the two deaths were unnatural and probably resulted from smothering, the defense' medical experts considered them unexplained natural deaths. The prosecution's expert witness Professor Roy Meadow, a consultant pediatrician, relying on a draft of *Confidential Enquiry into Stillbirths and Deaths in Infancy* (CESDI) report[26] claimed that "the probability of two SIDS deaths in one family matching the profile of the appellant were 1 in 73 million." The likelihood of a possible SIDS incidence was therefore ruled out.

The defense argued the innocence of Sally Clark and maintained that the babies may have died from 'natural causes'. It questioned the reliability of the forensic pathologist Dr. Alan Williams' post-mortem diagnosis of cause of death and argued that it was unlikely that a man will blindly cover up for a wife who murders his children. The defense argued that there is greater inherent risk for a family that has experienced a SIDS death to experience another. But the jury on a 10/2 majority decision convicted the accused Sally Clark. Mrs. Clark subsequently appealed against her conviction. Among the five grounds for appeal submitted to the Court of Appeal was Prof Meadow's 1 to 73 million statistical

26 Principal author Professor Fleming of the Institute of the University of Bristol was commissioned by the Department of Health to write the report.

evidence. On the basis of the circumstantial evidence against the appellant, the Court of Appeal,[27] on 2nd October 2000 ruled to affirm the conviction of Sally Clark. It considered the 'overwhelming' overall evidence against her as a proof of guilt but did not criticize the statistical evidence of Meadow except that it downplayed it as irrelevant and a mere 'sideshow'.

The Criminal Cases Review Commission (CRC) subsequently referred the case for a second appeal. On 29th January 2003, the Court of Appeal (Criminal Division) quashed the appellant's conviction. It had come to light that important microbiological evidence had not been disclosed at trial or to the prosecution. Dr. Alan Williams, the Crown forensic pathologist who performed the autopsy, had failed to disclose the results of medical tests which showed that at least one of Sally Clark's babies had died from a lethal bacterial infection called *Staphylocuccus aureus,* and not as a result of smothering as claimed by the prosecution. The Crown prosecution did not seek a retrial. Dr. Williams was later banned from Home Office pathology work or coroners' cases for three years.

Mrs. Clark's father (Frank Lockyer) made a formal complaint to the General Medical Council (GMC) alleging a serious professional misconduct charge against Professor Meadow, and following a sixteen-day hearing, he was found guilty of serious professional misconduct by the GMC's Fitness to Practice Panel (FPP) for his erroneous statistical evidence. Professor Meadow appealed to the High Court in line with section 40 of the Medical Act 1983. On l7th February 2006, the High Court reversed the erasure, overturning the serious professional misconduct verdict of the FPP; restored Professor Meadow to his original. The scope of the immunity for Professor Meadow included immunity from professional disciplinary action[28] Upon appeal by the GMC, the Court of Appeal overturned the ruling of the High Court on immunity for expert witnesses from disciplinary action on a 2-1 majority decision.[29] However, it affirmed the High Court ruling that Professor Meadow was not guilty of serious professional misconduct, though he had committed some professional misconduct. It also upheld the existing principle of expert witness immunity from civil suit.[30] There were three main reasons provided for the landmark ruling in the *GMC* v *Meadow* case. It was to prevent a situation where expert witnesses were deterred from appearing in child abuse cases and speaking "freely and fearlessly" [31] in the protection of children from abuse. The second consideration was that

27 Comprising Lord Justice Henry, Mrs Justice Bracewell and Mr Justice Richards

28 Meadow v General Medical Council [2006] EWHC 146 (Admin)

29 Lord Justice Auld and Lord Justice Thorpe in the majority and Master of the Rolls Sir Anthony Clarke dissenting.

30 General Medical Council v Meadow [2006] EWHC Civ 1390

31 Darker v Chief Constable of West Midlands [2001] 1 AC 435

Professor Meadow was judged to have acted in good faith and did not intend to mislead the jury. Thirdly it was aimed at minimizing the tendency of parties who lose a case, from deliberately and unnecessarily prolonging the course of litigation in court.[32]

Results and Discussion

Professor Meadow adduced statistical evidence as a means of communicating to the jury his 'expert' opinion. This flawed statistical evidence expectedly got very wide news coverage in the English media. Meadow's 'flamboyant' statistical display appears to have distracted the jury from focusing its attention on the non-statistical evidence adduced. The misleading nature of the statistical evidence in *Clark* raises a number of collateral questions relating to how capable jurors and trial judges are in coping with complex statistical probability theorems in court and for that matter scientific principles; whether the use of statistical evidence really facilitate the courts' aim of reaching just and fair rulings and whether the misuse of statistics by an expert witness constitutes a serious professional misconduct. Professor Meadow applied an 'irrelevant' and 'prejudicial' probability multiplication rule using the odds ratio to calculate the risk of two infants dying in a family by chance. Professor Meadow arrived at his "one in 73 million" probability by mathematically squaring the chance of an affluent family suffering one cot death (one in 8,543). He had failed to consider genetic and environmental factors in his theory on the chances of a second infant mortality occurring in the same family.

It could be argued that Professor Meadow may have acted rightly by citing the source upon which his figure of 1 in 73,000,000 was based i.e. the draft CESDI report. Statistical evidence based on research findings by a reputable authority may be presumed authoritative evidence of a fact, unless it is reliably and logically contradicted by an opponent as a mere hearsay. The defense expert witnesses Professor Berry, a co-author of the CESDI report and the other pediatricians of the defense could have done more to draw the jury's attention to the flawed statistical evidence of Meadow and his deficient expertise in the use of statistics. They appeared to have accepted Meadow's statistical evidence. Besides, the jury's attention was not drawn by the trial judge that there was a looming prosecutor's fallacy either. As the final arbiter of evidence admissibility, the trial judge could have prevented Professor Meadow from straying outside the domain of his expertise. In the field of statistical probability he had little or no expertise. These shortcomings however did not justify Meadow's flawed statistical evidence. Though he may have acted in good faith, Prof. Meadow himself stated at the cross-examination that 'I don't like statistics, but I'm forced into their usefulness."

32 Roy v Prior [1971] AC 470

Strangely, the first Court of Appeal considered that "there was an overwhelming case against the appellant at trial" albeit it conceded that the 73 million figure should have been treated as a 'distraction'. Interestingly, Meadow's misleading statistical evidence appears to have nothing technically to do with the success of the second appeal. Unlike in the first Appeal Court proceedings his statistical opinion was strongly criticized by the trial judge. Several peer experts including the Royal Statistical Society (RSS) giving evidence before the GMC rejected Professor Meadow's statistical evidence as having "no statistical basis". In the process Professor Meadow committed four fundamental statistical errors.

