Journal of Law, Policy and Globalization

ISSN 2224-3240 (print)
ISSN 2224-3259 (online)
Vol.117
2022

IISTE International Institute for Science, Technology & Education
Accelerating Global Knowledge Creation and Sharing

IISTE International Institute for Science, Technology & Education
Accelerating Global Knowledge Creation and Sharing

Journal of Law, Policy and Globalization

Journal of Law, Policy and Globalization is a peer-reviewed journal published by IISTE. The journal publishes original papers at the forefront of international law, corporate law, public policy and globalization issues. The journal is published in both printed and online versions. The online version is free access and download.

IISTE is a member of CrossRef.

The DOI of the journal is: https://doi.org/10.7176/JLPG

Paper submission email: JLPG@iiste.org

ISSN (Paper)2224-3240 ISSN (Online)2224-3259

Please add our address "contact@iiste.org" into your email contact list.

Vol 117 (2022)

Table of Contents

Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Legal Consequences of Underage Marriage (Case Study of Elopement of Bajau Tribe in Lagasa Village, Muna Regency)

La Ode Munawir, Suriani B. Tolo, Yaya Alfia
Faculty of Law, Southeast Sulawesi University

Abstract
Marriage Law in Indonesia is regulated through Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. Through this Law, the provisions of the general public, Article 7 (1) Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years. (2) In the event that there is a deviation from the age provisions as referred to in paragraph (1), the parents of the male and/or female parents may request a dispensation from the Court on the grounds that it is very urgent, accompanied by sufficient supporting evidence. However, in reality in the community, especially in the village of Lagasa, Muna Regency, there are other phenomena that are contrary to the law on underage marriage, this research uses the empirical legal research method. have not met the applicable legal requirements, other legal consequences of course from unregistered marriages have implications for the civil rights of wives and children later in life.
Keywords: Marriage, Minors, Lagasa Village
DOI: 10.7176/JLPG/117-01
Publication date: January 31st 2022

1. Introduction

Philosophically, according to the law on child protection, children are buds, potentials, and the younger generation who succeeds in the ideals of the nation's struggle, has a strategic role, characteristics, and special characteristics so that it must be protected from all forms of inhumane treatment that result in violations of human rights. So that the marriage below must be prevented and not allowed to continue to occur in the community.

However, in reality underage marriage in ancient times until today is still a lot going on. However, in the case that underage marriages are forced to be carried out, the marriage law still provides the possibility of deviations. [1]

This is regulated in Article 7 paragraph (1) Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years. (2) In the event that there is a deviation from the age provisions as referred to in paragraph (1), the parents of the male and/or female parents may request a dispensation from the Court on the grounds that it is very urgent, accompanied by sufficient supporting evidence.[2] And this is given to avoid unwanted things in children such as adultery and others.[3]

From this age limit, it can be interpreted that Law Number 1 of 1974 does not require the implementation of underage marriages which have been determined by Law Number 1 of 1974. Underage marriage is not something new in Indonesia. This practice has been around for a long time with so many perpetrators. Not in the big city, not in the interior. The reasons also vary, due to economic problems, low education, cultural understanding and certain religious values, and so on.[4]

Lagasa Village, Duruka Subdistrict, Muna Regency, Southeast Sulawesi, the majority of which are Bajau people with the majority of their livelihoods being fishermen who almost every month have a pair of children who elope (silayyang) where they always do silayyang (elopement) during the middle of the full moon or in the middle of the full moon. when the fishermen take a break from doing work as sailors.[5]

the phenomenon of elopement very often occurs in the Bajau tribe of Lagasa Village which is usually caused by several educational factors where almost most of those who elope are children who have dropped out of school or who have never attended school whose daily activities are only playing and participating in earning a living as a source of income. fisherman;

Economic factors where the parents of the man do not have enough money to propose to the girl who is the boyfriend of the boy, the factor of the parents or family of the woman does not approve of her daughter's relationship with the man who is her child's lover so that both partners they do silayyang so that they are not

[1] Zulfiani, Kajian Hukum Terhadap Perkawinan Anak Di Bawah Umur Menurut Undang-Undang Nomor 1 Tahun 1974, Jurnal Hukum Samudra Keadilan Volume 12, Nomor 2, Juli-Desember 2017, Hlm 212
[2] Lihat Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan
[3] Zulfiani, *Op, Cit.,* hlm 212.
[4] *Ibid*
[5] Yaya Alfia, dkk, *Perspektif Hukum Adat Kawin Lari (Silayyang) Suku Bajau Di Desa La Gasa Kabupaten Muna*, Jurnal Hukum UNISSULA Volume 37 No. 1, Mei P-ISSN: 1412-2723, Hlm 26

separated.[1]

Elopement (*silayyang*) from year to year continues to show an increase. From 2019 to 2020, there were almost 18 young couples who performed the *Silayyang* practice, generally those who eloped were children who dropped out or did not go to school and even minors. Usually those who do this are actually just regular dating, but because the relationship is opposed by their parents, they elope so they don't get separated.[2]

Based on the description of the background of the problem above, there are legal issues that need to be studied in research on legal behavior that is contrary to the provisions of marriage law in Indonesia. Marriage under public must be prevented in order to protect children from various negative impacts that will arise. For this reason, there is a need for legal research to protect children as buds, potentials and the nation's next generation.

Formulation of the problem

1. How is the marriage of minors viewed from the customary law system of the Bajau tribal community, Lagasa Village, Muna Regency?
2. How are the legal consequences of underage marriage reviewed in the case of elopement in Lagasa Village, Muna Regency?

2. Research methods

This study uses an empirical juridical research method that examines primary data regarding the legal consequences of child marriage under age. Case Study of Lari-Lari in Lagasa Village, Muna Regency. The research uses a juridical approach (law is seen as a norm or das sollen) and an empirical approach (law as a social, cultural or das sein reality) to analyze the problem of underage marriages that are not recorded and are contrary to Law no. 1/1974. Data collection techniques are carried out through direct observation or observation using field studies or case studies on the phenomenon of underage marriage. Then the author conducted structured and unstructured interviews, the data that had been collected was then analyzed using legal materials to examine and discuss and find answers to problems that had been found in the field. So that it can find answers as legal facts in this study.

3. Discussion

3.1. The marriage of minors is seen from the customary law system of the Bajau tribal community, Lagasa village, Muna Regency

3.1.1. Marriage according to Law no. 1 of 1974

The law applies to marriage in Indonesia subject to the provisions of law no. 1 of 1974 as referred to in the provisions of Article 1 "Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on God Almighty.

In addition, the marriage law is legal, if it is carried out according to the law of each religion and belief (stipulations of article 2 paragraph 1), to make administrative guidelines, marriages are required to be recorded as stipulated in article 2 paragraph (2) that each Each marriage is recorded according to the applicable laws and regulations.

The principles or principles contained in the marriage law in Indonesia are as follows:

a. The purpose of marriage is to form a happy and eternal family. For that husband and wife need to help and complement each other, each can develop his personality to help and achieve spiritual and material well-being.
b. In this law it is stated that a marriage is valid if it is carried out according to the law of each religion and belief; and besides that every marriage must be recorded according to the applicable laws and regulations. The recording of each marriage is the same as the recording of important events in a person's life, for example births, deaths which are stated in certificates, an official certificate which is also included in the register of records.
c. This law adheres to the principle of monogamy. Only if it is desired by the person concerned, because the law and religion of the person concerned allows it, a husband can have more than one wife. However, the marriage of a husband with more than one wife, even though it is desired by the parties concerned, can only be carried out if certain conditions are met and decided by the Court.
d. This law adheres to the principle that the prospective husband and wife must have matured in mind and body to be able to carry out a marriage, so that they can realize the purpose of marriage properly without ending in divorce and obtaining good and healthy offspring. For this reason, marriages between prospective husbands and wives who are still under age must be prevented. In addition, marriage has a relationship with population problems. It turns out that a lower age limit for a woman to marry results in a higher birth rate when compared to a higher age limit.

[1] *Ibid*
[2] *Ibid*

Underage marriage is a marriage carried out by a man and a woman where each party has not reached the age of 21 years and is still under the authority of parents so that all actions cannot be legally accounted for.[1]

3.1.2. Age Limits for Men and Women in Marriage

The granting of a marriage permit for a man and a woman prior to any changes, (1) Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years. After that, a change was made with the consideration "The Constitutional Court of the Republic of Indonesia has issued a Constitutional Court Decision No. 22/PUU-XV/2017 which one of the considerations of the Constitutional Court in the decision is "However, when the difference in treatment between men and women has an impact on or hinders the fulfillment of rights -basic rights or constitutional rights of citizens, whether included in the group of civil and political rights as well as economic, educational, social and cultural rights, which should not be distinguished solely on the basis of gender, then the distinction thus clearly constitutes discrimination." In the same consideration, it is also stated that the regulation of the minimum age limit for marriage that differs between men and women not only creates discrimination in the context of the implementation of the right to form a family as guaranteed in Article 28B paragraph (1) of the 1945 Constitution, but also creates discrimination against the protection and fulfillment of rights. children as guaranteed in Article 28B paragraph (2) of the 1945 Constitution. In this case, when the minimum age of marriage for women is lower than for men, legally women can form a family faster.

Based on this consideration then Law no. 1 of 1974 there was an amendment to Law No. 16 of 2019 then in the provisions of article 7 paragraph marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years. However, in implementation in the Bajau tribal community, this rule has not been implemented effectively due to the cultural beliefs of the Bajau tribal community that does not provide an age limit for drinks for men and women.

3.1.3. Study of the customary law of the Bajau tribe, marriage of children under age

The meaning of marriage for customary law is important because "in customary law it is believed that marriage is not only an important event for their deceased ancestors. The ancestral spirits of both parties are also expected to bless the continuity of their household, which will be more harmonious and happy. Once the importance of this marriage, then the marriage was always and continuously accompanied by various ceremonies complete with offerings. Forms of marriage of minors in the village of Lagasa include marriages in the sala of marriages carried out by men and women in the homes of traditional parents after being married by traditional parents, then 1 or two weeks later the man and woman re-conduct the marriage agreement in front of the leader.

In addition, the **Silayyang** incident that occurred in Lagasa Village, Muna Regency, was a marriage that was considered valid based on consensual consent. In the village of Lagasa silay which is a common thing because it has become a habit when the male and female partners are not approved by the woman's parents, not only that, elopement is also carried out by those who are still classified as minors so that it is contrary to the marriage law.[2]

There is also no customary law that regulates the age limit for marriage, therefore, if there is an underage *silayyang* then they can still be married according to the pillars of marriage and can live as husband and wife but underage marriages do not get legal legality because they are not recorded by the marriage registrar. The study of the effectiveness of the law cannot be separated from aspects of community behavior in law.[3]

3.2 The legal consequences of underage marriage are reviewed in the case of elopement in Lagasa village, Muna Regency

3.2.1. Legal Impact of the Marriage Law

The legal impact arising from a marriage that does not meet the age requirements is reviewed from the marriage law "Marriage is only permitted if a man and a woman have reached the age of 19 (nineteen) years." Underage marriage is not in accordance with the spirit of the marriage law, the reason why the age limit for a child's marriage must be limited, the age limit in question is considered to have matured physically and mentally to be able to carry out a marriage in order to realize the purpose of marriage properly without ending in divorce and getting offspring who healthy and quality. It is also hoped that an increase in the age limit higher than 19 (sixteen) years for women to marry will result in a lower birth rate and reduce the risk of maternal and child mortality. In addition, it can also fulfill the rights of children so as to optimize the growth and development of children including parental assistance and provide children with access to education as high as possible.

3.2.2. Legal Impact of the Child Protection Act

Child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. Law Number 35 of 2014 concerning Child Protection Article 26 (1) Parents are obligated and responsible for:

[1] Hasan Bastomi, Pernikahan Dini Dan Dampaknya (Tinjauan Batas Umur Perkawinan Menurut Hukum Islam Dan Hukum Perkawinan Indonesia), YUDISIA, Vol. 7, No. 2, Desember 2016, hlm 371
[2] Yaya Alfia, Op., Cit., hlm 28
[3] Ibid

nurturing, nurturing, educating and protecting children, nurturing children according to their abilities, talents and interests and; prevent child marriage.

3.3.3. Marriage is not registered at KUA

Law No. 1 of 1974 Article 2 Paragraph (2) mandates that the implementation of marriages be recorded. In practice, for people who adhere to the Islamic religion, marriage registration is carried out by officers from the sub-district Religious Affairs Office. The purpose of recording a marriage is to make the marriage bond legally valid and the consequences of marriage such as the birth of a child have legal force and can be registered in accordance with applicable laws and regulations.[1]

For those who have not reached adulthood according to the marriage law for men and women of 19 years, the local religious affairs office will not register the marriage between a man and a woman if they do not meet the age requirements and obtain dispensation from the local court in accordance with the provisions of Article 7 paragraph (1) Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years. (2) In the event that there is a deviation from the age provisions as referred to in paragraph (1), the parents of the male and/or female parents may request a dispensation from the Court on the grounds that it is very urgent, accompanied by sufficient supporting evidence.[2] The law provides an opportunity to carry out marriages but by asking the court for dispensation with urgent reasons accompanied by sufficient evidence.

3.3.4. Loss of Wife's Civil Rights

Underage marriages carried out by men and women who do not meet the marriage requirements as described above, the marriage will not be registered if it does not get dispensation from the court accompanied by sufficient evidence, the local religious affairs office will not record the marriage. In addition, as a result of not being recorded in the Office of Religious Affairs, administratively the marriage is not recognized by the state, although in Islamic law it is still recognized because it has fulfilled the elements of the pillars and requirements of marriage. So that marriages that are not registered, the civil rights of a wife to a marriage are not recognized by the state because the reason for the marriage is that the marriage is carried out in the hands of which does not get recognition from the state so that this is very detrimental to the civil rights of a wife.

3.3.5. Loss of Children's Civil Rights

In addition to the loss of a wife's civil rights in marriage law in Indonesia, the rights of a child born without marriage registration by the mother and father are not granted civil rights to the child. In accordance with the provisions of Article 43 (1) of Law Number 1 of 1974, children born outside of marriage only have a civil relationship with their mother and their mother's family.

However, based on the Constitutional Court's Decision Number 46/PUU-VIII/2010, it is stated that Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage which reads "Children born outside of marriage only have a civil relationship with their mother and their mother's family". with the 1945 Constitution and does not have binding legal force as long as it is interpreted to eliminate civil relations with men which can be proven based on science and technology and/or other evidence according to the law that turns out to have blood relations as the father, so the paragraph must read, "The child who born out of wedlock has a civil relationship with his mother and his mother's family as well as with a man as his father which can be proven based on science and technology and/or other evidence according to the law having blood relations, including civil relations with his father's family.

Based on the decision, the civil rights can be granted through evidence based on science and technology.

4. Conclusion

Marriage of minors is seen from the customary law system of the Bajau tribal community, Lagasa Village, Muna Regency. Underage marriages in the Bajau tribal community in customary law communities do not regulate the age limit for marriage, therefore if there is an underage silay then they can still be married according to the pillars of marriage and can live as husband and wife but underage marriages do not get legal legality because not registered by the marriage registrar. The study of the effectiveness of the law cannot be separated from aspects of community behavior in law.

Legal Consequences of Underage Marriage Reviewed in the Elopement Case in Lagasa Village, Muna Regency, underage marriages cannot be registered with the marriage registrar because they are contrary to the provisions of law number 16 of 2019 concerning amendments to law number 1 of 1974 concerning marriage , the loss of civil rights of a wife to her husband because she did not get recognition from the state on her marital status because it was not recorded at the local Religious Affairs Office, the civil rights of a child to his biological father must be proven based on science and technology and/or other evidence according to the law having blood relationship, including civil relationship with the father's family, if it cannot be proven then the child has no civil relationship with his father

[1]Kustini, Perkawinan tidak Tercatat: Pudarnya Hak-Hak Perempuan (Studi di Kabupaten Cianjur), HARMONI Mei - Agustus 2013, hlm. 73
[2] Lihat Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan

References

Hasan Bastomi, *Early Marriage and Its Impact (Review of Marriage Age Limits According to Islamic Law and Indonesian Marriage Law*), YUDISIA, Vol. 7, No. 2, December 2016

Kustini, Unregistered Marriages: *The Fading of Women's Rights (Study in Cianjur Regency), HARMONY* May - August 2013

Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage

Sherlin Darondos, Child Marriage and Its Legal Consequences, Lex et Societatis, Vol. II/No. 4/May/2014

Yaya Alfia, et al, Perspective of the Customary Law of Marriage (Silayyang) of the Bajau Tribe in La Gasa Village, Muna Regency, UNISSULA Legal Journal Volume 37 No. 1, May P-ISSN: 1412-2723

Zulfiani, Legal Studies on Marriage of Minors According to Law Number 1 of 1974, Journal of Samudra Justice Law Volume 12, Number 2, July-December 2017

Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Legal Protection Principle for Workers Terminated Due to Industrial Digitalization

Sidi Alkahfi Setiawan[1] Dominikus Rato[2] Aries Harianto[3] Dyah Ochtorina Susanti[4]
1.Sidi Alkahfi Setiawan, Law Doctoral Program Student of Jember University
2.Dominikus Rato, Prof. Doctor of Law Faculty of Jember University, in the field of Customary Law
3.Aries Harianto, Doctor of Law Faculty of Jember University, in the field of Labor Law
4.Dyah Octorina Susanti, Doctor of Law Faculty of Jember University, in the field of Civil Law

Abstract
Employment termination caused by industrial digitalization is contrary to the constitutional rights of workers. The essence of this right indicates that everyone has the right to get a decent living and fair treatment through a constructive and proportionate working relationship. Constitutional rights are an inseparable part of human rights. It is a primary right, thus the state is obliged to protect and realize it through the state constitution and existing positive law. One of the fundamental constitutional rights is the protection of workers due to terminations. However, a legal vacuum exists regarding the protection for labour due to industrial digitalization. The phenomenon of industrial digitalization is unavoidable, workers will be greatly harmed when most companies digitize simultaneously for the sake of efficiency. Such protection must be regulated proportionally which is oriented towards fulfilling the interests of workers as an impact of the company's efficiency due to digitalization. The legal principles of providing legal protection for workers who have been terminated due to digitalization include, first, the principle of legal protection guarantee for workers and their families; Second, the principle of fair compensation; Third, the principle of mutual will of parties involved in the working relationship; and Fourth, the principle of authoritative intervention.
Keywords: Constitutional Rights, Industrial Digitalization, and Termination of Employment.
DOI: 10.7176/JLPG/117-02
Publication date: January 31st 2022

1. Introduction

The 4.0 industrial revolution does not require human energy and thoughts at work. This revolution replace human by machine which is able to communicate and connect with one another. Artificial intelligence is starting to replace human thinking abilities, especially in terms of decision making. For example, in the banking world, banks are starting to use machines to analyse loan applications as well as to make decisions based on data and track records. The rapid development of technology affects employment sector. There are at least 50 thousand workers in the banking sector have been terminated due to digitalization. Gradual termination of employment of banking sector began since 2016. The terminations were carried out for efficiency. Certain position such as teller, customer service, and banking sales began to be slowly reduced.

The above statistical fact indicates that employment termination as a form of efficiency in Indonesia is undeniable threat. The Act Number 13 of 2003 on Manpower (hereinafter referred to as UUK) has regulated various dynamics of workers termination, such as resignation, without notification, company's bankrupt, contract termination of Particular Time Agreement, and efficiency. However, termination of employment to reduce number of workers is referred to as company efficiency.

Article 164 paragraph (3) of the UUK states:

The entrepreneur may terminate the employment because the enterprise has to be closed down not due to continual losses for two years nor force majeure, but rather due to efficiency, the company shall entitle certain amount of severance pay and reward for workers stipulated in two different regulations. Severance pay referred to Article 156 Paragraph (2) of the UUK is the amount of two years of work, and the reward pay for one term of service referring to Article 156 Paragraph (3) of the UUK, and compensation pay for one term is according to Article 156 Paragraph (4) of the UUK.

In short, termination of employment carried out under efficiency is legal. However, Article 164 Paragraph (3) of the UUK allowing termination for the sake of efficiency has been countered by Decision of the Constitutional Court of the Republic of Indonesia precisely Decision Number 19/PUU-IX/2011. This verdict stated that the enterprise shall be permanently closed down to carry out massive termination of employment. The annulled norm has been declared contrary to the 1945 Constitution of the Republic of Indonesia. The companies closed down temporary and terminated its workers. Article 164 Paragraph (3) contradicts the main moral value of Manpower Law. The Article 151 Paragraph (1) states that *the entrepreneur, worker/labourer, and or the trade/ labour union, and the government must make all efforts to prevent termination of employment from taking place".*

The government has to ensure that its entire citizen shall have access to work which is commonly referred

to as right to work. Employment is a means of every individual to achieve independence and prosperity. All government policies shall be oriented on reducing number of unemployment and improving the quality of work environment (Agusmidah, 2011:214-215). The state shall protect all workers/ labourers through various policies, one of which through the issuance of law and regulations which is oriented toward improving employees welfare. It cannot be contested as it has been recognized as part of human rights stipulated by the Constitution.
Based on the above short elucidation, the termination of employment caused by industrial digitalization raises various problems as follows:

1. Philosophical problem. On the philosophical problem, the occurrence of constitutional injustice due to the absence of legal protection for terminated workers/labourers due to industrial digitization will distort the values of Pancasila Industrial Relations. In addition, termination of employment which is undeniable due to industrial digitalization is an indication of disharmony against Article 27 paragraph (2) and Article 28D paragraph (2) of the 1945 Constitution of the Republic of Indonesia
2. Juridical problem, the occurrence of worker efficiency due to industrial digitization is contrary to Article 151 paragraph (1) of the UUK. This article states *"The entrepreneur, worker/labourer, and or the trade/ labour union, and the government must make all efforts to prevent termination of employment from taking place.* The Constitutional Court through Decision Number 19/PUU-IX/2011 created poor protection for entrepreneurs because the arrangements in the decision did not accommodate the reality of industrial digitization which caused termination of employment.
3. Theoretical problem, there has been a vacuum in the role of the welfare law state in employment relations, where industrial digitalization as a manifestation of economic law does not run linearly with the welfare of workers. The digitalization of industry clearly threatens the principle of legal purpose in providing worker protection, due to the absence of the state.
4. Sociological problems, which arise as a result of the digitalization of the company's industry resulting in Termination of Employment and social impacts in the form of increasing unemployment statistics and their negative consequences, such as high crime rates arising from social disparities that arise.

Based on the above information, a new labour law system exists. It is done through the issuance of UUK and Act Number 11 of 2020 concerning Job Creation (UUCK) which mutatis mutandis also brings new legal issues. Thus, there are several legal issues will be further analysed, namely what are the legal protections for workers terminated due to industrial digitalization? What are the legal principles used in providing legal protection for workers/labourers terminated due to industrial digitalization?

2. Research Method

This study belongs to normative legal research which is oriented to legal norm analysis resulted in argumentation, theory and concept as a prescription to answer legal issues by implementing law and regulations, verdicts, and other legal materials. This study obtains wrong, appropriate or right answers. It applies statutory approach, conceptual approach, and case approach (Peter Mahmud Marzuki, 2019:29-36). Statutory and conceptual approached are used examine issues of legal protection for workers terminated due to industrial digitalization based on positive law and several similar issues to obtain comprehensive understanding in constructing complete idea. Furthermore, conceptual approach is applied to arrange legal principles used as reference of legal renewal for workers protection due to digitalization.

3. Results and Discussion

3.1 Legal Protection for Terminated Indonesian Workers due to Industrial Digitalization

The legal protection aims at protecting the values of Human Rights to be injured. One of government duties is to ensure every citizen get his rights, such as giving sense of both mental and physical security, and preventing several threats both from internal and external parties (Satjipto Rahardjo, 2000: 74). Protection of dignity is also the scope of legal protection which is part of human rights (Philipus M. Hadjon, 1987: 25). As legal subject, human will always be bound by their rights and obligations toward their fellow human especially in taking legal actions (CST Kansil, 1989: 102). According to Setiono, legal protection is an effort to protect all citizens from government arbitrary actions and is aimed to create order, security, and to maximize human to maintain their dignity (Setiono, 2004:3).

Indonesia adheres to the welfare state model with an industrial relations system of economic democracy as its basis as being stipulated by Article 27 Paragraph (2) jo. Article 28D Paragraph (2) of the 1945 Constitution of the Republic of Indonesia which clearly stated that everyone has the right to receive wages and fair and equal treatment for humanity. Therefore, the state is not only obliged to provide job vacancies, but also to ensure all workers/ labourers receive decent living and fair treatment. This concept is supported by Kartasapoetra stating that employment is not merely economic oriented but it carries the value of humanity (Asri Wijayanti, 2010:112). The ideal of Indonesian labour law is stipulated in the Article 27 Paragraph (2) jo. Article 28D Paragraph (2) of the 1945 Constitution of the Republic of Indonesia. It is inline with the principle of economic

democracy of Pancasila which is supporting the national development goal to achieve communities' welfare.

Labour is one of development goal main actors since it has strategic role to achieve the objective. The development of manpower system is aimed at protecting labourers/workers interests. It requires all efforts to improve labours quality and contribution for national development. Therefore, Pancasila Industrial Relations shall be the proper system to be applied because philosophically, the essence and purpose of this system is inline with the Indonesian legal ideals namely to grant all Indonesian citizens' welfare through the creation of a just and prosperous society.

The Pancasila Industrial Relation system is characterized by the opinion that in a work relationship, human is dignified and equal and has the ability to communicate, coordinate, and consult so that preventive efforts on errors can be minimized; and the existence of deliberation and consensus in solving problems, and the absence of company closures (Muhammad Sadi and Sobandi, 2020: 21).

The Indonesian Industrial Relations is an integral part of Pancasila Industrial Relations system, while the system of industrial relationship is a sub-system of the Indonesian labour integral system as a part of Pancasila Economic Democracy System, due to the fact that the state has the efforts to build proportional position between entrepreneurs and workers/labourers, and to prioritize deliberation process for solving problems.

All citizens' rights are the carried out by the State to ensure its people welfare. Though, there are differences found in the implementation. The readiness of the state and its tools must be strengthened, especially financing aspect to support the welfare of all its citizens. The state shall make every effort to ensure that the standard of living of its citizens is guaranteed because society cannot be separated from government policies and actions to defend their rights and dignity. In Indonesia, all aspects are regulated in detail in the form of regulations because with these regulations the features of the rule of law will appear clearly, conceptually and theoretically.

The number of workers who do not meet the qualifications especially in the manufacturing sector shows their unpreparedness to adapt the 4.0 industrial revolutions which is identical with digital economy and automation. Therefore, the government has made various preparations to face the industrial revolution 4.0, one of which is the empowerment of human resources. The government through the Ministry of Finance has allocated more funds in the education and health sectors. The Ministry of Industry has also provided several strategies to deal with the industrial revolution 4.0, including starting to create a stimulus to encourage the use of digital technology in the industrial sector and increasing internet technology literacy.

Employment termination due to industrial digitalization is caused by massive efficiency of manufactures to reduce production costs and to increase benefits. Profit orientation inevitably makes entrepreneurs choose software technology and artificial intelligence. Even Jeremy Rifkin in The End of Work predicts that there will be massive termination of workers where most companies no longer need workers. By the existence of technology disruption, the community shall be more vigilant because the position of the state, entrepreneurs and workers has changed. The state cannot unilaterally determine the survival or failure of a business when the entrepreneur does not comply with state regulations (Jeremy Rifkin, 1996: 19-21).

Massive and complex technology disruption requires all parties' formulation, namely the state, entrepreneurs, and workers/labourers to create a balance. The termination of employment issue will not meet a common ground if the parties are still adamant about their respective interests. In this case, the termination mechanism should be clear and flexible in its implementation to avoid miss-interpretation, be it the entrepreneur or the worker/labourer themselves.

a. Economic Aspect Protection

In this modern time, social status is required besides fulfilling life necessities. To improve social status, one needs an occupation that will greatly impact the lifestyle. Work is a necessity for every human being to achieve maximum prosperity, because a person will earn income and career path. These two things are absolute to achieve a better life.

In its development, to improve the performance and quality of the workforce, it is necessary to guarantee a safe and decent life for someone that can also lead to an increase of workers/labourers quality of life by strengthening protection for workers/labourers who prioritize their own dignity and human rights (Abdul Khakim, 2003: 12). The rapid development of era and technology demands protection of workers, because labour protection is an important thing to be supported due to the increasing risks and responsibilities of workers. Indirectly, the implementation of the guarantee is an appreciation to see the value created by the workers/labourers who have contributed to the company through their ideas and thoughts. Likewise, job security which is based on Pancasila and the 1945 Constitution of the Republic of Indonesia can be considered as an important labour promotion for national integration and development. Thus, it is important for public authorities to increase protection for workers (I. Made Udiana, 2018: 26).

In Indonesia, employment is regulated by the Manpower Law and Job Creation Law. The disharmony of entrepreneurs and workers/labourers mostly causes the occurrence of employment issues (Ashabul Kahfi, 2016: 62). Since work relation problems is identical with elements of social, economic, and political welfare,

termination of employment shall be seriously considered to achieve fair national development goals (Aries Harianto, 2016:71-73).

Termination of employment causes social imbalances as a result of the company's inability to meet the termination standards imposed on its workers. Companies will generally carry out unilateral termination which is not in accordance with the applicable regulations. In principle, the company is obliged to protect and prosper each of its workers in order to create a harmonious relationship between workers/labourers and employers without any structural coercion from stronger parties (employers) to more vulnerable individuals (labourers/workers). Along with the improvement of information technology, besides having a positive impact, especially as far as modernization and advancement of information is concerned, it also has a negative impact on the employment sector.

The negative impact of information technology advancement is reflected in the use of technology that develops mechanically in the company which no longer need human for the program. This change is referred to as digitalization. Efficiency is a justification of enterprise to terminate its workers. In this case, digitalization is usually taken for the sake of efficiency.

The affectivity mentioned indicates that company will impose restrictions on the use of resources into the interactions used in the company's workflow. It is seen through labours limitation by replacing them with machines or the transformation from all manual structures to advanced ones. For workers, termination is the beginning of livelihood loss affecting domino impacts for their families and government. Due to the fact that, in this digitalization era, finding job is hard (Aries Harianto, 2021:31).

Multi-interpretation of worker termination both by the statutory regulations and experts' doctrines will at least provide more detail definitions of termination of employment. In principle, the guidelines are contained in Article XII Article 150 to Article 172 of the UUK. Then Article 1 number 25 of the UUK has given approval on termination, especially the most common way to terminate a work relationship due to certain things which end working relationship between the two parties, i.e., the worker/labourer and the entrepreneur. Halim opines that termination of employment is caused by certain factor. It is taken by entrepreneurs to their workers as an end of their work relationship. Work relation occurs due to certain consensus between entrepreneurs and workers (Cristoforus Valentino AP, 2017: 68).

A work agreement is an arrangement containing rights ad obligations plan of parties involved. It also regulates the framework to be carried out by the workers/labourers depending on the provisions that will be given and will be recognized by the workers/labourers. Termination of employment is closely related to workers rights. Both are viewed as two inseparable things since they lead to an attachment and commitment between workers and the company. The expiry of employment relationship will clearly disrupt the chain of rights and commitment contained therein.

Rewards fees for years of service are regulated by the Article 156 Paragraph (3) of the UUK, like severance pay, both are calculated based on the total years of service. Points a to h mentioned that workers/labourers receiving reward pays shall be at least in 3 years of service or more, or even up to 24 years or more.

Wiwoho Siedjono opined that reward fee is not only given to workers/labourers that are good for the company. However, every terminated worker/labourer that has been worked for 5 years or more she is entitled to an award pay (Agung Prasetyo Wibowo, 2021: 76).