In applying the principle of *odds ratio*, Professor Meadow misunderstood and misapplied the multiplication rule of probability on the basis of statistically invalid assumption of independence between the two cot deaths in the same family. The appropriate probability principle that may have been statistically plausible is the *conditional multiplication rule*[33] and not the ordinary multiplication rule. Prof. Meadow's second statistical error was his categorization of families into two classes by applying only three risk factors of SIDS namely smoking, income and age of mother although there were several known risk factors of SIDS deaths.[34] He wrongly categorized the Clark family as a low-risk as far SIDS incidence was concerned and failed to recognize that individual families may have specific and unique genetic, environmental and socio-economic characteristics that could affect the health and well-being of the family including the vulnerable child. It is reasonable to expect that when a cot-death occurs in a given family, the probability of other cot-deaths in that family is likely to be greater than the group average estimate because of likely family predisposition. The population statistics of cot deaths only provided a broad bird's eye view of the incidence pattern in the population and cannot be valid when it is applied to any given individual population unit (family). One should not therefore infer an act of murder from them. Meadow's omission could also be described as a prosecutors' fallacy. Since the GMC's FPP and the Court of Appeal ruled that he acted without intending to mislead the jury, he most likely committed the prosecutors' fallacy out of ignorance. He adduced fallacious evidence and therefore could not be described as having the expertise to adduce statistical evidence in court. Yet he was adducing expert evidence in a criminal case in which the standard of proof was proof beyond all reasonable doubt.

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33 The probability (P) OF 2nd cot death y given the first death x is symbolically denoted p(y/x). P(x and y) = P(x). P(y) is the invalid Meadow's probability application which should have been P(x and y) = P(x).P(y/x). Note that P(y/x) is not known until it is studied empirically. (Refer Spiegel MR 1992)

34 Office for National Statistics Health Statistics Quarterly 27 autumn 2005; and Byard & Krous (2001)

Professor Meadow's expertise was in pediatric medicine. He was not a biostatistician. He was therefore competent to give expert opinion evidence in his own field as a pediatrician and not in the field of biostatistics. Ultimately, the decision as to Professor Meadow's competence to tender opinion statistical evidence was for the trial judge to make. The trial judge rightly cautioned the jury against the application of statistics in their verdict in his last day summing-up. Said he: "we do not convict people in these courts on statistics," But perhaps he should have applied the exclusionary rule earlier. It appears that the trial judge did not highlight the 73 million statistical evidence as a distraction probably because of the general reputation of Professor Sir Meadow. His achievements in the area of pediatrics had been acknowledged wide and near. Prof Meadow, was originally renowned for postulating what had become known as the 'Meadow's Law' namely, that "one sudden infant death is a tragedy, two is suspicious and three is murder, unless proven otherwise." His status as a renowned pediatrician may have added to the perceived strength and credibility of his statistical evidence. At the pinnacle of his career he had been knighted.

In an another case in 1993, The Meadow's Law had ironically been vindicated when Sir Meadow successfully brought expert evidence against a nurse Beverley Alit,[35] accused of murdering four children and having harmed nine others. Beverley was convicted and sentenced to life imprisonment. In contrast the Meadow's Law played a significantly devastating role *Clark*. Technically, a verdict of guilty was returned on Sally Clark by the jury not on the basis of statistics. But the role of numbers in securing the verdict of the jury cannot be discounted or downplayed. The other reason why the jury may have put much weight on the Meadow's statistical evidence is the apparent mystic infallibility of numbers. The one in 73 million figures captured the headlines in the media thus having an instant and dramatic impact on the public, the jury probably not excluded. Sight must also not be lost of the fact that the Crown forensic pathologist, Dr. Alan Williams, who performed the post-mortem had failed to disclose the results of medical tests which showed that at least one of Sally Clark's babies had died from a lethal bacterial infection which may have also constituted a serious professional misconduct.

Another principle of interest in Clark relates to expert witness' immunity and accountability. In the GMC v Meadow[36] case the Court of Appeal re-echoed Lord Justice Auld's statement in Darker: 'The whole point of the first public policy reason for the immunity is to encourage honest and well-meaning persons to assist justice even if dishonest and

35 Beverly Gale Alit worked at the Lincolnshire Clinic in England as a pediatric nurse. His method of lethal insulin dosing and whenever she failed, just suffocated the victim. According to one theory, he suffers from the Minhauzen syndrome and caused the pain to attract the attention of others.
36 GMC v Meadow [2006] EWCA Civ 1390

malicious persons may on occasion benefit from the immunity.' At common law expert witnesses and by implication expert statistical witnesses don't enjoy absolute immunity though they enjoy immunity from civil suit. Even though immunity bars civil suits, an expert witness is not protected from contempt proceedings. He does not enjoy the right of immunity if he perverts the course of justice.[37] Contempt or perjury proceedings may be brought against a bad expert witness if he gives willful and deceitful evidence. The criminal justice system may be shooting itself in the foot if it protects the expert witness from civil suit while at the same time it permits him to subvert the same administration of justice. Opinion evidence as a matter of personal judgement and adduced in good faith is not subject to perjury proceedings.[38] An incompetent expert witness may lose integrity and respect within his professional body and may come under ferocious criticisms by his peers.

Another issue of interest is the selection and the composition of the jury itself. For expert statistical evidence to achieve its *ultimate aim* of assisting the court to reach just conclusions, it is vital to ensure that the jury has the capacity to deal scrupulously with such evidence when they are adduced in court. The mode of selection of jury pools or panel is therefore an important factor for consideration. It is natural that one needs to be mathematically minded to grasp and assess the validity of complex statistical computations in court. In *Sally Clark,* the jury needed to assess the "relative likelihood of the deaths" under either SIDS or murder and not just how unlikely they are due to SIDS. The principle of random selection which itself is a sampling technique in the discipline of statistics, gives all qualified adult citizens roughly equal chance of being selected to serve on the jury. It may provide the courts with a jury that is representative of the community and any possible biases offsetting each other, making its final decisions products of diffused impartiality. However it appears that the procedure as it existed did not make provision for the caliber of jurors with the appropriate knowledge and skills to deal competently with scientific or statistical evidence. There are two possible ways of getting around this problem. A hybrid procedure involving random selection from a pool of adequately competent and qualified persons. Alternatively, the trial judge's summing up must serve to 'educate' the jury and to draw attention to the risk of prosecutor's fallacy in such cases. It appears that in high profile and complex proceedings it may be advantageous to define juror competence mainly in terms of qualifications, experience and proven expertise.