Then the compensation money is regulated in Article 156 Paragraph (4) of the UUK, in its provisions a worker/ labourer has the right to get compensation for rights, including:

1. Available annual leave;
2. Transportation cost of workers/ labourer to work;
3. Reimbursement of housing costs and health insurance; and
4. Provision of compensation based on the work agreement.

According to the UUK, the right protection for workers/ labourers is interpreted that payment received by workers is a form of wages protection to make a living for their families. Furthermore, Article 154 paragraph (1) of the UUK regulated that every entrepreneur is obliged to grant severance pay and/or reward pay and compensation for entitlements submitted to workers/ labourers concerned.

b. Social Aspect Protection

Social security as a form of employment protection shall be granted by the state to workers/labourers. It is an effort to increase dignity and welfare of workers/labourers in order to maximize the success of national development (Dodi Satriawan, Agus Joko Pitoyo, and Sri Rum Giyarsih, 2020: 558).

Work relationship shall be directed to constructive relations based on Pancasila and the 1945 Constitution of the Republic of Indonesia. Both parties shall have mutual understanding and respect the rights, obligations and roles of each other. The provision of social security to workers is not necessarily intended for the workers themselves but their families, if they pass away, sick and other unfortunate conditions (Ida Ayu Sadnyini dan Milton Gabe L. Tobing, 2020: 109). Some of the social security benefits that workers/labourers receive include:

1. Health Care Insurance (hereinafter referred to as JPK)

This service is provided through cooperating partners that have met the qualifications according to the Organizing Body. It is provided in a structured, systematic and sustainable manner. This health insurance is carried out comprehensively, starting from the prevention and cure of disease, to the recovery and improvement of health.

2. Pension Plan (hereinafter referred to as JHT)
   This plan is prepared when workers/labourers are no longer in a productive condition such as retirement, passing away and disability.
3. Death Insurance (hereinafter referred to as JK)
   This program is addressed to the heirs of the worker/labourer if the death is not caused by a work accident. It is provided to lighten the family's burden such as funeral costs and other additional costs.

c. Job Access Insurance Protection

Legal arrangement of digitalization is referred to Article 164 Paragraph (3) of the UUK. This article stated that entrepreneur cannot terminate workers for the sake of efficiency if the enterprise does not suffer continual losses for 2 years or force majeure. In addition, employers are obliged to grant severance pay (two terms of service), reward pay (one term of service), and certain amount of compassion pay as stipulated by the Article 156 Paragraph (4) of the UUK (Siti Ummu Adillah and Sri Anik, 2015: 560).

Efficiency is one of the main reasons for termination of employment. This efficiency is carried out through reducing number of labour with the aim of increasing profits, one of which is through digitalization. Digitalization is often taken by companies to survive and thrive in an increasingly complex era of disruption (Sudiarawan, 2018: 797).

Companies are required to be able to carry out business processes appropriately in order to maximize profits and minimize existing losses. However, termination of employment shall be carried out in accordance with the provisions of the UUK and UUCK. The state must be present as a third party to be able to equalize the imbalance position of employers and workers. The prohibition of unilateral termination and the efforts to consider all the consequences arising from layoffs are form of representation of the state as a balancing party that must provide various affirmative policies to workers/ labourers (Edi Suharto, 2011: 41).

Affirmative policies can be carried out through job loss insurance. It is implemented through the Job Loss Insurance (hereinafter referred to as JKP) program. JKP also provides several benefits to workers/labourers, including information on job vacancies, competency training, and cash payments. To get this benefit, workers/labourers must first be registered as participants (Hartini Retnaningsih, 2019: 167). The status of an Indonesian citizen and a maximum age of 54 years and having a working relationship are the main requirements to register for the JKP program. The phrase having a working relationship refers to work agreements such as a Specific Time Work Agreement (PKWT) or an Indefinite Work Agreement (PKWTT) to register as a JKP participant.

JKP membership has been integrated with BPJS Employment. The funding of this program refers to Article 11 PP No. 37 of 2021. The participants pay a contribution of 0.46% per month from one month's wages for workers/labourers with an upper limit of 5 million rupiah in accordance with the provisions of PP. 37 of 2021. Furthermore, the Central Government also pays 0.22%, while other contributions sourced from the JKK program contributions at 0.14%) and JK (0.01%).

JKP has several benefits for workers/labourers, including access to job vacancies information, cash and competency training that workers only get if they have a minimum contribution period of 12 months in 24 months and have paid a minimum of continual 6 months of contributions before termination takes place. If a participant experiences permanent/total disability, resigns, retires and passes away, the participant cannot receive JKP benefits. As for PKWT workers, JKP can only be submitted if termination happened before the end of the contract. Companies have an obligation to register their workers/labourers to the JKP program. The imperative provisions are contained in Article 37 PP No. 37 of 2021. The company is obliged to guarantee workers/labourers to get JKP benefits. However, micro entrepreneurs are not included in this provision.

3.2 The Formulation of Labour Protection Principle of Workers Terminated due to Digitalization

In the industrial era 4.0, Indonesia's labour conditions will experience changes or transformations, whether in the structural form and subject of individual workers. Low education will have an impact on low use of technology, and uneven development will end in structural changes (Jan Luiten van Zanden and Daan Marks, 2012: 13). In addition, Indonesia has an abstract employment relationship in the Indonesian Manpower Law which requires the formulation and changes to the concept of employment relations in industrial relations in the UUK. The UUK stated that an employment relationship happen when a work agreement between the entrepreneur or business owner and the worker/labourer exists. Then, it was further stated that the employment relationship must meet three elements, namely work (Article 1601 of the Civil Code and Article 341 of the Commercial Code), wages (Article 1603 of the Civil Code) and orders (Article 1603 of the Civil Code).

Although Article 1 number 15 of the UUK has explicitly included elements of a work agreement, in the

view of legal experts, it is necessary to include another element in the form of a specific time element which is explained as follows:

1. Work
   It is not possible for employers to recruit workers/labourers without considering the needs of the company. Normatively, work is included in one of the legal criteria of a work agreement as regulated in Article 52 Paragraph (1) of the UUK whose original rule derives from Article 1320 of the Civil Code. In this article, work is an objective requirement. Thus, a work agreement is null and void if these objective conditions are not met.
2. Wages
   Workers/employees/labourers will definitely receive wages to meet their needs. Article 90 Paragraph 1 of the UUK explains that entrepreneurs are strictly prohibited from paying wages lower than the minimum wage as stipulated in Article 89 of the UUCK.
3. Order
   The strategic position of entrepreneurs is that they have a stronger bargaining position than the workers/labourers. Therefore, the entrepreneur has the prerogative. Employers can give orders to workers/ labourers in accordance with the criteria and needs of the company. This makes workers/labourers integrate themselves with the company through the orders of the entrepreneur. According to most legal experts, this fact is called *dienstverhoeding*, in other words, workers/labourers must be willing to work under the orders of the entrepreneur.
4. Specific Time
   The duration of entrepreneur and the worker/labourer working relationship can be minimized or regulated according to the agreement of the parties. Specified time is indeed not included in the interpretation of the employment relationship, as stated in Article 1 number 15 of the UUK. Given the fact that this factor is related to the implementation of a working relationship, since it is impossible for a working relationship to be carried out without mentioning the specific time needed. In addition, the regulation of the employment relationship duration also concerns the certainty and status of the parties in an employment relationship (Arifuddin Muda Harahap, 2020:71).

This specific time factor has three interpretations. First, specified time of working relationship will not force workers/labourers to work without specific duration. Therefore, work relations shall arrange definite duration to minimize the occurrence of violations of rights and obligations between entrepreneurs and workers/labourers. Employees have the right to rest and leave. Thus, the arrangement of work duration s made based on the agreement of both parties. Second, workers/labourers shall not violate the agreement since it may be harmful for all parties involved. Third, there shall be no work relations applicable for life.

In this era of digital, the effort of protecting workers shall readapt to the existing Manpower Law in Indonesia. By the development of more flexible work relations, the UUK needs to rearrange type of the relationship and its social protection. The wages mechanism does not adapt monthly payment anymore. The Law requires an hourly and daily wage ecosystem regulator that is in accordance with the growth of the existing work bond. The workforce Indonesian labourer is low, thus government shall provide a strong legal basis to guarantee workers rights for improving their competence. The improvement of employment social insurance shall not burden entrepreneurs, but it must be aimed at expanding the benefits of existing social security to be more tangible (Yeni Nuraeni, 2020: 1).

The decision on judicial review of article 164 paragraph 3 of the UUK by the Constitutional Court has made a clear understanding of efficiency in which employers may only make layoffs if the company has a high potential for being permanently closed down. The interpretation of efficiency contained in the labour law includes reducing wages and facilities for top-level workers, minimizing the division of work time, eliminating overtime work, minimizing work duration, taking employment termination gradually by not extending contracts for workers whose contract period has expired, and distributing retirement fees for those who meet the requirements.

Protection of workers/labourers can be implemented through the distribution of guidance, compensation, or clearly increasing the recognition of human rights, physical and socio-economic protection through the norms that apply in the industry, thus, it is theoretically known as 3 types of work protections as follows (Zaeni Asyhadie, 2007: 51-54):

1. Social protection is aimed at giving workers/labourers opportunity to improve their life as human being especially as members of the community and a family. This protection is also known as occupational health.
2. Technical protection is related to certain efforts to protect workers/ labourers from the dangers of disasters that can be caused by work equipments or materials. This protection is often referred to as work safety.
3. Economic protection is closely related to all efforts to provide workers/ labourers with an adequate

income aiming to meet the daily needs of workers/ labourers and their families, including in the case they are no longer able to work beyond their will. This type of protection is also referred to as social security.

The UUK has regulated termination of employment provisions. Article 151 Paragraph (2) stated that if termination cannot be avoided, the entrepreneur shall explain to the workers/labourers or the trade union about the motives. It may seem to be multi-interpreted that the Law is allowing unilateral termination. However, the Paragraphs (3) and (4) explained that workers/labourers have been notified and refused to terminate their employment relationship, the settlement of termination of employment must be tried through bipartite, if Bipartite negotiations as defined in paragraph (3) do not obtain a consensus, then the settlement of work termination issue must take litigation through the Industrial Relations Court.

In short, the provisions of UUCK concerning termination of employment are described as follows:

a. Refusing employment termination is hard since the workers/labourers do not understand their rights at work. For it often causes them to be unable to defend their rights.
b. The UUK prevents unilateral termination of employment from taking place into two things, namely the obligation to conduct consensus deliberation through bipartite meetings and if the agreement does not find any solution, both parties can take litigation through the Industrial Relations Court as previously explained in the UUK section.

The social justice theory is the branch of Rawls theory of justice. The main idea contained in theory of justice is also applicable to social justice theory. As well as the philosophical thought that has been rooted and built the concept of ideal social justice (I Nyoman Putu Budiarta, 2012:20). The scope of social justice theory derives from neo-liberalism in England which demands equity of opportunity and minimum standard of living, while neo-liberalism of France socialist requires affirmative policies from the state through the issuance of laws and regulations on social sector. Thus, disparity of difference and inequality among human being can be connected (The Liang Gie, 1979:40).

Ernest Baker, from idealist, in The Liang Gie mentioned that social justice shall be the main foundation for the community's life which prioritizes togetherness and kinship to build the potentials of all levels of society (The Liang Gie, 1979: 5). The social justice as the value of Pancasila is applied by all levels of society through their representatives in the House of Representatives to create pro-people legislation products. In the future, Indonesia will be able to become a truly modern country by carrying out the best ideas from the content of the precepts of social justice, as a component of our nation's children, we are obliged to realize the noble ideals of the nation and state.

According to Mohamad Hatta (The Liang Gie, 1979: 5), social justice for all Indonesian people means that: *a decisive step to realize a just and prosperous Indonesia. Indonesian leaders who drafted the 1945 Constitution have the belief that the ideal of social justice in the economic field is able to achieve equitable prosperity*. This thought has arisen since he was elected as the head of Indonesian Association in 1926. He had delivered a speech entitled *Economische Wereldbouw en Machtstegenstellingen* (World Economic Structure and Conflicts of Power). His speech aimed at analysing the world economic structure to become the reference for Indonesia which favours the small people. *A great era has been born by centuries, but the great age meets small humans*. This quote from the great German poet, Schiller, underscores Hatta's conscience in feeling the pain and disappointment of Soekarno who deviated from his ideal of democracy. Hatta was a phenomenal figure in his time (Salman Alfarizi, 2020: 119).

The idealism of Hatta is an attempt to revolt the invaders who have been exploiting the Indonesian people. Indonesia must be independent to be able to defend from the massive imperialism barrier at that time. Finally, after a long struggle, Indonesia got the independence through the Proclamation of August 17, 1945 (Salman Alfarizi, 2020: 119).

Social justice is not only the basis of the state, but also a goal that shall be implemented. Meanwhile, Soekarno's ideals of social justice were formulated as Indonesian socialism: "*A zonder society of capitalism*" (Bur Rasuanto, 2005: 216), and *an independent Indonesia will have no poverty* (The Liang Gie, 1979: 40). From the Soekarno-Hatta description above, the notion of social justice is articulated as the welfare of the people.

Social justice needs to be connected with the Pancasila perspective, Notonagoro said that the fifth principle of social justice for all Indonesian people is divine justice, contains human values, and democracy which prioritizes deliberation and consensus. This concept must be applied by the state, because the essence of the state purpose is to create a just and prosperous society (I Nyoman Putu Budiarta, 2012: 20.). In interpreting the principles contained in the 1945 Constitution of the Republic of Indonesia, it is necessary to understand that social justice means all Citizens have the same rights and status before the law.

4. Conclusion

There are several aspects of legal protection for workers who have been terminated in the labour regime in Indonesia, namely. First, the aspect of Economy. Entrepreneurs are obliged to provide severance and reward

pays for terminated workers based on the provision of existing laws ad regulations. Thus, they have the opportunity to make a living for their families; Second, the social aspect. This ideal is realized by the implementation of several insurance programs, namely Health Care Insurance (JPK), Pension Plan (JHT) and Death Insurance (JK); Third, the aspect of granting an access to work which consists of Health Care Insurance (JPK), Pension Plan (JHT) and Death Insurance (JK).

The legal principles to provide legal protection for workers being terminated are, first, the principle of legal protection certainty for workers and their families. Employers must provide definite guarantees in the form of a written legal commitment to provide legal protection in the form of compensation to workers and their families due to termination of employment caused by industrial digitization; Second, the principle of justice to receive compensation. Compensation given to workers functionally shall meet a decent standard of needs where workers and their families live; third, the principle of mutual will of the parties in the working relationship. The final decision on the termination of employment by the entrepreneur must reflect the collective will as a compromise to prevent industrial relations disputes; Fourth, the principle of authoritative intervention. The decision to terminate employment shall first obtain government approval through authoritative recommendations because termination due to industrial digitalization is usually massive and sensitive to the welfare of workers.

5. Recommendations

In regards to the above conclusion, some recommendations are compiled to follow up the existing ideas. First, un urgent effort is needed by the legislator to formulate technical rules and regulations, a regulation that demand entrepreneurs to make strategic plans for providing proportional job vacancies in the digital era to maintain the constitutional rights as worker.

Second, acceleration is required on the formulation of technical regulations as an effort of optimizing labour inspection system by the government in order that the reinforcement of legal protection for labours can be realized properly. Especially legal certainty of workers rights after termination aiming to provide comprehensive legal protection for workers.

References

Rifkin, J. (1996). End of work. Los Angeles: Pacifica Radio Archive.

Harianto, Aries. (2016). Hukum ketenagakerjaan: Makna kesusilaan dalam perjanjian kerja. Yogyakarta: LaksBang PRESSindo.

Harianto, Aries. (2021). Problema Hukum Ketenagakerjaan. Second Edition. Malang: Media Nusa Creative.

Harianto, A. (2013). Makna "Tidak Bertentangan dengan Kesusilaan" sebagai Syarat Sah Perjanjian Kerja (Doctoral dissertation, Universitas Brawijaya).

Sari, P., Vista, R., Harianto, A., & Oka Ana, I. B. (2018). Kepastian Hukum Pengaturan Penggunaan Tenaga Kerja Asing di Indonesia. Lentera Hukum, 5, 389.