Prof Meadow was struck off the medical register by the GMC for serious professional misconduct. The GMC had a duty to protect public interest, maintain public confidence in

37 Roy v Prior [8] 30

38 Contempt of Court Act (1981)

the medical profession and to declare and uphold proper standards of performance and conduct. However, public confidence in the medical profession and even the administration of justice may have been adversely affected as a result. The High Court and later the Court of Appeal however reversed this erasure and restored him to his original status. A contentious issue is the ruling by the Court of Appeal that Professor Meadow's statistical evidence in Clark did not constitute serious professional misconduct. The majority ruled that Professor Meadow's had committed 'misconduct' and not a serious professional misconduct. The argument that evidence not adduced in bad faith does not constitute a serious professional misconduct appears feeble. As Sir Anthony Clarke, MR noted in GMC v Meadow, *Clark* was a 'rare case in which a person should be held to be guilty of serious professional misconduct in the absence of bad faith'.

Conclusion and the Way Forward

The lesson learnt from *Clark* is that expert witnesses should not be allowed to give reckless evidence. They must offer explanations and reasons for their opinion, provide sources or evidence for the assumptions on which their opinions are based and must not adduce evidence outside their field of expertise. They must give evidence honestly and in good faith; and must not seek to mislead the court. The enormity of the overall impact of the statistical evidence in the *Clark* case on the jury, the English medical system and the common law cannot be over-emphasized. The courts cannot use theoretical statistical evidence to establish the truth of an ultimate issue with mathematical or scientific certainty. Statistics cannot and should not be the basis for conviction. To convict a defendant of murder requires taking all steps necessary not to convict the innocent. That notwithstanding the role of pediatricians and pathologists as medical experts in SIDS cases is inevitably important. But the use of any far-reaching statistics as evidence require that experts with competence in medical statistics adduce evidence. The expert witness owes a duty to himself to be aware of his duties, his responsibilities, his limitations as well as court procedures and practices. A good expert witness must exhibit the values of independence, objectivity and be manifestly non-dogmatic. An expert above all must recognize that his foremost duty is to help the court reach the correct conclusions. He has the ethical obligation to state any assumptions on which his opinion is based and to state in clear terms any issue that falls outside his expertise. The court also has a duty to ensure that only qualified experts adduce evidence as expert statistical witnesses. Statistical evidence should also not overshadow non-statistical evidence. Lay opinion should not be allowed to masquerade as expert opinion. Probably, the most qualified professionals to adduce the most reliable statistical evidence in SIDS cases are biostatisticians and epidemiologists.

Professional bodies should encourage their members who are expert statistical witnesses to be refreshed in statistical probability theorems and how to adduce persuasive non-fallacious oral evidence in court. Since the average juror may not be statistics-literate it may be necessary for the judiciary to design statistics related educational programmes for judges and jurors. The more educated judges and jurors become in statistics the greater may be their ability to detect statistical fallacies and exercise the power of exclusionary discretion when it matters most. The curricula of law schools may also be designed to adequately incorporate the discipline of statistics in relevant law courses. It is suggested that trial judges operate a checklist to determine whether an expert witness is qualified in a given case. The criminal justice system has a huge task of exposing true child abusers. But not at the expense of convicting the innocent. The social cost of wrongful conviction of accused parents in sudden infant death cases is immense. In punishing an innocent person a greater error and a worse 'moral harm' would have been inflicted than not punishing a guilty person. Families and friends of wrongly convicted parents tend to suffer immense distress and emotional harm. And such wrongful convictions could easily cause the disintegration of marriages and families. Tragically Sally Clark never came to terms with her wrongful conviction. In 2007 she drank herself to death.[39] Equally important elements of the justice system to help achieve that ultimate goal include quality police community investigations, thorough death-scene investigations, quality of autopsy reports, the legal processes and rules of court as well as the competence and representativeness of jurors.

39 http://www.sally Clark/Alcohol killed freed mother Sally Clark - Telegraph.htm

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EXAMINATION OF FORM NOT SUBSTANCE: RETHINKING THE PATENT EXAMINATION PROCESS IN NIGERIA

Kasim Musa Waziri[1] and Gwom Solomon Gwom[2]

ABSTRACT

In an age where knowledge assets play significant roles in the economic development of nations, the patent system has become one of the essential drivers of technological and economic advancement. Thus, the essence of examining inventions is to ensure good quality of patents granted by a patent office and to ensure that such patent applications satisfy the novelty, inventive step, and industrial application criteria. It is standard practice in most countries that patent applications by patentees go through examination processes before they are granted patents. Local patent rules usually guide such examination processes. The Nigerian patent system is not an exception to such practice. However, it suffices to submit only necessary documents for inspection by officials of the Nigerian Patent Registry before a patent is granted. This process of registering patents in Nigeria, which is the depository process of examination, is not thorough compared to the substantive method of examination. The substantive procedure is lacking in the Nigerian patent system. The need for a substantive process of examination in Nigeria is what this article discusses. The article recommends a mix of both the depository and the substantive process of examination in Nigeria, as practised in some countries to issue quality patents that would aid technological and economic growth in the country. The article also concludes that much more needs to be done by the government and policymakers in Nigeria in terms of funds, human resources, and other things to ensure the institution and sustenance of a substantive method of examination of patent applications.

1 Department of Public Law, Faculty of Law, University of Abuja, FCT
2 Department of Public Law, Faculty of Law, University of Abuja, FCT

Introduction

The term "patent" is generally defined in the dictionary as "an official right to be the only person to make, use, or sell a product or an invention; a document that proves this."[3] It also means "an official document showing a person has the exclusive right to make and sell an invention,"[4]or "the grant of an exclusive right to exploit an invention."[5] In many countries, a patent is usually granted if the patent application meets certain requirements. A substantive examination is also usually carried out to determine whether the invention meets statutory patentability standards of novelty, inventive step, and industrial application or non-obviousness.[6] The notion of examination of patents began with the formalisation of the patent granting process in 1836.[7] This development paved the way for patent examination and patent litigations, as known today.[8] It is vital to say that the type of examination process chosen in the country may depend on economic, social, and geographical factors. There is also no denying that countries are free to choose their patent examination process. However, for there to be a grant of a quality patent, the substantive examination process is a good option. There is no gainsaying that the patent market and economic development of a country is determined by the quality of the patents that the country issues. The subject of examination of patent applications is rarely discussed within academic spheres. However, it is not only an integral part of patent protection, but it is also indispensable. The patent system revolves around patent examination. Some developing countries have harnessed their patent examination systems to their advantage. A country like Malaysia, for example, has within five years of proper planning, developed its patent examination system and addressed its national scientific and technological abilities. During the Sixth Malaysia Plan (1991–1995), the goals set for science and technology were to obtain a continuous scientific and technological development in Malaysia by providing necessary infrastructure that included incentives and support services for science and technology.[9] Emphasis was

3 AS Hornby and AP Cowie, *Oxford Advanced Learner's Dictionary of Current English* (7th edn, Oxford Univ Pr 2005) 842.

4 PH Collin, *Dictionary of Law, Bloomsbury Reference Book, 2004: Dictionary of Law* (Bukupedia 2004) 216.

5 Elizabeth A Martin, *A Dictionary of Law* (5th edn, Oxford University Press 2009) 358.

6 Some countries like Luxembourg and South Africa confer patents without such a substantive examination or without assessing inventive step, like Switzerland and France. See Carlos M Correa, 'Patent Examination and Legal Fictions: How Rights Are Created on Feet of Clay' in Peter Drahos, Gustavo Ghidini and Hanns Ullrich, *Kritika: Essays on Intellectual Property* (Edward Elgar Publishing 2015).