Utomo, Y. R., & Harianto, A. (2018). Hak Konstitusional Pekerja/Buruh Sebagai Pengurus Serikat Pekerja/Serikat Buruh. Fairness and Justice: Jurnal Ilmiah Ilmu Hukum, 16(2).

https://finance.detik.com/moneter/d-4386840/digantikan-mesin-50000-karyawan-bank-di-ri-kena-phk\, accessed on October 7th, 2019.

https://ekbis.sindonews.com/read/1357343/34/digitalisasi-ancam-ratusan-juta-pekerjaan- 1543109531,accessed on October 18th, 2019.

The Indonesian Constitution Number 13 of 2003 concerning Manpower Law Articles 154 to 172

Agusmidah, 2011, *Dilematika Hukum Ketenagakerjaan, Tinjauan Politik Hukum,* Jakarta:Sofmedia. p. 214-216.

Suliati Rahmat, *Upaya Peningkatan Perlindungan Hukum Wanita Pekerja di Perusahaan Industri Swasta* Dissertation, (Jakarta:Postragudate Program of Universitas Indonesia, 1996), p. 10.

Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat,* (Jakarta: Raja Grafindo Persada, 2007), p. 6.

Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)*, (Jakarta:Prenadamedia Group (Divisi Kencana): 2019), p. 29-36.

Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)*, (Jakarta:Prenadamedia Group (Divisi Kencana): 2019), p. 60.

Dyah Ochtorina Susanti dan A'an Efendi, *Penelitian Hukum (Legal Research), (*Jakarta: Sinar Grafika, 2014), p. 115-116.

G. Kartasapoetra, *Hukum Perburuhan di Indonesia Beedasarkan Pancasila* (Jakarta: Sinar Grafika, 1992), p. 161.

Herowati Poesoko, *Diktat Metode Penulisan dan Penelitian Hukum,* Jember: Faculty of Law Universitas Jember, 2012, p. 36.

Peter Mahmud Marzuki, (2005), *Penelitian Hukum*, Jakarta : Prenada Media, p.29 -36.

Peter Mahmud Marzuki, (2005), *Penelitian Hukum*, Jakarta : Prenada Media, p134.

Peter Mahmud Marzuki, (2005), *Penelitian Hukum*, Jakarta : Prenada Media, p 166.
Philipus M.Hadjon, Tatik Sri Djatmiati, (2005). *Argumentasi Hukum*, (2005). Yogyakarta : Gajah Mada University Press, p. 1.
Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia: Sebuah Studi Tentang Prinsip-Prinsipnya, Penanganannya oleh Pengadilan dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara,* (Surabaya:PT. Bina Ilmu, 1987), p. 25.
CST Kansil. *Pengantar Ilmu Hukum dan Tata Hukum Indonesia,* (Jakarta:Balai Pustaka, 1989), h. 102
Setiono, *Rule of Law (Supremasi Hukum),* (Surakarta:Magister Ilmu Hukum Program Pasca sarjana Universitas Sebelas Maret, 2004), p. 3
Politikana.com. accessed on August 12th, 2012
Black Henry Campbell, *Black's Law Dictionary, With Pronunciations, Abidged Sixth Edition*, Centennial Edition (1891-1991), St. Paul Minn, West Publishing Co, 1991, p. 605.
Perjanjian Kerja Bersama PT Bank Central Asia, Tbk 2012-2014, 2012: 2
Asri Wijayanti, *Hukum Ketenagakerjaan Pasca Reformasi,* (Jakarta : Sinar Grafika, 2010), p.112.
UU NRI No. 13 tahun 2003 tentang Ketenagakerjaan (Lembaran Negara Republik Indonesia Tahun 2003 Nomor 39)
Muhammad Sadi dan Sobandi, *Hukum Ketenagakerjaan di Indonesia*, (Jakarta: Kencana, 2020) p. 21.
Naskah Komperhensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses dan Hasil Pembahasan, 1999-2002. (Internal Edition)
Christine Kaufmann, *Globalisation And Labour Rights: The Conflict Between Core Labour Rights And International Economic Law* (Bloomsbury Publishing, 2007), p. 129.
Qiu Yang, *ILO Fundamental Conventions and Chinese Labor Law: From a Comparative Perspective*, Chinese L. & Pol'y Rev., Vol. 2, No. 2006: p. 19.
Jordi Agusti-Panareda, Franz Christian Ebert, dan Desirée LeClercq, *ILO Labor Standards and Trade Agreements: A case for consistency*, Comp. Lab. L. & Pol'y J., Vol. 36, No. 2014: p. 350.
Lammy Betten, *International Labor Law* (HeinOnline, 1993), p. 22.
Otto Kahn-Freund Dkk., *Kahn-Freund's Labour And The Law* (Stevens London, 1983), p. 121.
Arturo S. Bronstein, *Protection Against Unjustified Dismissal In Latin America*, Int'l Lab. Rev., Vol. 129, No. 1990: p. 599.
Simon Deakin Dan Frank Wilkinson, *Rights Vs Efficiency-The Economic Case For Transnational Labour Standards*, Indus. Lj, Vol. 23, No. 2, 1994: p. 290.
Sean Cooney, *Testing Times For The ILO: Institutional Reform For The New International Political Economy*, Comp. Lab. L. & Pol'y J., Vol. 20, No. 1998: p. 365.
Stephen L. Schlossberg, *United States' Participation In The ILO: Redefining The Role*, Comp. Lab. LJ, Vol. 11, No. 1989: p. 60.
David Weissbrodt Dan Matthew Mason, *Compliance Of The United States With International Labor Law*, Minn. L. Rev., Vol. 98, No. 2013: p. 1843.
Lee Swepston, *The Future of ILO standards*, Monthly Labor Review, Vol. 117, No. 9, 1994: p. 350.
Sendjun H. Manulang, *Pokok-Pokok Hukum Ketenagakerjaan Indonesia* (Jakarta: Rineka Cipta, 1990), p. 20.
Imam Soepomo, *Hukum Perburuhan Bagian Pertama Hubungan Kerja* (Jakarta: PPAKRI Bhayangkara, 1968), p. 3.
Melania Kiswandari, *Kesehatan dan Keselamatan Kerja,* (Jakarta: Rajawali Pers, 2014), p. 78.
S. H. Hidayat Muharam, *Panduan Memahami Hukum Ketenagakerjaan Serta Pelaksanaannya Di Indonesia* (Jakarta: Citra Aditya Bakti, 2006), p.8.
FORKOMSI FEB UGM, 2019: 161
Astrid Savitri, *Revolusi Industri 4.0: Mengubah Tantangan menjadi Peluang di Era Disrupsi* 4.0 (Bantul: Genesis,2019) p.2-4.
efisiensi Sebagai Alas Pemutusan Hubungan Kerja, Business Law, accessed on July 28th, 2021, https://business-law.binus.ac.id/2016/09/28/efisiensi-sebagai-alas-pemutusan-hubungan-kerja
Andika Pramana Putra, *Kajian Hukum Terhadap Putusan Mahkamah Agung Atas Perkara No. 825k/Pdt. Sus-Phi/2015 Tentang Pemutusan Hubungan Kerja Karena Alasan Efisiensi*, Jurnal Hukum Adigama, Vol. 1, No. 1, (t.t.): p. 770.
Abi Pasha Nugraha, *Efisiensi usaha sebagai alasan pemutusan hubungan kerja Perspektif Hukum Islam: Putusan Mahkamah Agung Nomor 69 K/Pdt. Sus-PHI/2017* (Dissertation, Malang, Universitas Islam Negeri Maulana Malik Ibrahim, 2020), p. 102.
Abdul Khakim, *Pengantar Hukum Ketenagakerjaan Indonesia Berdasarkan Undang-Undang No. 13 Tahun 2003* (Bandung: Citra Aditya Bakti, 2003), p. 12,
I. Made Udiana, *Industrialisasi dan Tanggungjawab Pengusaha Terhadap Tenaga Kerja Terlibat Hukum* (Denpasar: Udayana University Press, Denpasar, 2018), p. 26.

Ashabul Kahfi, *Perlindungan Hukum Terhadap Tenaga Kerja*, Jurisprudentie: Jurusan Ilmu Hukum Fakultas Syariah dan Hukum, Vol. 3, No. 2, 2016: p. 62.

Cristoforus Valentino Alexander Putra, *Urgensi Klausula Definisi Dalam Perjanjian Kerja*, Jurnal Ilmiah Fakultas Hukum Universitas Udayana, Vol. 63, No. 2017: p. 68.

Siti Kunarti, *Perjanjian Pemborongan Pekerjaan (Outsourcing) Dalam Hukum Ketenagakerjaan*, Jurnal Dinamika Hukum, Vol. 9, No. 1, 2009: p. 70.

Agung Prasetyo Wibowo, *Perlindungan Hukum Terhadap Pekerja Dalam Pemutusan Hubungan Kerja Dengan Alasan Efisiensi Sebagai Akibat Pandemi Covid 19 (Studi Kasus Putusan Pengadilan Hubungan Industrial Pada Pengadilan Negeri Palangkaraya Perkara No. 10/Pdt. Sus-PHI/2020/PN Plk* (Disertasi, Universitas Tarumanagara, 2021), p. 76.

Kadek Agus Sudiarawan dan Nyoman Satyayudha Dananjaya, *Konsep Penyelesaian Perselisihan Hubungan Industrial Berbasis Pemberdayaan Sebagai Upaya Peningkatan Perlindungan Hukum Terhadap Buruh Dalam Mencari Keadilan*, ADHAPER: Jurnal Hukum Acara Perdata, Vol. 3, No. 1, 2018: p. 20.

Kadek Agus Sudiarawan dan Nyoman Satyayudha Dananjaya, *Konsep Penyelesaian Perselisihan Hubungan Industrial Berbasis Pemberdayaan Sebagai Upaya Peningkatan Perlindungan Hukum Terhadap Buruh Dalam Mencari Keadilan*, ADHAPER: Jurnal Hukum Acara Perdata, Vol. 3, No. 1, 2018: p. 797.

Siti Ummu Adillah Dan Sri Anik, *Kebijakan Jaminan Sosial Tenaga Kerja Sektor Informal Berbasis Keadilan Sosial Untuk Meningkatkan Kesejahteraan*, Yustisia Jurnal Hukum, Vol. 4, No. 3, 2015: p. 560.

Dodi Satriawan, Agus Joko Pitoyo, dan Sri Rum Giyarsih, *Cakupan Kesehatan Universal (UHC) Pekerja Sektor Informal di Indonesia*, Tata Loka, Vol. 22, No. 4, 2020: p. 558.

Ida Ayu Sadnyini dan Milton Gabe L. Tobing, *Jaminan Sosial Ketenagakerjaan Terhadap Pekerja Harian Hotel Bintang Lima Di Kabupaten Badung*, Soumatera Law Review, Vol. 3, No. 1, 2020: p. 109.

Hartini Retnaningsih, *Strategi Sistem Jaminan Sosial Nasional Bidang Ketenagakerjaan Dalam Upaya Pelindungan Pekerja Di Kota Surabaya Dan Kota Pekanbaru*, Aspirasi: Jurnal Masalah-masalah Sosial, Vol. 7, No. 2, 2019: p. 167.

Arifuddin Muda Harahap, *Pengantar Hukum Ketenagakerjaan* (Malang: Literasi Nusantara, 2020).p.71.

Yeni Nuraeni, *Analisis Terhadap Undang-Undang Ketenagakerjaan Indonesia Dalam Menghadapi Tantangan Revolusi Industri 4.0*, Jurnal Ketenagakerjaan, Vol. 15, No. 1, 2020.

Zaeni Asyhadie, *Hukum Kerja, Hukum Ketenaga Kerjaan Bidang Hubungan Kerja,* (Jakarta: RajaGrafindo Persada Jakarta, 2007), p. 51-54.

Wirjono Prodjodikoro, *Asas-Asas Hukum Perdata Internasional* (Bandung:Sumur Bandung, 1979). p. 9.

I Nyoman Putu Budhiarta, *Perlindungan Hukum Pekerja Outsourcing Ditinjau Dari Prinsip Keadilan, Kepastian Hukum, Dan Hak Asasi Manusia*. (Dissertation) Faculty of Law, Universitas Brawijaya, 2012, p.20.

The Liang Gie, *Teori-Teori Keadilan*, (Yogyakarta:Penerbit Super, 1979,) p. 5

The Liang Gie, *Teori-Teori Keadilan*, (Yogyakarta:Penerbit Super, 1979,) p. 40

Salman Alfarizi, *Mohammad Hatta: Biografi Singkat (1902-1980),* (Yogyakarta:Garasi, 2020), p.119.

.

Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

The Role of Family in Youth's Moral Behavioral Development in Bangladesh: A Socio-economic Analysis at Dhaka City

Muhammad Rabi Ullah
Assistant Professor
Department of Economics
Bangabandhu Sheikh Mujibur Rahman Science and Technology University (BSMRSTU)
Gopalganj-8100, Dhaka, Bangladesh

Abul Kalam*
Assistant Professor
Department of Sociology
Bangabandhu Sheikh Mujibur Rahman Science and Technology University (BSMRSTU)
Gopalganj-8100, Dhaka, Bangladesh

Mohammad Abul Khair
Ph.D. Research Fellow
Department of Anthropology, Jahangirnagar University, Dhaka, Bangladesh

Abstract
This study examines the youth's moral behavior role of family inspiration in Bangladesh. Most young people grow up with various problems, but some parents may want or need additional help to support their children, particularly in coping with issues that can become exacerbated during these teenage years. Parent-adolescent turmoil was supposed to be a normal occurrence triggered, in part, by raging hormones, dramatic physiological changes, re-emerging sexual impulses, and rapidly changing social expectations for the young. These research major findings are the majority of youths have lack self-confidence; modern technology affects the aggressive moral behavior of youths. Behavioral pattern and corrupt leaders and social system influence of youth's illegal and anti-social activities. Low socioeconomic status increases the high rate of attempted suicides, smoking, and drinking. It can also lead to a high level of emotional behavior including anxiety, depression, mental disorder, aggression, and antagonism of youth's moral behavior.
Keywords: Moral behavior, Socio-economic status, Adolescents, parent's child relationships, peer group.
DOI: 10.7176/JLPG/117-03
Publication date: January 31st 2022

1. Introduction

The role of the family in the influence of youth's moral behavior has been a prominent issue in Bangladesh, especially in Dhaka City. In the formation of children's morals, no outside influence is greater than that of the family. Through punishment, reinforcement and both direct and indirect teaching families instill morals in children and help them to develop beliefs that reflect the values of their culture. A family contribution to children's moral development is broad there are particular ways in which morals are most effectively conveyed and learned by youths Fairness, Justice, Social roles Personal Balance. Different societies have their own moral values which are considered normal ideal and morally acceptable. Hence the conduct of the people in a society is regulated and controlled by their moral values (Anasi, 2010). Within the context of education, therefore, the public holds the schools and teachers more accountable for students learning and behavior (Omede and Odiba, 2010). According to (Ajiboye, Atere, and Olunfunmi 2012), the United Nations puts the age of the youths between fifteen and twenty-four years. In Bangladesh government determined the age of youths from 13 to 19 years old. Psychologically, it refers to the extent of time in between childhood transform to adulthood. (Alfrey 2010), argued that youths are referred to as those people who possess certain distinct physical characteristics which include: Ability to think fast, the ability to display much energy towards the actualization of goals, assertive and resistant personality, and the ability to change a state of art. According to (Haidt 2012), at the broadest level as interconnecting sets of values, virtue, norms, practice, logical mechanisms that work together to defeat or regulate self-interest and make cooperative societies possible. In a variation of modern societies for example youths currently feel a heightened empathy with the digital age (Bennett and Manton 2010). The current revolution in technology known as the Information age or age of technology similarly is insistent the older person who is unwilling to use a computer may even accept a basic mobile telephone once considered a glamorous accessory (Cockelbergh, 2012), with the growth of technologies as the internet, computers, and television youths are becoming more dislocated from society (Griswold 2012), most youths prefer watching television and playing computer games to those moral movies that positively position them for life challenges.

1.1 Objectives of the Study

The main objective of the study is to reveal factors that affect youth's moral behavior in youth at Dhaka City. The specific objectives are;

- To examine how the socio-economic background affects the influence of moral behaviors in youths within families in Dhaka both city corporations.
- To ascertain how mass media & modern technology influence the moral behavior of youths within families in Dhaka both city corporations.
- To find out how the social and family environmental factors affect on moral behaviors of youth's psychology within the families in Dhaka both city corporations.
- To discover how peer groups influence and role model effect of moral behavior of youths within the families in Dhaka both city corporations.

1.2 .Research Question:

The following research questions are formulated to conduct the study:

- How does the socio-economic background affect the influence of moral behaviors in youths within families in Dhaka both city corporations?
- How do mass media and modern technology influence moral behavior in youths within the families in Dhaka both city corporations?
- How does the social and family environmental factor effect on moral behaviors of youth's psychology within the families in Dhaka both city corporations?
- How do peer groups influence and role model the effect of moral behavior of youths within the families in Dhaka both city corporations?

1.3 Research Hypothesis:

The null hypothesis was tested at a 0.05 level of significance;

Ho1: There is no significant difference between housewife and service holder urban families on how socio-psychological factors affect the moral behavior in youths within the families.

Ho2: There is no significant difference between males and females on peer group influence of moral behaviors in youths.

2. Review of Literature:

Morality and moral development are sometimes defined in terms of objective norms and established standards of behaviors. Morality often provides the basic formation for personality education programs, where a set of virtues such as sincerity, sympathy, courage, the strength of mind are recognized and encouraged. (Lawrence Kohlberg 1984), an internationally recognized researcher and expert in the field of moral development used the term a bag of virtues in discussing the restrictions of this conventional framework. A recent book by (David Callahan the Cheating Culture 2004), presents a volume of research data on the selfish nature of our culture today and people's willingness to do wrong to acquire in advance. Sometimes family breakdowns and re-marriage raising a child in a single-parent family is a regular experience. If the families can live in agreement raise children together and celebrate togetherness, they can be called hodgepodge families (Wiencelewska 2016). Nowadays more and more children are being brought up in families with one non-biological parent or they are encountering various forms of the family structure created by an enduring parent or a weekend parent structure (Kwak 2005). Family relationships created in such a way to have an impact on the youth constitute its image of the world, nature its classification of values, attitudes, and beliefs.

As positive moral characteristics do not appear spontaneously (Berkowitch & Grych, 1998), addressing our cultural moral crisis will take the obligation and participation of many fundamentals of society, including early childhood education. Adolescence is the foundation for adulthood. Peers provide added role-taking opportunities and expose adolescents to novel moral behaviors (Hart, Atkins, Markey, &Youniss, 2004; Hart & Atkins 2002). Kohlberg and others argued that moral development in a more developmental and constructivist perspective believes that goodness is developed from the inside of an individual rather than being imposed from the outside.

Halverson (2004), says that the simplistic strategy of directly teaching ethics does not work. (Robert Coles The Moral Life of Children 1986), speaks to this same misinterpretation. It is a mistake to think of morality as a set of external standards that adults somehow foist upon an unknowing or unwilling child…most of our current moral education efforts fail precisely because of this mistaken yet pervasive assumption. (Alfie Kohn 1997), offers a similarly critical assessment of character education in schools. He feels that character education in most schools is a form of indoctrination in which absolutes of moral action are instilled or transmitted. According to (Gibbs 1991), who works specifically with antisocial adolescents reports processes similar to those found by Bandura. Gibbs held discussions with youth involved in juvenile justice systems.

According to (Piaget 1965), children construct and reconstruct their knowledge of the world through

interactions with the environment. Being a good person involves more than the cognitive understanding of what is right and what is wrong. Other central aspects of moral functioning include empathy, conscience, and altruism (Berkowitz & Grych 1998). There are several studies that indicate that the self-reported use of inductive discipline authoritative parenting affection support responsiveness and involvement has been associated with youth's moral maturity (Hoffman & Saltzstein 1967; Parikh 1980; Hart 1988; Speicher, 1992; Boyes & Allen 1993).

Similarly, behavioral ratings of parenting style have revealed that parental responsiveness and psychological differentiation are related to youth's moral development (Holstein, 1972; Parikh, 1980); Dunton, (1989). Doubtfully attached youth are likely to distance themselves from their parents either by ceasing religious attendance or by joining a different religious organization and seeking attachment and family there (Kirkpatrick & Shaver 1990). Religious organizations that successfully foster youth involvement offer youth-oriented contexts of spiritual development, but also provide youth with a role in the larger religious community that is consistent with their almost-adult status (Ream & Witt 2003).

3.Theoretical Understanding:

Many theories have been used in previous studies to analyze moral behavior among youths. In our research, social development theories and Behaviorist theory have been used to analyze moral behavior among the youths.

3.1 Social Developmental Theories:

The social developmental theory has been used to measure the relationships between social and environmental factors and their influence on youth's behavior and personality. It emphasizes the behavioral component of morality. An example of social development theory is Bandura's social learning theory. Social learning theory was postulated by (Bandura 1925) who regards human beings as agents of their own lives. It takes into reflection role of the influence of the surrounding of role models, self-efficacy, beliefs, and perceptions. According to (Nkwopara 2011), Bandura was interested in the behavioral component of morality which is part of this study. Moral behavior is strongly influenced by the nature of the specific situation in which people find themselves. This theory emphasizes that behavior is a result of the interaction of personal factors and the environment, pre-directing the person to act in a certain way. Bandura believes that most human learning is observational learning, not conditioning, and occurs by observing others.

3.2 Behaviorist Theory:

The behaviorist attempts to explain moral behavior through the process of strengthening, conditioning, imitation, and modeling (Alfrey 2010), Skinner's radical behaviorism theory proposed that moral behavior is learned in the course of human development through association, imitation, practice, and reinforcement. (Skinner 1971:p95) argues that one's behavior can form and prohibited that conforms in all proceedings to what is best for the survival of the culture. It is a basic philosophic disagreement of radical behaviorism that all behavior is unwavering and under the control of environmental factors. (Skinner 1971:p102) believes that equipment is good which make stronger or compensation the individual. Those things are bad which do not strengthen or reward the individual.

4. Methodology of the Study:

The research design of the study was descriptive in nature of the study. The study focuses on discovering the role of the family in the influence of youth's moral behavior in Bangladesh. The study area was both Dhaka city corporations. The study requires both primary and secondary data. Secondary data were collected from different books, journals, articles, government reports, websites, previous research reports, etc. while primary data were collected from parents by using survey method. The sample size for the study consisted of 200 parents who were randomly selected from the sampled schools from both Dhaka city corporation areas as presented in table-1 the selection of sample size was done through the simple random sampling technique. The main purpose of using a simple random sampling technique was to complete a sample that could be generalized to a bigger population.

Distribution of Sample Size						
Communities	Families	Housewife	Service Holder	Male	Female	**Total**
Dhaka North	116	64	52	28	88	**116**
Dhaka South	84	47	41	22	62	**84**
Total	**200**	**111**	**89**	**50**	**150**	**200**

Source: Field Survey, 2021

The instrument used for data collection was a structured questionnaire for an easy way of determining information from the selected respondents (Parents). The questionnaire was designed according to the Likert Scale for each item required for the respondent to answer various acts under Strongly Agreed (SA), Agreed (A), Disagreed (D), and Strongly Disagree (SD) was adopted for the responses on the questionnaire. The survey and

interview data were processed with the use of Statistical Package for the Social Science (SPSS). All qualitative data were also analyzed prior to considering the objectives of the study. Mean and the Standard deviation was used to answer research questions 1, 2, 3, and 4. Hypothesis 1 and 2 were tested using simple chi-square (x2). The null hypothesis was tested at a 0.05 level of significance for interpreting the results of the analysis for the research questions 1, 2, 3, and 4are mean value of 2.50 and above was accepted while a mean value below 2.50 was rejected. For hypotheses 1 and 2, if t-calculated is greater than t-critical, the hypothesis is rejected and if t-calculated is less then t-critical is accepted.

5. Findings and Result Analysis:

5.1. How does the socio-economic background affect the influence of moral behaviors in youths within families in Dhaka both city corporations?

Item no	Peer influence on youth moral behavior	X	Std.	Decision
1	Youths are lack self-confidence and socially introverted because of their friends.	2.52	1.13	Accepted
2	Youths can't break down bad habits because of their friends.	2.74	1.07	Accepted
3	Friends can influence you to follow their beliefs from their own eyes and convince you that it is reality.	3.10	0.79	Accepted
4	Humans are particularly receptive to suggestions, especially from close friends.	2.56	0.97	Accepted
5	A peer can help motivate youths to face challenges.	3.08	0.79	Accepted
6	Peer pressure inspirations youths choice to keep Friends (boyfriend or girlfriend).	2.78	1.09	Accepted
7	Peer influence affects youths' behavioral patterns.	2.92	1.19	Accepted
8	Peer influences our choice of fashion.	2.72	1.00	Accepted
9	Peer influence exposes us to smoking (alcohol and drug use).	3.01	0.79	Accepted
10	The peer can influence our choice of religion.	2.36	0.95	Rejected

Grand mean=2.77

Here the research question one (Table 5.1) shows that items 1, 2, 3, 4, 5, 6, 7, 8, and 9 were accepted based on the judgment rule while item 10, is rejected. Since the accepted items are more than the rejected item. The grand mean is 2.77 which shows acceptability on the decision rule. We, therefore, accept that peer influence is a factor that affects the moral behavior of youths within families.

5.2. How do mass media and modern technology influence of moral behavior in youths within the families in Dhaka both city corporations?

Item no	Mass Media &Modern Technology	X	Std.	Decision
11	Online video games show violent acts contribute to the aggressive behavior of youths.	2.80	1.02	Accepted
12	Televisions help youths to learn about other own cultures, norms, values and ethics.	2.80	1.00	Accepted
13	Mass media & technology helps youths in an anti-drug campaign	2.52	1.28	Accepted
14	Actor's immoral behaviors on the TV screen encourage youth's immorality.	2.92	1.11	Accepted
15	Technology such as social networking distracts the youths from their self-responsibilities in the family.	2.95	1.09	Accepted
16	Technology provides youth access to pornographic pictures and movies to destroy morality.	2.92	1.27	Accepted
17	Technology provides youths the opportunity to access moral articles online.	2.24	1.14	Rejected

Grand mean=2.27

Here the research question two (Table 5.2) shows that items 11, 12,13,14,15, and 16 are accepted based on the judgment rule while item 17 is rejected. Here the mean below is 2.50. It shows that mass media and modern technology is a factor that effects moral behavior in youth within families. Hence mass media and modern technology scored the grand mean of 2.76 which implies its acceptability as a factor that affects the moral behavior in youths within families.

5.3. How do the social and family environmental factors affect on moral behaviors of youth's psychology within the families in Dhaka both city corporations?

Item no	Social and Families Environmental Factor	X	Std.	Decision
18	Social and families environmental factors can influence youths' choice of role model.	2.76	0.94	Accepted
19	The social environment can influence youth's mode of dressing.	2.68	1.02	Accepted
20	Family violence can affect youths' behavioral patterns.	2.68	1.09	Accepted
21	Family environment influences the way we relate with others	2.00	0.9	Rejected
22	Family environment can influence youth's belief system.	2.88	0.96	Accepted
23	Modern culture and social environment illicit market and exposure to the social organization of criminal activity esc an worsen immoral behavior among the youths.	2.64	1.36	Accepted
24	A bad family environment can lead to easy access to illegal drugs and guns.	2.64	1.36	Accepted
25	Divorce, dowry and domestic violence increasing the number of single parents can influence the moral behavior of youths.	2.54	0.90	Accepted
26	Corrupted leaders and social systems influence youths' illegal and anti-social activities.	2.72	1.16	Accepted

Grand mean=2.64

Here the research question three (Table 5.3) shows that items 18,19,20,22,23,24,25 and 26 were accepted based on the judgment rule while item 21 was rejected on the decision rule as it scored the mean rating below 2.50.Since the accepted items are more than the rejected item in table 3, this, therefore, implies that environmental factor effect of moral behavior in youths within families.

5.4. How do peer groups influence and role model the effect of moral behavior of youths within the families in Dhaka both city corporations?

Item no	Socio-economic Status	X	Std.	Decision
27	Lower socioeconomic status increases the high rate of attempted suicides, smoking, and engaging in episodic heavy drinking.	3.22	0.81	Accepted
28	Lower SES can lead to a high level of emotional behavior difficulties including anxiety, depression, and mental disorder in youths.	2.76	1.06	Accepted
29	Lower SES can lead to a high level of aggression and anger in youths.	2.92	0.95	Accepted
30	Lower SES can lead to high victims of violence among family members.	2.40	0.14	Rejected
31	Lower SES can influence the lower level of moral behavior and education in youths.	2.94	0.89	Accepted
32	Higher SES can helps to build rigorous personality in youth	3.08	0.79	Accepted
33	The family SES can influence the behavioral pattern of youths within the family.	2.79	0.89	Accepted

Grand mean=2.87

Here the research question four (Table 5.4) shows that items 27, 28, 29, 31, 32, and 33 were accepted on the decision rule while item 30 was rejected as it scored the mean rating below 2.50. Since the accepted level is more than the rejected item in table 4, this implies that the socio-economic status of the family affects the inculcation of moral behavior in youths within families.

5.6. Hypothesis Testing:

Ho1: There is no significant difference between housewife and service holder urban families on how socio-economic factors affect the moral behavior in youths within the families.

Table 5.5 Mean response in housewife and service holder urban families on how socio-psychological factors affect moral behavior in youths within the families.

Status	N	X	Std.	DF	T-cal	T-table	Decision
Housewife	111	3.25	0.81				
Service holder	89	2.89	1.40				
Total	**200**			**3**	**14.38**	**7.81**	**Rejected**

Decision Rule: Here accept the null hypothesis when x2-calc. is less than x2-tab, that is (x2 –cal<x2- tab) and rejected when x2-cal is greater thanx2-tab, that is (x2-cal>x2-tab). From the table above the calculated chi-square is greater than the tabulated chi-square, we, therefore, reject the null hypothesis and accept the alternative hypothesis that there is a significant difference in the mean responses of the housewife and service holder urban families on how socio-psychological factors affect the moral behavior in youths within the families on both

Dhaka city corporations in Bangladesh.

Ho2: There is no significant difference between the mean responses of males and females on peer group influence of moral behaviors in youths within the families.

Table-5.6 there is no significant difference between the mean responses of males and females on peer group influence of moral behaviors in youths within the families.

Status	N	X	Std.	DF	T-cal	T-table	Decision
Male	50	2.05	0.73				
Female	150	3.49	1.24				
Total	**200**			**3**	**6.96**	**7.81**	**Accepted**

Decision Rule: Here accept the null hypothesis when the x2-cal is less than the x2-tab that is (x2- cal<x2-tab) and reject when the x2-calculation value is greater than the x2-table value that is (x2-cal>x2-tab. In the chi-square table above, the calculated chi-square is less than the tabulated chi-square, we then accept the null hypothesis that there is no significant difference between the response of male and female on how peer influence affect moral behavior in youths within families on both Dhaka city corporations in Bangladesh.