7 Rochelle Cooper Dreyfuss and Justine Pila, *The Oxford Handbook of Intellectual Property Law* (Oxford University Press 2018) 252.

8 ibid.

9 VGR Chandran Govindaraju and Chan-Yuan Wong, 'Patenting Activities by Developing Countries: The

made to ensure that public R&D programs became more market-oriented by exploiting the commercialisation of research and technology.[10] Also, the private sector was expected to complement the government in expanding the R&D and science and technology by using appropriate technology assimilation, diffusion, and application.[11] This stride also extended from 1995 to 2000.[12]

The Nigerian patent system was inherited from the British, and patents are granted under the Patents and Designs Act of 1972.[13] This legislation is still the existing legislation on issuing patents in Nigeria.[14] Currently, the Act legislates on both patent and design matters with a statutory framework of eleven sections each for both subjects.[15] Since its enactment, the Nigerian patent legislation has not undergone any significant reforms. It has been the unanimous agitation by scholars, researchers and policymakers that there is the need for reforms of the Nigerian patent legislation which should include its patent examination process, which does not have a substantive procedure.[16] Patent

Case of Malaysia' (2011) 33 World Patent Information 51, 10.particularly due to foreign firms' participation in the Malaysian economy. As such, any shock to the economic activities of foreign firms will deter patenting trends. This also indicates that the current local indigenous innovative capabilities are still weak and require better policy intervention to accelerate the inventive capabilities of Malaysia.","container-title":"World Patent Information","DOI":"10.1016/j.wpi.2010.01.001","ISSN":"0172-2190","issue":"1","journalAbbreviation":"World Patent Information","page":"51-57","source":"ScienceDirect","title":"Patenting Activities by Developing Countries: The Case of Malaysia","title-short":"Patenting activities by developing countries","volume":"33","author":[{"family":"Chandran Govindaraju","given":"V. G. R."},{"family":"Wong","given":"Chan-Yuan"}],"issued":{"date-parts":[["2011",3,1]]},"locator":"10","label":"page"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

10 ibid

11 ibid

12 ibid

13 Now Cap P2, Laws of the Federation of Nigeria, 2004.(The acronym PDA shall henceforth be used to denote the Patents and Designs Act). The 2004 Act is not any different in content from the Patents and Designs Act of 1970. Cap 344 of Laws of the Federation of Nigeria, 1990.

14 s 315 of the 1999 Constitution of Nigeria makes provision for existing laws. It states that (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be:
(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and
(b) a Law made by a House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws.

15 ss 1 to 11 deal with patents, while ss 12 to 22 deal with designs.

16 Observations of this nature have been raised in books, workshops and conferences respectively. See Abdulai Taiwo and Co, 'Requirements and Procedure for Patent Registration in Nigeria' (*Lexicology*, 6 February 2019) <https://www.lexology.com/library/detail.aspx?g=f0321f8b-0da4-4480-b424-ca31ca894726> accessed 6 October 2020; George Sipa-Adjah Yankey, *International Patents and*

legislation and practice remain archaic and in need of reforms. Although there are strong agitations by experts for reforms of the country's legislation and entire patent system,[17] there is still no introduction of legislative or policy changes to tighten the application of the patentability requirements, introduce a rigorous examination, and reduce the proliferation of foreign patents. Thus, the focus of discussions in this article is the examination process of patents in Nigeria. There is a need for an examination process that is either solely substantive in nature or a mix of both substantive or non-substantive. The article analyses the patent examination process in Nigeria. Discussions are also bothered on patent administration reforms, which are necessary to undertake in Nigeria to have a good patent examination process.

The Grant of Patents in Nigeria

Process and product patents are registered in Nigeria to ensure that an inventor can exploit an invention exclusively and commercially.[18] The rights to a granted patent are usually vested in the first person to file and register the patent.[19] According to section 3 of the PDA:

> (1) Every patent application-- (a) shall be made to the Registrar and shall contain—
>
> (i) the applicant's full name and address and, if that address is outside Nigeria, an address for service in Nigeria;
>
> (ii) a description of the relevant invention with any appropriate plans and drawings; (iii) a claim or claims; and
>
> (iv) such other matter as may be prescribed; and (b) shall be accompanied by-
>
> (i) the prescribed fees;

Technology Transfer to Less Developed Countries: The Case of Ghana and Nigeria (Avebury 1987) 219–222; Amaka Vanni, *Patent Games in the Global South: Pharmaceutical Patent Law-Making in Brazil, India and Nigeria* (Bloomsbury Publishing 2020) 169.{\\i{}International Patents and Technology Transfer to Less Developed Countries: The Case of Ghana and Nigeria} (Avebury 1987

17 Femi Olubanwo and Oluwatoba Oguntuase, 'Strengthening Intellectual Property Rights and Protection In Nigeria' (*Mondaq*, 11 March 2019) <https://www.mondaq.com/nigeria/trademark/788714/strengthening-intellectual-property-rights-and-protection-in-nigeria> accessed 27 May 2020.

18 s 3(3).

19 s 2(1).

> (ii) where appropriate, a declaration signed by the true inventor requesting that he be mentioned as such in the patent and giving his name and address; and
>
> (iii) if the application is made by an agent, a signed power of attorney (so however that, notwithstanding any rule of law, legalisation or certification of the signature of the power of attorney shall be unnecessary).
>
> (2) The description referred to in subsection (I) (a) (ii) of this section shall disclose the relevant invention in a manner sufficiently clear and complete for the invention to be put into effect by a person skilled in the art or field of knowledge to which the invention relates; and the claim or claims referred to in subsection (1) (a) (iii) of this section shall define the protection sought and shall not go beyond the limits of the said description.

In order to determine newness, section 1(2) of the PDA states that "an invention is new if it does not form part of the state of the art." Section 1(3) further determines "pror art" to mean:

> the art or field of knowledge to which an invention relates and "the state of the art" means everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever (by means of a written or oral description, by use or in any other way) before the date of the filing of the patent application relating to the invention or the foreign priority date validly claimed in respect thereof, so however that an invention shall not be deemed to have been made available to the public merely by reason of the fact that, within the period of six months preceding the filing of a patent application in respect of the invention, the inventor or his successor in title has exhibited it in an official or officially recognised international exhibition.