6. General Discussions:

The result of data analyses in table one discovered that peer influence effects ofmoral behavior in youth within families as it scored mean above 2.50. The findings of this study are in concurrence with (Olaitan, Mohmed, and Ajibola, 2013), that peer influence can lead to regulation problems and youth antisocial activities both inside and outside the school. Also, (Radwan 2015), showed that everyone wants to be accepted and loved most teens try to conform to the group they belong to by wearing similar clothes and adopting similar behavior. The result of data analysis in table 2 discovered that modern technology affects moral behavior in youth within the families. Hence, youths, access to modern technology should be supervised and made sure with (Barrell and Fic 2013), when they found that one of the most important advantages of modern technology is globalization. This has allowed the world to feel closer and tolerable the world's economy to become a single interdependent system. Where people can not only share information quickly and efficiently bring down barriers of linguistic and geographic borders. (Davies and Eynon 2013), argued that youths in today's world mobile phones, the internet, music, movies, television, and video games are very important. Most teenagers prefer watching television and playing computer games to reading books. They dislike reading because watching television or playing online games is easier and they do not have to use their own imagination. (Longo 2010), argued that computer games have the capacity to provide a teaching opportunity but they are also harmful to health. The result of data analysis in table 3 exposed socio-psychological environments affects the moral behavior of youths within families in both city corporation area. This is supported by (Obiefuna 2010), argued that human beings are products of their socio-psychological environment in terms of the interaction that exists between the individual and the society. However, (Gainey 2013), argued that delinquency is a class-specific behavior. As a result, social bonding, class consciousness, alienation, and negative labeling are the peacekeepers on the relationship between family SES and delinquent behavior. The data analysis in table 4, observed that there were differences in their views on how socio-economic factor affects the moral behavior of youths within families. The data analysis of table 5 showed that there was no significant difference between the mean rating of the male and female on how peer influences affect the inculcation of moral behavior in youths within the families.

7. Findings of the Study:

This research result analysis major significant findings are given below;

- ✓ Peer influence of moral behavior in youths within the families, where the majority of youths have a lack of self-confidence. As a result, youths are highly influenced by peer behavior.
- ✓ Modern technology affects moral behavior, whereas online video games show violent acts contribute to the aggressive behavior of youths. Thus, encouraging immorality.
- ✓ Social and family environment affects moral behaviors in youths within families, where the social and family environment can influence youths' choice of role model, one's mode of dressing, behavioral pattern and corrupt leaders and social system influence of youth's illegal and anti-social activities.
- ✓ Socio-economic factors affect moral behavior in youths within families, where low socioeconomic status increases the high rate of attempted suicides, smoking, and drinking.

8. Recommendations

There are some policy recommendations for further improvement of youth's moral behavior within the family and out of the family. Those are given below;

- ➢ Parents should be providing proper and sufficient home training for our youths. Religious norms and values are also taught by the families.
- ➢ Parents should concern about the social and cultural environment of socialization to raise their children

as surroundings have great influences on the moral behavior of children and youths.

- Youth's access to modern technology and social networking site should be properly monitored to avoid being exposed to pornography addiction and immoralities.
- It would be a cry-off in the feat among the students and the society in general if the factor affecting the moral behavior in youths is not checked.
- The study discovered that moral dissipation can generate hostile and unbearable teaching and learning environment if these factors responsible for moral behavior in youths.

9. Conclusions:

This research finding has shown that the moral character of youths is declining rapidly due to the moral behavioral standard of youths in our society. They are more desperate and crazy it is alarming to future generations and social systems. Considering the dimension of violent and moral misconduct in our society today, like *jongibad* and terrorism issues also Islamic religious extremism, armed robbers, kidnapping cases, juvenile delinquency, etc. But remedies to those factors that cause moral misconduct in our society. On the other hand, the findings of this study showed that youths have more tendency of being morally self-indulgent as these factors expose them to high dangers today. So every angle of society parents and civil society must be knocking over in checking immoralities in youths at schools, families, and nations. Thus there is a dire need to check these factors that affect moral behavior in youths to ensure a positive outcome for future generations.

References

Alfrey, C. (2010). Juvenile Delinquency & family Structure: Implications for marriage and relationship education. Retrieved April 20th, 2010 fromhttp://www.healthymarriageinfo.org/docs/juveniledelinquency.pdf

Anasi, S.N.I (2010). Curbing youth restiveness in Nigeria: The role of information and libraries Retrieved 24.10.2012 from http://digitalcommons.uni.edu/cgi/viewcontent.cgi? Article1404.

Asim, O. N (2004), Psychology of adjustment and career development for all educational levels. Enugu: Unizik Press Limited.

Bandura, A.(1925). Key theories in psychology: psychology resource site. Available at www.psy.palx.edu.keytheorist.accessedon 06/05/2009.

Barrell, R. & Fic, T. (2013), Integration, globalization, technology, and trade patterns in the EU8.Research in Economics and Business: Central and Eastern Europe, 2(1), 1-13.

Bennett, S. & Maton, K. (2010), beyond the digital natives' Journal of Computer Assisted Learning, 26(5), 321-331.

Berkowitch, M.W., &Grych, J.H. (1998), Fostering goodness: teaching parents to facilitate children's moral development. Journal of Moral Education, 27(3), 371- 391.

Boyes, M.C. & Allen, S.G. (1993) Styles of parent-child interaction and moral reasoning in adolescence, Merrill-Palmer Quarterly, 39,551-570.

Callahan, D. (2004). The cheating culture: why more Americans are doing wrong to get ahead. Orlando: Harcourt.

Coeckelbergh, M. (2012). How I learned to love the robot Capabilities, information technologies, and elderly care. Springer, 77-86.

Coles, R. (1986). The moral life of children. Berkeley: Publishers Group West.

Davies, C. & Eynon, R. (2013).Teenagers and technology. Hove: Routledge.

Defoe, I. N., (2013). Disentangling the Relationship between Delinquency and Hyperactivity, Journal of Criminal Justice 41(1), 100–107.

Dunton, K.J. (1989) Parenting practices associated with their children's moral reasoning development, Dissertation Abstracts International, 49, p. 3306A (University Microlms no. 8826133).

Gainey, K. (2013). Evaluation of the model to the prediction of anxiety and mood disorder constructs behavior therapy, 44(1), 277-292.

Gibbs, J. C. (1991). Socio-moral developmental delay and cognitive distortions: Implications for the treatment of antisocial youth.

Griswold, W. (2012).Cultures and societies in a changing world (4thedn). Thousand Oaks, CA: SAGE.

Haidt, J. (2012). the righteous mind: why good people are divided by politics and religion. Pantheon Books, New York, NY.

Halverson, S (2004). Teaching ethics: the role of the classroom teacher. Childhood Education, 80(3), 157.

Hart, D. (1988) A longitudinal study of adolescents' socialization and identification as predictors of adult moral judgment development, Merrill-Palmer Quarterly, 34,245 to 260.

Hart, D., & Atkins, R. (2002). Civic development in urban youth. Applied Developmental Science, 6, 227–236.

Hart, D., Atkins, R., Markey, P., &Youniss, J. (2004). Youth bulges in communities: The effects of age structure

on adolescent civic knowledge and civic participation. Psychological Science, 15,591–597.
Hoffman, M.L. & Saltzstein, H.A. (1967). Parent discipline and the child's moral development, Journal of Personality and Social Psychology, 5, 45-57.
Holstein, C.B. (1972) the relation of children's moral judgment level to that of their parents and to communication patterns in the family, Readings in Child Development and Relationships, 484 to 494 (New York, Macmillan).
Kirkpatrick,L.A.,&Shaver, P. R. (1990). Attachment theory and religion: Childhood attachments, religious beliefs, and conversion. Journal for the Scientific Study of Religion, 29(3), 315-334.
Ream, G. L., & Witt, P. A. (2003). Organizations serving all ages. In S. F. Hamilton & M. A. Hamilton (Eds.), Handbook of Youth Development (pp. 49-74). Thousand Oaks, CA: Sage.
Kohlberg, L. (1984). The psychology of moral development. New York: Harper & Row.
Kohn, A. (1997). How not to teach values. Education Digest, 62(9), 12.
Kwak, A. (2005). Rodzina w dobieprzemian. Małżeństwoikohabitacja. Warszawa.
Longo, G.O. (2010). Communication, technology, and the planetary creature. Communication, Capitalism & Critique, 8(1), 18-27.
Nkwopara, C. (2011, March, 1). Drug barons convert government farms into Indian hemp farms. Daily Vanguard, 36-37.
Obiefuna, B. A. C. (2010). Moral decadence among the youth in Nigeria: lessons from part the apodle. African Journal of Local Society Initiative.
Olaitan, S. O., Mohmed & Ajibola (2013). The making of a curriculum: theory, process and evaluation. Onitsha: Cape publisher international ltd.
Omede, J. &Odiba, P. (2010). Youths Restiveness Across the globe: where the adults may have gone wrong. In J. Omede (Ed).Higher education and Global Challenges. Ankpa: ROMA computers.
Parikh, B. (1980) Development of moral judgment and its relation to family environmental factors in Indian and American families, Child Development, 51, 1030-1039.
Piaget, J. (1965). The moral judgment of the child. New York: The Free Press.
Radwan, N.D (2015). Hollywood Movies and Nigerian Youths. An evaluation. JORIND 10 (2).
Skinner, B. F. (1971). Beyond freedom and dignity. New York: Knopf.
Speicher, B. (1992) Adolescent moral judgment and perceptions of family interaction, Journal of Family Psychology, 6,128-38.

Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Military Interventions in International Law and Practices: Objectives, Legality and Legitimacy

Ahmed Naji Mohammed Al-hanhanah* Maming Fei
Dalian Maritime University, Administration Building, School of Law, Industrial Zone, No. 1 Linghai Road, 116026, Ganjingzi District, Dalian, China

Abstract
Military intervention is defined as forcible meddling in state affairs. This intervention can take many different forms, including political or military action, as well as direct or indirect intervention. International law is largely concerned with the prohibition of dictatorial or coercive meddling in state affairs. Military intervention has piqued scholarly attention since the Cold War's conclusion, and it has been proven that various cases of the usage of force or the menace to apply force were lawful in the lack of a Security Council resolution. Nonetheless, since the Cold War's end, issues of dominance and non-intervention have been called into question by the emerging human rights rhetoric, which has used the benefit of the big powers to engage in the concerns of weaker nations. Through the Charter of the UN, it is clear that the international military intervention under Chapter VII is not an advantage to the Security Council Rather; it is a legal obligation subject to international law to attain safety and harmony for all the peoples in this world. Through the Charter of the UN also, must respect the aims and rules of international law when deciding military intervention against a state or entity in the international community away from the political objectives that achieve the interests of powerful countries. The decision to engage in military intervention against a non-state entity or another state is a tough and complex one that involves a plethora of moral, political, legal, economical, and logistical concerns for a state to measure. Therefore, this research focused on the military intervention in international law and practices, study provided a comprehensive and specialized legal study on military intervention subject, in which study provides analysis on the historical background, types, objectives, legality and legitimacy of military intervention in international law comparable with international practice and make proposals to develop a clear legal framework for military intervention to ensure the realization of the main objectives of military intervention that set in UN Charter and international law away from the influence of the majors' powers that aim to achieve their own goals through military intervention within the framework of the UNSC.
Keywords: Military Intervention, International Law, International Practice, UN Charter, International Peace and Security.
DOI: 10.7176/JLPG/117-04
Publication date: January 31st 2022

1. Introduction

Military interventions in operation are defined as "the movement of regular troops or forces (airborne, seaborne, shelling, etc.) of one country inside another, in the context of some political issue or dispute"[1]. Punitive intervention actually verified in the 1990s but it started in the late 1980s, the first instance was the United States' airstrike on Libya in 1986. The United States' missile attacks on Iraq in 1993, as well as on locations in Sudan and Afghanistan in 1998, sparked considerable new interventionist discussions[2]. Because of unilateral state-centered interventions, these attacks sparked new debates over the legitimizing effect of interventions, resulting in the discussions of modern interventionist. Humanitarian intervention, whether multilateral or unilateral in nature, turned into important in upcoming discussion on intervention's polemics. Following the events of September 11, 2001 (9/11), there appears to have been another important shift in which the focus appears to have shifted back to military action. For some, this new activism represents a globalization of the human conscience, which has been long overdue; for others, it represents an unsettling violation of an international system based on state sovereignty and the sanctity of their zone. For some, the only significant difficulty is guaranteeing that involuntary interventions are operative; for others, debates concerning the legality procedure and the potential misapplication of law practice play a larger role. This dispute exposed some major schisms in the worldwide society. In the 1990s, the growth of new forms of intervention like combating terrorism, humanitarian interventions and defending democracy were accompanied by the decline of other intervention patterns[1]. In fact, most patterns of military involvement have been abandoned in favour of combating terrorism and defending democracy[3].

Next to the Cold War, it became increasingly obvious that the worldwide legal structure leading the usage of force among states, as preserved in the UN Charter is incapable of successfully responding to contemporary challenges to global harmony and safety. With the biological, chemical, and nuclear weapons propagation; large-scale human rights violations comprising crimes against genocide and humanity; well-planned and equipped non-state actors like terrorist and soldiers groups are all contributing factors, the situation is particularly dire.

Furthermore, over the last few years, the human rights discourse has grown at a rapid speed. The global community has now largely acknowledged that independent nations have a responsibility to guard their citizen from egregious human rights desecrations and, as a result, to abstain from committing such crimes. As an outcome, the idea of state sovereignty is changed from the view of a nation to be the exclusive chief of its internal affairs, and recognising the claim to sovereignty. The accompanying non-interference rights are premised on a state's effective performance of responsibilities as strong-minded by the international society, particularly the safeguarding of essential human rights. The global community is obligated to act in response and apply the necessary means once a state un-able to meet its obligations, which may eventually comprise the usage of military force to restore global harmony and safety or to prevent severe human rights breaches from occurring. As an outcome, there is an obvious conflict among the prohibition on using force contrary to countries, the principle of non-interference in the internal affairs of nations, safeguarding and promoting human right and restoring global harmony and safety. This is a tension that the international community has not entirely resolved, as seen by the extensive debates and criticisms in this area by the existing nation of international law. According to the preceding, it is clear that the judgment to involve in military intervention contrary to a non-state entity or another state is a tough and complex one that involves a plethora of moral, political, legal, economical, and logistical concerns when framing policies and implementing decisions regarding military intervention.

Military intervention has attracted much scholarly interest but has not received adequate attention from legal researchers in comparison to researches that conducted by journalists and politicians on the effect of military intervention on intercontinental relations and human rights, or from a moral humanitarian perspective. Therefore, this study will be a comprehensive and specialized legal study on military intervention subject, which will analyse the historical background, types, objectives, legality and legitimacy of military intervention in international law compared with international practice and make proposals to develop a clear legal framework for military intervention to ensure the realization of the main objectives of military intervention that set in the international law and UN Charter away from the influence of the majors' powers that aim to achieve their own goals through military intervention within the framework of the UNSC. In the following sections study begun by examining the historical background of military intervention, conceptual framework and classifications of military intervention, and then move on to examining the objectives of military interventions. Lastly, the study discussed the legality and legitimacy of military intervention.

2. Historical Background of Military Intervention

2.1 The Military Intervention under middle Ages

Evidence indicates that even before the pre-Roman era, cultures governed the conditions under which force might be used. Formal "just war" emerged in the Roman era, although at the time it was more concerned with enforcing rules of procedure than with justifying the use of military force on moral grounds. Lawful justifications for war were emphasized by Christians and Muslims who felt that 'God had decreed' every conflict to be unquestionably just[4]. As a legitimate response to the other side's illegal actions, war was called for. However, it had to be proportional to the extent of the illegality of the enemy's actions to be considered restitution[5].

2.2 The Military Intervention under League of Nations

Since ancient times, the idea of creating a world body through which disputes between states can be settled amicably has been raised. After the collapse of the Pact of Europe and after World War I (1914-1918), the League of Nations was founded in 1919 and was the first modern organization of the collective security system. An idea that war may be used as a last resort to enforce legal rights if negotiations failed developed between the Vienna Conference's last act in 1815 and the founding of The League of Nations in 1919. The tremendous devastation of World War One (WWI) played a key role in this complete change in attitudes about war. In order to create the legal framework for carrying out the mission of the League of Nations, the members included a special clause in the charter they signed. Article 10 of the League of Nations states: “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled. However, movements toward peaceful conflict resolution have been hampered by state policies that continue to emphasize a limitless right to go to war as an attribute of sovereignty[6]. The League of Nations Charter of 1919 featured with formalities that imposed some limitations on usage of force, but they didn’t fully forbid these actions from occurring. Kellogg-Briand Treaty or the Pact of Paris was signed in 1928, another significant breakthrough occurred[7], members of this pact agreed that only peaceful tactics should be used to settle disagreements. This agreement was requisite on 63 countries, condemned the “recourse to war for the solution of international disputes” did not fully forbid completely the use of force. The Paris Pact affected the ensuing legal structure for the use of force and it appears to be still in place[8]. In theory, although the charter gave the League

of Nations the right to use military force, it had no force at its disposal; So in the end, there was nothing the League could do if any nation violated the terms of the charter and used force through military intervention. The necessary conditions that the League of Nations failed to implement are; First, the obligation of states to renounce the use of force for any purpose other than defending their territorial sovereignty. Second, that all states agree on a clear definition of aggression so that measures can be taken to prevent or counteract it. Third, the obligation of states, especially the great powers, to place their armed forces at the disposal of the international institution for the prevention of aggression, away from their immediate interests. Fourth, the obligation of all states to prevent any violations of sanctions that would help outlaws. This is what the United Nations tried to achieve after World War II in 1945.