The examination process in the grant of patents is usually aimed at ensuring the quality of an invention by making sure that the invention does not form part of the prior art. The result is good quality patents, a potential for a rich patent market and also good investor confidence

Analysing Patent Examination in Nigeria

One of the important tasks of a patent office is to decide whether a patent shall be granted, or an application shall be refused, based on the procedures and patentability requirements under the applicable national law.[20] Patent examination refers to the ability of patent examiners to make a correct judgment about whether or not to grant a patent application. This also invariably means that the decisions of patent examiners about the validity and scope of protection are consistent with the patent rules and subsisting court judgements. Rules of examination and judicial pronouncements are usually made after a comprehensive review of the application.[21] Patent examination, therefore, requires many things: from considerable knowledge and skill in the technological area to knowledge of evolving court rulings.[22] Nigeria has a depository patent system of patent application, which means that patent applications made at the Nigerian Trademarks, Patents and Designs Registry, are merely examined for compliance with the requisite formalities deemed necessary for the grant of a patent.[23] This includes consideration as to whether the correct official forms and requisite fees have been paid. However, such an examination is not carried out without recourse to the existing patent rules.[24]

Currently, the examination process of patent applications in Nigeria is not without certain peculiar challenges that require diligent attention.[25] Some of the challenges include insufficient government funding, lack of basic education and expertise, especially in the various fields of technology, access to historical databases and libraries, lack of sufficient international cooperation with other countries, hence sustaining wasteful duplication of applications, the formation of regional cooperation and databases and effective use of modern information and communication technology, and other deficiencies.[26]

20 WIPO, Alternatives in Patent Search and Examination (WIPO 2014) 4 <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_guide_patentsearch.pdf> accessed 12 March 2019. The territoriality of the global patent system play a key role in patent examinations. Nations have the option to choose the type of examination they desire.

21 John. L King, 'Patents in the Knowledge-Based Economy', *Patent Examination Procedures and Patent Quality* (National Academies Press 2003) 4.

22 National Research Council and others, *A Patent System for the 21st Century* (National Academies Press 2004) 42–46.

23 Patents and Designs Act,s 4.

24 Patent examination in Nigeria is guided by the Patent Rules, LN 96, 1971(subsidiary legislation of the Patent Act).

25 This also includes drafting a patent application, which is a rigorous exercise in technical language that must accommodate the technology underlying the invention, its commercial significance, and relevant statutory and case law.

26 Carlos A Primo Braga and Carsten Fink, 'Reforming Intellectual Property Rights Regimes: Challenges for Developing Countries' (1998) 1 Journal of International Economic Law 547,549.

Countries of the world are at liberty to use depository or substantive examination systems for granting patents.[27] In countries with depository systems, patent applicants are simply required to file the correct forms and pay the requisite fees to be granted a patent. In other words, cursory checks are carried out on patent applications to ensure that patentability criteria are met before the granting of patents. Conversely, under standard examination systems, the merits of a patent application are reviewed by expert examiners, and applicants must demonstrate that patentability criteria have been met to receive monopoly protection.[28] One of the important tasks of a patent office is to decide whether a patent shall be granted, or an application shall be refused, based on the procedures and patentability requirements under the applicable national law. Making such decisions accurately, effectively, and efficiently is a complex mission, involving deliberate policy changes and strong political will. In reality, there is evidence to show that uncertain intellectual property rights impose several kinds of costs on the economy.[29] It also leads to unnecessary legal disputes to determine the validity or proper scope of a patent when examination quality is lower. Legal costs are especially high when patent disputes result in litigation.[30] There are available options in finding a way forward. One option is to amend legislation, either to designate the Patent Registry with the sole responsibility of examining patents, or to designate another part of the patent office an authority other than the Patent Registry. This authority could be another authority of the same country, either a scientific institution for instance or an authority located outside the country, in particular, an international preliminary examining authority under the PCT.[31] Nigeria does not currently conduct any form of examination of patent applications but is now considering the options in this regard.[32] Thus, having a substantive examination in Nigeria's patent system is advantageous as compared to the absence of it. There has been stiff opposition, especially by multinational pharmaceutical companies, to the intention of many African countries adopting the substantive examination process.[33] One of the arguments put forward by the opponents was that implementing substantive

27 The Patent Cooperation Treaty (PCT) (as modified on October 3, 2001).

28 Catherine Tomlinson and others, 'Reforming South Africa's Procedures for Granting Patents to Improve Medicine Access' (2015) 105 South African Medical Journal 741.

29 JohnL King, *Patents in the Knowledge-Based Economy* (2003) 54 <https://www.nap.edu/read/10770/chapter/4> accessed 5 January 2019.In other words, it provides a strong deterrence against infringement claims.

30 ibid.

31 World Intellectual Property Organization, *WIPO Model Law for Developing Countries on Inventions* (WIPO 1979) 78. The good news is that Nigeria is PCT compliant. Applications at the Patent Registry pass through an international search procedure for prior art.

32 ibid. Even though no options have been adopted yet in Nigeria, save for recent recommendations by Nigerian Law Reform Commission on amendments to the current PDA.

33 "PCT" refers to the Patent Cooperation Treaty. See Correa (n 4) 7.

examination will take several years to complete and will be too costly and that the system would also discourage patent applications that may not survive serious substantive analysis.[34] However, these arguments may be diversions and sabotage against the main advantage of the substantive process of examination, which is to ensure good patent quality.

Registration of patents by patentees in Nigeria is made at the Nigerian Trademarks, Patents and Designs Registry which a registry under the Federal Ministry of Trade and Investment. Applications made at the at Trademarks, Patents and Designs Registry are usually depository in nature. The existing statutory backing for such examination in the PDA is section 4(1) which states:

> The Registrar shall examine every patent application as to its conformity with section 3(1), (3) and (4) of this Act, and-(a) if section 3(1) of this Act has not been complied with, the Registrar shall reject the application;(b)if section 3(3) of this Act has not been complied with, the Registrar shall-(i) invite the applicant to restrict the application so that it relates to only one invention, and(ii) notify the applicant that he may within, three months file in respect of the other inventions dealt with in the original application subsidiary applications which shall benefit from the date of filing of the original application and, if relevant, from the date of any foreign priority claimed under section 3(4) of this Act, and, if the applicant does not comply with the invitation mentioned in sub-paragraph (i) of this subsection, shall reject the application, and(c) if section 3(4) of this Act has not been complied with, the Registrar shall disregard any claim for foreign priority.

Section 4(2)(3)(4) of PDA is explicit about the method of examination in Nigeria. According to Section 4(2):

> Where the examination mentioned in subsection (1) of this subsection shows that a patent application satisfies the requirements of section 3(1) and (3) of this Act, the patent shall be granted as applied for without further examination and, in particular, without examination of the questions- (a) whether the subject of the application is patentable under section 1 of this Act; (b)whether the description and claims satisfy the requirements of section 3(2) of this Act; and (c) whether a prior application, or an application benefiting from a foreign priority, has been

34 ibid.

> made in Nigeria in respect of the same invention, and whether a patent has been granted as a result of such an application.

Section 4(3) states that

> Where the said examination shows that section 3(4) of this Act has been complied with as respects a claim for a foreign priority, the foreign priority claimed shall be mentioned in the patent.

Some developing countries in a similar situation like Nigeria have made attempts to remodel their patent examination methods. Consequently, they created world-class generic drug manufacturing industries by excluding at first and reintroducing process pharmaceutical patents to comply with their obligations as WTO members. These emerging superpower states made such changes while mired in poverty and public health crises. For example, in Indian jurisdiction, the formal and substantive methods of patent examination are practised.[35] Another country that has recorded a success story on patent examination and a good patent system in Brazil as inventions are subject to formal and substantive examinations before being patented. Today, because of its success story, Brazil issues more patents to foreigners than any other South American country and more patents to foreigners than to Brazilians.[36] Hitherto, the patent examination systems of the countries cited above were purely depository. Deliberate efforts and mechanisms were put in place by their respective governments to change the type of examination. South Africa, like Nigeria, uses the depository system.[37] However, it is no longer a secret that its patent office is proposing to implement substantive search and examination (SSE), especially in specific technology sectors.[38] The new IP Consultative Framework, which was approved by Cabinet on 6th July 2016, earmarked

35 Indian Patent Rules (as amended) 2003, ss 1-16,24-40. Examination of patents in Asian countries like Thailand, Malaysia and Singapore are a substantive, and more rigorous than the depository system in Nigeria.

36 Donald G Daus, 'Patents in Brazil' (1983) 8 North Carolina Law Journal of International Law and Commercial Regulation 1.

37 The South African patent examination System, like that of Nigeria, has shortcomings, such that many patents granted in its current IP system fail to meet the country's patentability criteria .This is as a result of the depository system used for granting patents in the country without examination of their merits. Given the lack of examination in South Africa, many patents are granted are rejected by countries and regions, including Brazil, the USA and the European Union (EU), that have examination systems in place.

38 Robyn-Leigh Merry, 'South Africa:The Intention to Become a Substantive Search and Examination Office' (*Mondaq*, 18 October 2017) <https://www.mondaq.com/southafrica/patent/638086/the-intention-to-become-a-substantive-search-and-examination-office> accessed 6 October 2020."plainCitation":"Robyn-Leigh Merry, 'South Africa:The Intention to Become a Substantive Search and Examination Office' (Mondaq, 18 October 2017

the implementation of SSE as an item for immediate domestic review. [39] Policymakers and law reform specialists have a benchmarked with other jurisdictions, in order to inform a change of policy positions. Thus, the progress of South Africa in the area of organic chemistry, engineering (mining), petroleum, and biodiversity (plants) have suggested that South Africa should incrementally establish examination capability with depositary/ examination systems.

Rethinking the Patent Examination Procedure

The past few years have seen an increase in the number of patent applications filed in many African countries or with regional organisations. With the increase in patent filings, the debate over the issue of substantive examination has intensified.[40] Generally, patent examination procedures affect the patent quality and determine the patentability of patent applications. A patent that has been subjected to good examination, at a minimum, describes a newness, inventive step and industrial application covering eligible subject matter in such full and definite terms that others can understand how to make and use it.[41] Also, the success of any national patent system depends on how well organised its patenting procedures are carried out in its patent office. Good examples of success stories triggered by restructured patent offices are South-East Asian countries like India and Korea. The Korean patent policy and the activities of the Korean Intellectual Property Office (KIPO), for instance, have been integral components in Korea's successful growth

39 Von Seidels, 'South Africa Prepares for a Thorough Examination' (*Von Seidels: Intellectual Property Attorneys*, 8 March 2017) <http://www.vonseidels.com/south-africa-prepares-for-a-thorough-examination/> accessed 12 March 2019. Examiners have been appointed by the Patent Office in South Africa to include: No less than 20 trainee patent examiners; Of the 20 trainee examiners, 11 have PhDs, 6 have Master's degrees and 2 have Bachelor Honours degrees; While qualifications are spread out over a number of technical fields, the overwhelming majority are in the life sciences with a strong focus on chemistry, biochemistry and medicinal chemistry; Secondary fields of qualification include electrical and electronic engineering and pure physics; Assuming for the moment that each examiner can examine 2 to 3 new applications every work week of the year, this would imply that 20 examiners could examine roughly 2000 to 3000 new applications in a year. The trainee examiners are undergoing a two-year extensive training programme before they can formally start examining new applications. This realistically pushes out the start of SSE to at least the end of 2018;The trainee examiners have received first-hand training from the Japanese Patent Office, the WIPO and, most notably, the European Patent Office (EPO);The EPO have also been contracted to conduct the bulk of the training over the next two years. SSE in line with EPO practice can therefore be expected, probably rightly so seeing as our patent laws are largely the same patent applications in the pharmaceutical and other chemistry-based fields will be the first to be examined. This is in line with both the Draft Policy and the Consultative Framework.

40 Adams and others, 'Enforcing IP Rights in Africa'(*Lexicology*, 24 October 2014) <https://www.lexology.com/library/detail.aspx?g=af8c1fbf-aa3b-4079-b1bd-250cffd319aa> accessed 5 January 2019.