2.3 The Military Intervention under UN Charter

About the usage of force and threats in accordance with UN Charter Article 2, paragraph 4, are totally prohibited. "United Nations members are expected to refrain from threatening or employing force against political independence or any state's sovereignty, or in any other manner inconsistent with the goals of the United Nations in international affairs"[9]. A totally prohibition on usage of force and threats is counter to the political independence or any state's sovereignty. Also UN charter in Article 2, paragraph 3 necessitates national disputes to settle by "peaceful means"[10], which considered as the main pillars of global system after the post-World War II. As stated in the UN Charter's Preamble, the international community stated its goal of creating a peaceful world so that to defend future generations from the scourge of war[11]. The UN Charter though contains two exemptions to this rule: collective or individual self-defence in reaction to an armed attack, as defined in Article 51 of the Charter, and UNSC-authorized the uses of force under Chapter VII of the Charter in Articles 39-54[12] to reinstate and preserve international concord and safety[13]. These rules show that the use of military force is tolerable in particular cases and must be viewed as a legal exemption to the overall ban on the usage of force. Self-defence under UN Charter Article 51 or the UNSC's authorisation to use force under article 42[14] are the exceptions here to the restriction. Additionally, states may allow another state to employ force in their territory such as against rebel or terrorist groups, in order to protect themselves. Sometimes, new interpretations of existing regulations or new exclusions emerge because of governmental practice.

3. The Conceptual Framework of Military intervention

3.1The Military Intervention Concept

Rosenau was one of the earliest persons to express reservations concerning the idea of military intervention's inherent ambiguity. He traits the scantiness of "scholarly writings on the problem of in developing systematic knowledge on conditions under which military intervention behavior is initiated, sustained, and abandoned", mainly to scarcities in conceptualization[15]. In another opinion, Hermann and Kegley stretched Rosenau's worry about conceptual vagueness to conflicting understandings of military intervention, perceiving that the similar skirmish conduct can be characterized as military intervention, non-intervention, or other intervention, depending on distinct indexes[16]. In order to fully appreciate its contribution, having a clear definition of "just war" is critical to full understanding on how this idea might be applied to contemporary interventionist ethics. There have been numerous sorts of intervention throughout human history: political or military, direct or indirect. New types of military intervention have arisen as a result of the decease of the Cold War period because of the perpendicular volume of military activity.

As result the concept "intervention" becomes more complex to understand its meaning. According to Garrett, he summarised that instances of intervention give out nearly ceaselessly, and in significance he contends that, the notion has converted "inherently broad and protean"[17]. As a result, comprehending the meaning of the phrase "intervention" becomes more difficult. Garrett observes that examples of intervention are nearly endless, and as a result, he believed the idea has become "inherently vast and protean"[18]. Nevertheless, two main factors may be attributed to this: first, there is an ever-increasing variety of motivations for intervention; and second, non-state actors are becoming increasingly significant political players. Aside from globalization and developments in international media, the rise of new humanitarianism and aggressively political non-governmental organizations (NGOs) are critical in the humanitarian sector [19].

Woodhouse and Ramsbotham established a five-part typology in an effort to get direction to this definitional argument. Coercive governmental humanitarian intervention has military and non-military manifestations, which offer the first two kinds. Military and non-military forms of non-coercive governmental humanitarian assistance give the following two sorts of non-coercive humanitarian intervention. The remained types are non-governmental, intergovernmental and transnational humanitarian intervention[20]. In this regard as a follow-up to this analysis, Holliday proposed the creation of a larger typology of intervention than only humanitarian aid. This typology relies solely on the political component of intervention, and attempting to go beyond this would produce an almost uncontrolled level of complexity. This will push the boundaries of both the most contemporary interventionist thinking and just war tradition. When the key features of intervention are

Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

considered in this way, three are particularly significant and useful in developing a typology; the first is the temperament of the intervening agency, whether it is a non-state or a state; the second is the technique of intervention, whether non-coercive or coercive; and the third is the domain of intervention, whether it is internal or exterior to the target society. When these three conditions are fed into a matrix, eight different varieties are produced[21]. Different types of international political involvement are depicted in Figure 3.1 below

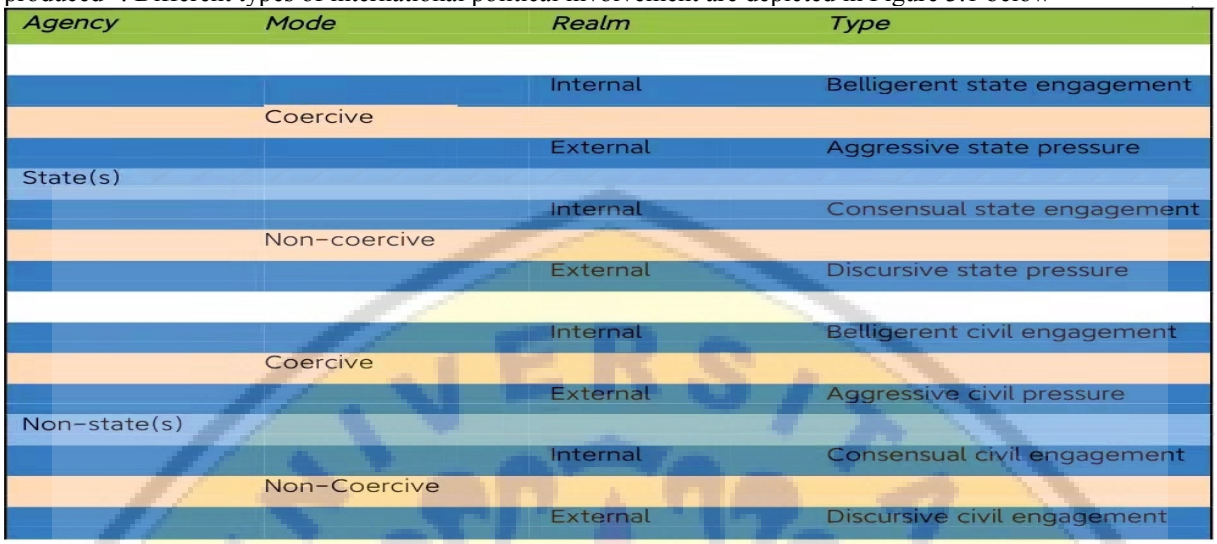

Figure 3.1: Classes of Interventions

There has been resurgence in "just war" thinking as a result of this heightened attention to the concept of military intervention (JWT). The JWT was mainly an anxiety for theologians and legal theorists in the twentieth century, with the former owing to its historical origins in Augustine and Aquinas' spiritual instruction, and the latter due to disagreements over the theory's efficacy in relation to a multinational authority and intercontinental law. In the formation of the JWT, St. Augustine (354 – 430) claimed, "the justness of action could be judged without evaluating the driving intention, so also with the action of going to war"[22].

3.2 Patterns of Military Intervention

It is the goal of this section to explain how military intervention has evolved since Cold War ended. To begin, ten historical patterns of military intervention will be clarified. In Ortega (2001), a variety of patterns have developed over time, but only ten of these historical examples will be used in this study (see figure 3.2 below)[23]. To highlight the uncertainties that arise from the evolution of military intervention theory and practice across time, is the main reason for these interventions to be used in this study. In the next sections only a few types of interventions will be explored and referenced to.

Historical	More Contemporary
Imperialistic intervention	Cold War pattern of intervention
Colonial Pattern of intervention	Humanitarian intervention
The Balance of power	Collective intervention
Ideological intervention	Punitive intervention
Self-determination	Pre-emptive intervention

Figure 3.2: Patterns of Interventions

Patterns of interventions are historically supplemented by a variety of normative norms that often arose. Intervening powers claim, with varied degrees of clarity and certainty, justification and validations for their conduct, whereas other governments use a variety of arguments to oppose interventions. As a result of these interactions, the international community has developed principles for intervening. This is obviously a set of broad legal rules, but they aren't just applicable in the legal sphere. Non-written definitions of the legal, political and moral underpinnings of international order at a specific time are what we mean by international principles. In this sense, they can be seen as both broad ideals and principles that are constantly changing.

It has constantly remained a dominant worth tied to state sovereignty, and the content of the latter has evolved in tandem with military intervention's evolution. There are four forms of the non-intervention concept that can be recognized. First, there is the ancient European ideal of non-intervention, which was formed for the European concert of countries from the sixteenth century and remained in effect until World War II. Second, there is legalistic principle of non-intervention which was developed under the auspices of the United Nations during the Cold War and was hailed as the extreme version of the former. Third, the notion of collective intervention evolved relatively recently, as a result of United Nations Security Council interventions, which we

will be addressed in the sections of this paper. Last but not least, there is the "principle of limited intervention," which enables governments to employ armed force in other countries for humanitarian reasons as well as for the aims stated in the UN Charter, which is to maintain international harmony and safety [23].

4. Objectives of Military Intervention

The military intervention undertaken by the international community to maintain peace and security or to stop mass violations of human rights was frequently erratic with the objectives of the intervention which brings lack of trustworthiness. All the objectives of military intervention are going to be discussed in this section together with the circumstances that may permit military intervention to guarding of collective security and civilians in conflict circumstances also the possible consequences of military interventions.

4.1 Restoring and Maintaining International Harmony and Safety

According to the principle of restoring and maintaining international harmony and safety, the UNSC has interfered in many circumstances. The UNSC is the main body that given full mandate by the United Nations Charter to oversee all matters concerning the peace and security[24]. Since 2001, to secure the international system from terrorist attacks has become a common notion among affiliates of the global community, also when the violations against human right like offences against humanity, genocide and ethnic cleansing occurs and a nation is impotent or disinclined to defend its residents, the obligation to defend collective security validates the right to interfere[25]. Even when military action is involved, the UNSC bears this obligation as the UN's primary collective security body[25]. Therefore, the current trend to an understanding of collective security goes in the direction of a more comprehensive system of protection notwithstanding the restriction stipulated in UN Charter article 2(7), the system includes interfering in the states internal affairs in circumstances of offences against humanity like genocide and ethnic cleansing. The actions were taken by the UNSC on the premise of collective security and protect human rights has been subjects of controversies among different stakeholders as explained in the next sections. In recent years, the UNSC has been more prepared to act on this basis, most obviously in Bosnia, Kosovo, Somalia, Afghanistan, Iraq, Libya and later in Syria, and Yemen [26].

4.2 Protecting International Human Rights

Determining when the safeguard of basic human rights permits for military intervention is a very challenging task. The humanitarian interventions are commonly authorized by the UNSC to prevent extensive distress among the citizen or residents. In order for military intervention to be considered proportional, the harm done must be with less weight compares to the harm it prevented, which is recognised as the “do no harm” principle. ""Do no harm" involves stepping back to consider the whole picture and minimize any negative consequences on the environment, economy or social fabric that a particular action might have[27]. Preventing the genocide of a massive population, specifically those belonging to a certain ethnic or religious group considered as one of the foremost specimens of when intervention is justified[28]. Military intervention can also be justified when there is stabbing on the right to life in general comprising but not limited to extrajudicial implementations of political prisoners, large-scale attacks against civilians and massacres,. Likewise, humanitarian intervention grounds are extended to right violations which are not subjected to torture.

4.3 Military Intervention and R2P

A rapid response to prevent genocide is essential, as ethnic cleansing and genocide in many instances happen in the initial stages of conflicts within the state. Even in cases where interventions to stop war immediately do not succeed, it can frequently minimize violence against citizens, as it compel potential offenders to redirect their resources and time away from the extermination of civilians and toward their own defence. Though it is significant to abide by and obey with the rules of international law, sometimes this cannot be-done from a moral considerations such as intervening to protect the world's most vulnerable people from heinous and gross abuses of state power without the approval of the Security Council. Legal scholar Thomas Franck correctly asserts that "international justice is better served by sometimes breaking the law rather than respecting it" and in support of this proposition, he references NATO's operation in Kosovo[29].

Therefore, taking such a coercive military stance against countries that commit massive violations against human rights is necessary even if it violates the rules of law for some. After making all reasonable efforts to get the UNSC's authorisation, if this cannot be obtained and a full evaluation of whether action is suitable and capable of achieving the stated objectives, such intervention should take place without the UNSC's permission[30]. However, trying to obtain UN Security Council authorization should not be a process so long when it becomes clear to all Council members the legitimate objective of the intervention.

According to this view, in the first place states would ask authorization from the UNSC Council for military intervention, but when this cannot be-secured due to the stalemate facing the UNSC, this should not prevent humanitarian intervention to fulfil the R2P[31]. So that, there is a essential to try to link the gap between UNSC

authorizations, which are rarely authorized in politically sensitive circumstances and violate the use of force principle when necessary in times of need. There's been a lot of progress made in the area of the R2P. The General Assembly accepted the principle in 2005, and the Security Council reaffirmed it unanimously in 2006, notwithstanding its shaky beginnings[32]. However, the principle continues to be challenged, especially due to its relationship with humanitarian intervention and the widespread assumption that its primary objective is to pave the way for unilateral military intervention to be legitimized.

4.4 Guarantee Country's Security during Military Intervention

The foremost interventions aim is to uphold international harmony and safety and protect civilians, the intervention may also aggravate the suffering of the citizens, particularly when the intervention is carried out inappropriately. Intervention may make civilians trapped between the fire of the warring factions and the fire of military intervention and siege, as is happening now in Yemen[33], or instead, they could be left defenceless in the vacuum created by the overthrow of their nation's government, as it is happening now in Iraq[34]. Such issues started in 2003 during joint military intervention in Iraq, where the forces from USA and UK eventually found themselves not capable to guarantee the country's security after their invasion. Foreign forces in Iraq have failed to prevent the spread of looting and failed to protect the citizens from intolerant violence and the escalating insurrection to this day. This failure is resulted from the inherently of the military, military was not suitable to deal with security difficulties that arise during the military interventions, because the military fundamentally deficiencies the competences to adequately deal with mass population and lower levels of organized violence. These situations need qualified police forces to ensure the country's security in unstable environment after the military intervention. Police forces must also have military skills with an emphasis on the non-lethal use of force, because the police force is basically a mixture of the military and the police, and its role is to effectively neutralize violent situations [35].

5. Legality and Legitimacy of Military Intervention

5.1 Legality of Military Intervention

UN Charter does not expressly allow direct or indirect military intervention to defend human rights by the United Nations or by any state. The basis of the UN Charter is non-interference in the internal affairs of any other country as stipulated in Article 2(4), even if the people of that country faced recognised massive human right violations. Conversely, since the after Cold War period, the UNSC has sanctioned the use of force within member states' boundaries on numerous occasions. Real example is the case of Somalia, in which the UNSC sanctioned the use of force in eradicating human right violence and famine[36]. In the case of Rwanda, the UNSC sanctioned the use of force to stop the genocide of one ethnic group by another[37]. Also in Haiti, the Security Council granted the authority to use force to abolish the systematic human rights violations and re-establish democracy[38]. This also happened in the case of Libya, where the UNSC adopted Resolution of 1973 on 17th March, 2011 authorizing the use of force in Libya to guard citizens from attacks, precisely in the Benghazi city located in eastern part, which Colonel Muammar Gaddafi reportedly said he would storm to end the revolution's offensive against his regime. We note from the cases of Somalia, Haiti, and Libya that subsequently the end of the cold war the UNSC has decided that humanitarian crises of states or internal human rights violations may be described as a "threat to international peace and security" and thus allow the UN to intervene by force under Chapter VII of the UN Charter.