41 Christi Guerrini, 'Defining Patent Quality' (2014) 82 Fordham Law Review 3080.

strategy and continue to be important factors in ensuring Korea's economic wellbeing.[42] Korea has long been a proponent of strong patent protection and of the need to maintain a robust, well-functioning patent office that supports the development of local technology. That view is consistent with the notion, to which Korea subscribes that the patent system can help promote and sustain healthy economic development, particularly in emerging- or newly industrialising-countries.[43]

There are issues with the examination of patents in Nigeria that need reform. First, as pointed out, the Nigerian patent system has a formal system of patent examination where approvals of patents are hinged on merely filing the necessary application form and relevant supporting documents, which are then examined by an examiner to ascertain the patentability of the proposed invention claimed.[44] The PDA generally acknowledges the examination of the form of patent applications.[45] However, there are no provisions for examination as to the substance of patent applications, since Nigeria does not have the substantive examination process in its patent legislation. The provisions in the patent rules support only the formal examination process.[46] The purpose of the application as to form is to ascertain that there are no formal defects other than those that would prevent a filing date from being assigned to the application, while examining applications as to their substance requires an intensive study at the inventive steps taken in acquiring the invention to ascertain its patentability. Section 4(1) of the PDA states that "the Registrar shall examine every patent application as to its conformity with section 3(1), (3) and (4) of this Act." This means that the sole responsibility of examining patent applications lies in the Registrar of patents. Section 4(2) is critical. It states that:

> Where the examination mentioned in subsection (1) of this subsection shows that a patent application satisfies the requirements of section 3(1) and (3) of this Act, the patent shall be granted as applied for without further examination and, in particular, without examination of the questions…

Section 4(4) is another critical aspect of the PDA. It states that "patents are granted at the risk of the patentee and without guarantee of their validity." This provision then means that the patentee, not the patent office bears the risk of the validity of his or her

42 Jay Erstling, 'Korea's Patent Policy and Its Impact on Economic Development: A Model for Emerging Countries?' (2010) 11 San Diego International Law Journal 443.

43 ibid.

44 Nigeria Patent Rules 1971 ss 1-46. See also Patents and Designs Act, ss 3-6.

45 ss. 3 and 4.

46 Rules 8-43 of the Patent Rules 1971.

patent application, as the examination procedure cannot fully guarantee such validity..[47] The procedure is quite different from that of countries like India, Kenya, South Africa, and others that apply both formal and substantive systems of patent examination. The inclusion of the substantive examination procedure into the Nigerian patent system, particularly the patent office, would not just make it a substantive search and examination office but would also complement its existing formal system of examination. Making such a decision accurately, effectively, and efficiently is a complex mission, involving deliberate policy changes and strong political will. In reality, there is evidence to show that uncertain intellectual property rights impose several kinds of costs on the economy.[48] It also leads to unnecessary legal disputes to determine the validity or proper scope of a patent when examination quality is lower. Legal costs are especially high when patent disputes result in litigation.[49] There are available options in finding a way forward. One option is modelling patent granting procedures in the Nigerian patent office, such as patent search and examination, in the context of the entire patent system, including the judiciary, which has the ultimate competence to decide on the validity of patents, if they are challenged in court. It should also be considered within limited national resources. In other words, patent search and examination within a patent office should support the broader policy goal of maximising the social gains from the patent system against the social costs for maintaining the patent system. In that regard, a country's allocation of costs among a patent applicant, third parties, a patent office, and a judicial body has to be carefully evaluated, taking into consideration socio-economic development and the way the patent system is utilised in the country.[50]

Another option is to amend legislation. According to some recommendations proferred by WIPO, there is the option of either to designating the Patent Registry with the sole responsibility of examining patents or designating another authority other than the Patent Registry. It recommends that this authority could be another authority of the same country, either a scientific institution, for instance or an authority located outside the country, in particular, an International Preliminary Examining Authority under the PCT.[51] The alternative set out could be legitimised by special provisions in the Regulations to

47 This procedure is the existing practice, and it is understandable, because the substantive examination system is very expensive and requires a lot of training and equipping of the patent office and its staff.

48 John. L King, *Patents in the Knowledge-Based Economy* (2003)54 <https://www.nap.edu/read/10770/chapter/4> accessed 5 January 2019.In other words, it provides a strong deterrence against infringement claims.

49 ibid.

50 WIPO,'Alternatives in Patent Search and Examination' <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_guide_patentsearch.pdf> accessed 5 January 2019.

51 World Intellectual Property Organization (n 25) 78. The good news is that Nigeria is PCT compliant. Applications at the Patent Registry pass through an international search procedure for prior art.

designate the searching and examining authority. The recommendations go further to state that the legislation should also put in place the details of the relations between the Patent Office and the authority and to lay down the procedure before the authority; the relations and procedure referred to may also be set out in a working agreement between the Patent Office and the authority.[52] Under the alternative, the task of the authority is not limited to searching. However, such a limitation could be provided for, in which case the Patent Office would carry out the actual examination itself. The Patent Office should also have the power to alter the conclusions in the authority's report if they are not in conformity with the national law.

Finally, the Nigerian Patent Registry can learn from the experience of India by providing a manual or guideline of patent practice and procedure.[53] The use of a manual or guideline is quite laudable. Judicial decisions on procedural matters should also be included in the manual. The manual should not supplement the existing Patent Rules. The manual should solely be intended to codify the practices and procedures being followed by the Nigerian Patent Registry and also designed to serve as a procedural guide for the practitioners and other users of the Nigeria Patent System.

Patent Administration Reforms

Customarily, the Nigerian patent system, like other patent systems, is not made up of only the national patent office, i.e., the Trademarks, Patents and Designs Registry at the Federal Ministry of Trade and Investment.[54] It synergises with some establishments of government, each playing a role, to make the patent system sustainable. Thus, patent inventions cannot be possible without giving a high priority to patent office administration. The need to focus on the role of the national patent office cannot be overemphasised. It administers patent standards that are decided and defined by the courts, legislatures, or the executive actions in the context of treaty negotiation.[55]

A good national patent system is seen not only in the existence of a patent office but also a competent and result-oriented administration for patent rights protection. It is also seen in its ability and competence in enforcing patent legislation with competence and diligence, thereby gaining the trust of local and international patentees. Such attributes

52 ibid.

53 Indian Patent Office, 'Manual of Patent Office Practice and Procedure'<https://wipolex.wipo.int/en/text/201589> accessed 21 February 2019.

54 Ruth Taplin and Alojzy Z Nowak, *Intellectual Property, Innovation and Management in Emerging Economies* (Routledge 2010) 51–54.

55 Peter Drahos, 'Trust Me: Patent Offices in Developing Countries' (2008) 34 American Journal of Law & Medicine 151, 2.

have the propensity for improving the quality and quantity of patents, and also boosting the transfer of technology through registration of patented protected by foreign firms. Another endeavour that can foster the growth and progress of the patent office is reducing the cost of registration by engaging in bilateral agreements for foreign technical support or MOUs to unify administrative practices.[56]These are some of the missing ingredients in the Nigerian patent system.

Another issue to be confronted by the Nigerian Patent office, like any other patent office in a developing country, is its behaviour towards local patentees and local inventions as it is steadily integrated into an emerging system of global patent administration.[57] By this integration, it is disposed to behave in ways that are likely to be pro-foreign patent. Thus, if care is not taken, through its daily administrative practices, the patent offices will increasingly help to maintain foreign patent-regulated markets that will increase the difficulties surrounding the access of Nigerians to foods, medicines, and other goods. This raises the issue of how the Nigerian patent office should respond to functions in the Patent Registry.

There are many problems associated with patent office administration in Nigerian Patent Registry. Some of these problems have been identified to include the lack of uniform and consistent practice, and lack of adequate human resources, the lack of an efficient and well-regulated system to dispense the patents for inventions. These bureaucratic delays have caused organisational problems, neglect by the government despite constant appeals for more money, more clerks, and better organisation, and other issues. Some countries have overcome many of their patent administration challenges. The Nigerian Patent Registry can implement some reforms from the experiences of other countries. One of the first reforms is improvising ways of disseminating knowledge to Nigerians about what it does. Knowledge in this sense would include knowing about its operations, including its relations with pharmaceutical and other companies, their relationships with other patent offices, and the quality of their examination systems. This is the first step if the country wants to integrate their patent offices into its national economic strategy. Another good reform could be adopting the model of patent office regulation in the area of pharmaceuticals that operates by prevention. This has been practised in Brazil since 1999

56 ibid 3. For example, There are existing bilateral and trilateral patent offices between the USPTO , the EPO and the JPO which have moved well beyond simple technical co-operation into a much deeper convergence of administrative systems. Some developing countries are being integrated into the Trilateral system of governance for patent administration, like in the case of France and some West African Francophone countries.

57 Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (Cambridge University Press 2010) 177–199.

when it passed a measure that made the grant of patents on pharmaceutical products and processes dependent on the consent of the Brazilian Sanitary Surveillance Agency (ANVISA).[58] Brazil's intellectual property office processes patent applications concerning pharmaceuticals in the normal way, but ANVISA scrutinises them for compliance with the requirements of patentability.

Another policy for consideration is that the Nigerian Patent Registry can establish patent transparency registers in areas of technology where there are risk-management severe issues and where transparency concerning the patent situation is necessary.[59] This innovation would fulfil the TRIPs obligations of protecting human, animal or plant life or health or avoid serious prejudice to the environment under Article 27(1)(a) of TRIPs.[60] The scope of the transparency register's operation should be for the patent office or an assigned regulator to decide as part of a risk-assessment exercise. The use of registers

58 David M Trubek and others, *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge University Press 2013) 217.emerging forms of state activism, including a new industrial policy and a robust social policy, differ from both classic developmental state and neoliberal approaches. They favor a strong state and a strong market, employ public-private partnerships, seek to reduce inequality, and embrace the global economy. Case studies of state activism and law in Brazil show new roles emerging for legal institutions. They describe how the national development bank uses law in innovation promotion, trade law strengthens new developmental policies in export promotion and public health, and social law frames innovative poverty-relief programs that reduce inequality and stimulate demand. Contrasting Brazilian experience with Colombia and Mexico, the book underscores the unique features of Brazil's trajectory and the importance of this experience for understanding the role of law in development today.","ISBN":"978-1-107-35538-5","language":"en","note":"Google-Books-ID: 2ysgAwAAQBAJ","number-of-pages":"393","publisher":"Cambridge University Press","source":"Google Books","title":"Law and the New Developmental State: The Brazilian Experience in Latin American Context","title-short":"Law and the New Developmental State","author":[{"family":"Trubek","given":"David M."},{"family":"Garcia","given":"Helena Alviar"},{"family":"Coutinho","given":"Diogo R."},{"family":"Santos","given":"Alvaro"}],"issued":{"date-parts":[["2013",5,31]]}},"locator":"217","label":"page"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} As a matter of practice, if Brazilian ANVISA concludes that the patent application fails to meet one or more of the criteria of patentability, it can withhold its consent to the grant of the patent in which case the patent cannot issue. The Brazilian model is worth close study by other developing countries. It is a preventive strategy that avoids the high costs of attempting to remove patents that have been granted. It is also an integrative regulatory strategy. It links patentability criteria in the area of pharmaceuticals to the goal of welfare-enhancing innovation in the health sector.

59 Paul Grootendorst, Ron Bouchard and Aidan Hollis, 'Canada's Laws on Pharmaceutical Intellectual Property: The Case for Fundamental Reform' (2012) 184 CMAJ : Canadian Medical Association Journal 543. Transparency registers would only need to be created by regulatory agencies in areas where it was important to reduce the social costs of the uncertainty and complexity being orchestrated by patent owners.

60 Young-Gyoo Shim, 'Intellectual Property Protection of Biotechnology and Sustainable Development in International Law' 29 North Carolina Law Journal of International Law and Commercial Regulation 166.

would not, in other words, be confined to a particular type of technology. Companies would be required to use the registers to make full disclosure of the patents surrounding the targeted technology. Other companies would be able to rely on the register, knowing that surprise would not be sprung on them. Also, the registers would require the disclosure of information relating to ownership and license. This information is, in practice, challenging to track down. However, the cost to a company of not disclosing a patent on a transparency register that it should have disclosed could be some form of estoppel that would prevent it from enforcing that patent.[61] This would compel disclosure by some firms which might respond by flooding the transparency register with patents.

Reforms such as the few mentioned above have the potential to address the issues encountered in Nigerian patent office administration. In studying and finding solutions for proper patent office administration, fundamental questions need to be addressed. Basic questions like: how did the office function during this time of neglect? Why was it neglected? What is prompting the necessary reforms?[62] The answer lies in a combination of formulating and adopting national strategies and policies which consider public interest, and also a result-oriented implementation of such policies.

Conclusion

The discourse so far looked at patent legislation and the process of examination of patents in Nigeria. It affirms that the examination process of patents in Nigeria is a depository process and not substantive as practised in some jurisdictions. Rethinking the Nigerian patent examination system and the need for reforms in the patent administration are also discussed as aspects of the Nigerian patent system that require reform. The significance of examination of patent applications cannot be overemphasised, as it serves as the administrative procedure for an examiner to deliberate the formality and content of the registration application and decide whether or not to register it. Understandably, the article acknowledges that the substantive process of examination of patents is expensive and cumbersome. However, it is suggested that a shift towards the substantive process of examination would not only ensure a good quality of patents but also aide of the Nigerian patent system towards attaining technological and economic development. In achieving this, certain steps need to be taken, and specific changes need to be made. These include massive funding, training of experts in different fields of substantive examination, creating the right environment for patents to thrive, among other reforms.

61 For example, s 26(c) of the Therapeutic Goods Act 1989 of Australia imposes a penalty of 10 million Australian dollars to deter companies from using patents of doubtful validity as part of a strategy of preventing or delaying the registration of generic drugs. Much higher fines than these are needed, as well as criminal penalties.

62 Daniel Preston, 'The Administration and Reform of the U. S. Patent Office, 1790-1836' (1985) 5 Journal of the Early Republic 331, 332.

Above all, the most significant reform is the need for Nigeria to evolve a political culture that prioritises IP as an indispensable means for economic development. Thus, national development plans should accord high priority to IP protection, especially the protection of patent rights.

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