5.2 Legitimacy of Military Intervention

5.2.1 Right of Veto Power and Military Intervention

When a state is committing human rights breaches or a threat to world peace and security that necessitates the deployment of armed action, the UN Security Council is unable to sanction military intervention because of the veto of a permanent member of the UN[39]. The use of military action is not legal under international law when the veto is invoked, and if it were, it would be illegal. States must choose either doing nothing or abide by international law and acting in ways that violate established norms in order to avert or end human suffering and reinstate international security and peace. It may happen that states take military action without the sanction of the UNSC and outside the UN collective security system. This may happen when a State determines that military action is required to avert an imminent danger to world harmony and safety or to put an end to continuing violation of global security and peace or to confront an unfolding humanitarian disaster. As a result of a lack of UN Security Council support, NATO bombarded Kosovo in 1999 to stop the ethnic cleansing that was taking place there[40].

It is generally agreed that the exploit done by NATO was illegal as the UNSC didn't authorize the intervention and cannot be regarded as self-defence action. Though, it was deemed a legitimate use of force due on the basis of preventing the continuation of massive human rights violations. According to the eminent legal scholar Antonio Cassese, he said of the matter "From a moral point of view, the resort to armed force was

justified". However I cannot avoid that this moral act is inconsistent with existing international law"[41]. Self-governing International Commission on Kosovo decided that the action was illegal but acceptable based on a growing worldwide moral consensus[42]. Although NATO's operation was illegal at the time, the fact that no one publicly protested it suggests that most people agreed that it was the right thing to do at the time, even if it violated international law.

5.2.2 The Effect of Illegal Military Interventions on International Law

We must be careful not to violate the potential implications of an essential tenet of international law that forbids the usage of force contrary to sovereign states if we defend military intervention on moral grounds. International law is founded on the principle of reciprocity and the recognition of mutual obligation, and is recognized by states as binding in their relations with one another. Consequently, it is also possible that governments may opt not to adhere to an essential principle of international law such as non-use of force if it loses its authority and credibility[43]. When the scoundrel states act in violation of international law, whichever violation is probable to be viewed by the international community as illegal and unjustified. Nevertheless, when the violation of international law is by states that have political, legal and moral authority in the international arena, there is concern that other states will make the same act. This concern is due to the fact that it may eventually result to the regular fragmentation of the global system and a return to a world order regulated by political considerations. In addition to that and dissimilar local law, international law can be-amended or formed as the outcome of government practice. Thus, there must be a new customary norm of international law in order for it to be formed "evidence of general practice accepted as law"[43]. The concern basis is that violations of international law are one way to bring changes in the law. Therefore, in another word it can be explained as, if countries intervene external structure of the UN and under the auspices of (R2P). It will be possible to establish a legal basis for future intervention, in order for military intervention to be a legal omission to the ban on the use of force, there must be sufficient governmental practice and adequate countenance of the opinion that military intervention is a legal exemption.

5.2.3 The obligations of International Criminal Court

The international community has long felt the requirement for a global criminal court proficient of impeaching and gruelling those accountable for offenses of international anxiety, like genocide, offenses against humanity and war offences. The International Criminal Tribunals for Rwanda ("ICTR")[44] and Yugoslavia ("ICTY")[45], which were established specifically in 1994 and 1993, were set up to work with murders committed in these two nations These two tribunals have pointed-out the necessity for a stable international criminal court to respond quickly and effectively with abuses of this nature. Therefore, the ICC formed to be the first self-governing and stable criminal court to contribute to the abolition of exemption for offenders of the supreme heinous offences about the global community. The ICC prosecutes only those accused of the most heinous offences, including genocide, offences against humanity and war offences. Due to the Kampala modifications, the ICC will refrain from intervening and acting as a court of last resort if a matter is being investigated by a domestic judicial system, except the local procedures are not genuine[46].

Awkwardly not all countries recognize the authority of the ICC. The ICC's Rome Statute has 123 signatories as States Parties. There are 19 Asian-Pacific states, 28 Caribbean and Latin American states, 18 Eastern European states, 33 African states, and 25 Western European and other states. Though, the United States, one of the world's most important countries, has declined to ratify the Rome Statute so far. Russia, Israel, China and India are among the countries that have not joined the ICC[47]. The ICC's legitimacy and operational efficacy are both weakened by the absence of these significant players in the ICC's community. Additionally, the Court has been criticized in the past of failing to provide necessary balance and checks and of failing to sufficiently protect the rights of suspect individuals. The most devastating accusation so far has been the claim that the (ICC) is a tool of Western imperialism because of its biased and selective enforcement.

Regardless of all criticisms, the presence of a self-governing international organization, which can grasp the committers of the most serious crimes to account, is critical to the decline of military interventions. International justice becomes even more vital in the absenteeism of a country government prepared to grasp committers accountable. An individual state's inability to or unwillingness to conduct an investigation into war offences and offences against humanity necessitates judicial involvement from the international community. When it comes to its legitimacy and operational efficacy as well as other critiques, the ICC should be strengthened.

6. Conclusions

The idea of state sovereignty becomes moved away from the absolute conception where the state is the sole controller of its internal affairs. Therefore, where a state fails to discharge its responsibilities the international community is required to react and take the necessary steps, which may ultimately include the use of military force, to restore international peace and security, or to prevent gross human rights violations from occurring. There are exists a clear tension between the principle of non-interference in a state's internal affairs, and restoring international peace and security, and the promotion and protection of human rights. This is a tension,

which has not been fully reconciled by the international community, and this is reflected by the wide-ranging disagreements about, and criticism of, the current state of the legal framework of military intervention in international law. According to our analysis, military action should not be taken carelessly or without careful examination of the legal position, as shown by above analysis of the legal and conceptual context. The advantages and disadvantages of Interference, operating capacity, and planning considerations should be taken. When considering a military intervention, it is critical that the intervening state weighs the potential impact on the ground against the impact of not interfering. Both the customary international law and UN Charter bind all world state. International law prohibits any use of force that goes beyond the boundaries of these legal principles. There is little room for legal involvement currently because of the strict norms governing the use of force in international law. Though, it is still perceived as legitimate in numerous situations, such as upholding international harmony and safety from imminent danger or egregious and massive human rights violations. The legal framework of military intervention should be taken seriously with a comprehensive legal study to determine the type of conflict, the legal position on the intervention, and the importance of planning issues.

References

[1] FS Pearson, RA Baumann, 1993, International military intervention, 1946-1988. https://doi.org/10.3886/ICPSR06035.v.
[2] M Ortega, Military intervention and the European Union, 2001, P.5.
[3] Karin von Hippel. Democracy by Force US Military Intervention in the Post-Cold War World, 2000, P.3.
[4] Dennis J. Dunn: A History of Orthodox, Islamic, and Western Christian Political Values- 2016, p.1- 9.
[5] H. H. W. HALLECK: Elements of International Law and Laws of War-1866, p.20-21.
[6] Ian Brownie: International Law and the Use of Force by States-1981, pp. 49-50.
[7] The General Treaty for the Renunciation of War1928. https://iilj.org/wp-content/uploads/2016/08/General-Treaty-for-the-Renunciation-of-War-Kellogg-Briand-Pact.pdf.
[8] James Crawford: Principles of Public International Law, 2019, PP.717- 745.
[9] The UN Charter Article 2 (4).
[10] The UN Charter Article 2 (3).
[11] Charter of the United Nations and Statute of the International Court of Justice; United Nations Publications, Mar 31, 2015 - Law - 128 pages.
[12] The UN Charter Article 51
[13] The UN Charter Articles 39-54.
[14] The UN Charter Article 42: "Should the Security Council consider that measures provided for in Article 41would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."
[15] ROSENAU, J.M. Intervention as a scientific concept. Journal of Conflict Resolution, Vol.12, No.2, 1969, p.149.
[16] MG Hermann, CW Kegley Jr - Journal of Conflict Resolution. Ballots, a barrier against the use of bullets and bombs: Democratization and military intervention, 1996, P.244. https://www.jstor.org/.
[17] Garrett, S.A. Doing Good and Doing Well: An Examination of Humanitarian Intervention. Westport, CT: Prager, 1999, p.3.
[18] Korey, W. NGOs and the Universal Declaration of Human Rights: 'A Curious Grapevine'. New York: St Martin's Press, 1998.
[19] RAMSBOTHAM, O. Humanitarian Intervention 1990-1995: A Need to RECONCEPTUALIZE? Review of International Studies, Vol.23, 1997, p.112; RAMSBOTHAM, O. and Woodhouse, T. Humanitarian Intervention in Contemporary Conflict: A Reconceptualization. Cambridge: Polity Press, 1998, pp.225–231.
[20] Holliday, I. Ethics of Intervention: Just War Theory and the Challenges of the 21st Century, International Relations, Vol.17, No.2, 2003, p.121.
[21] Ian Holliday, 'When Is a Cause Just?', Review of International Studies 2002, 28: pp.557–75
[22] MUSHKAT, R. The Concept of Just War in International Law, LLD Thesis, UNISA, 1986, p. 278.
[23] Ortega, M. Military Intervention and the European Union. Institute for Security Studies of Western European Union, CHAILLOT Paper 45, 2001, p.5.
[24] R Gordon - Mich. J. Int'l L., 1993: United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond, Volume 15 Issue 2- 1994. https://repository.law.umich.edu/.
[25] International Commission on Intervention and State Sovereignty (ICISS) Report of the International Commission on Intervention and State Sovereignty-December 2001, p 57-66; Ruth Gordon: United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond, 1994, Volume 15 Issue 2
[26] Repertoire of the Practice of the Security Council 20th Supplement, 2016-2017 Department of Political

Affairs - Security Council Affairs Division Security Council Practices and Charter Research Branch.https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/part_vii_final_for_webposting.pdf.
[27] Bass, Gary J. Freedom's Battle: The Origins of Humanitarian Intervention. New York: Random House, 2008.
[28] ND White Melbourne, Defending humanity: when force is justified and why by George P Fletcher and Jens David Ohlin, 2009. https://nottingham-repository.worktribe.com/.
[29] Thomas M. Franck, "Who Killed Article 2 (4)? Or: Changing Norms Governing the Use of Force by States", American Journal of International Law 64 (1970) 810 in Ian Hurd, "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World", Ethics and International Affairs, 25 no. 3 (2011) pp. 293-313.
[30] J Morris - Libya and Syria: R2P and the spectra of the swinging pendulum, International Affairs, 2013. https://onlinelibrary.wiley.com/.
[31] B Simma. NATO, the UN and the Use of Force: Legal Aspects, 1999. https://watermark.silverchair.com/100001.pdf.
[32] On 28 April 2006, the Security Council unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict. Resolution 1674 contains the first official Security Council reference to the Responsibility to Protect. On 11 November 2009, during its eighth debate on the POC, the Security Council adopted Resolution 1894, in which where Member States expressed a continued commitment to RtoP; Bellamy, Alex J. (2009). Responsibility to protect: the global effort to end mass atrocities. Polity. p. 133. ISBN 978-0-7456-4347-2.
[33] World Report 2020 , Yemen Events of 2019; Children attending class on the first day of school, which was damaged by an airstrike during fighting between Saudi-led coalition-backed government forces and Houthi forces, Tazi, Yemen, September 3, 2019. https://www.hrw.org/world-report/2020/country-chapters/yemen.
[34] Michael E. O'Hanlon Saturday, January 1, 2005; Iraq without a Plan, https://www.brookings.edu/articles/iraq-without-a-plan/.
[35] S Hoffmann - Survival, - The politics and ethics of military intervention, 1995 Pages 29-51 | published online: 03 Mar 2008. https://doi.org/10.1080/00396339508442814.
[36] On 3 December, the Security Council adopted, unanimously, its resolution 794 authorizing the use of "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia",1992.
[37] S/RES/965 (1994), UN Assistance Mission for Rwanda; S/RES/955 (1994), Establishment of the International Criminal Tribunal for Rwanda (ICTR) and adoption of the Statute of the Tribunal.
[38] UNSC 940, adopted on 31 July 1994, the Council permitted a United States-led force to restore President Jean-Bertrand Aristide and authorities of the Government of Haiti, and extended the mandate of the United Nations Mission in Haiti (UNMIH) for an additional six months.
[39] RA Falk - American Journal of International Law, 1999. Kosovo, world order, and the future of international law. https://www.jstor.org/; See also, VP Nanda - Mich. St. U. Coll. L. Int'l L. Rev., 2013. The future under international law of the responsibility to protect after Libya and Syria. https://hcommons.org/deposits/download/hc:35362/CONTENT/fulltext.pdf/.
[40] Ramesh Thakur, Charles SAMPFORD· Responsibility to Protect and Sovereignty-2016, P.176.
[41] Antonio Cassese. Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?' (1999), European Journal of International Law 23 at 25.
[42] Independent International Commission on Kosovo, Kosovo Report: Conflict, International Response, Lessons Learned (2000), P.164.
[43] Emmanuel ROUCOUNAS· A Landscape of Contemporary Theories of International Law-2019, P.310.
[44] United Nations; International Residual Mechanism for Criminal Tribunals Legacy website of the International Criminal Tribunal for Rwanda. https://unictr.irmct.org/en/tribunal.
[45] United Nations | International Residual Mechanism for Criminal Tribunals; International Criminal Tribunal for the former Yugoslavia1993 - 2017. https://www.icty.org/.
[46] WA Schabas, An introduction to the international criminal court, 2011. https://d1wqtxts1xzle7.cloudfront.net/.
[47] R Villacis. Working Methods of the Assembly of States Parties to the Rome Statute- International Criminal Law Review, 2018

Acknowledgment
I express special thanks to the Chinese Scholarship Council (CSC) for supporting my PhD studies. Also I would like to express extremely gratitude to my supervisor Professor Maming Fei for his advice, encouragement and guidance in this research. Moreover, I admit and consider all organisation and individuals who helped me in one way or another toward the success of this research, in general I thank you all.

Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Regional Bond as a Regional Development Resource (Case Study on the Bali Government)

Togar Situmorang
Doctoral Program in Law Faculty of Law, Udayana University, Denpasar, Bali

Abstract
The Province of Bali is a tourist area that is well known throughout the world, so that the issuance of regional bonds in the Province of Bali to develop the development of the tourism sector is the right step. Philosophically, the purpose of development carried out by the region has one goal, namely to create a prosperous life in accordance with the values of Pancasila. The emergence of bonds that refer to creative and constructive bonds that can provide added value and become a stimulus for regional economic development efforts through policies and further studies. The purpose of this study is to: (a) examine the nature of regional bonds in regional development (b) examine the regulation of the issuance of regional bonds as a resource for regional development in Bali. This research method uses normative legal law research type. The results of this study indicate that the Demand Side of Bali's Economic Construction in the first quarter of 2020 from the demand side stems from negative growth in the performance of foreign exports, investment and government consumption. Meanwhile, private consumption needs, the consumption component in the reporting period grew 2.25% (yoy), lower than the previous quarter's 6.58% (yoy), stemming from contraction in government consumption and slowing household consumption. In addition, the consumption performance of LNPRT also contracted during the quarter under review. The performance of private consumption, namely household consumption and LNPRT consumption, was restrained during the quarter under review. Household consumption grew by 2.90% (yoy) in the first quarter of 2020, lower than 5.70% (yoy) in the previous quarter. Meanwhile, the consumption performance of LNPRT decreased from 6.00% (yoy) to -4.67% (yoy). On the other hand, the slowdown in household consumption performance in the quarter under review was caused by restrained purchasing power in line with the decline in tourism performance in the midst of the COVID-19 pandemic.
Keywords: Regional Bonds, Development Resources, Bali Province
DOI: 10.7176/JLPG/117-05
Publication date: January 31st 2022

Introduction

The province of Bali is a tourist area that is well known throughout the world, so the issuance of regional bonds for the Province of Bali to develop the development of the tourism sector is the right step. Philosophically, the purpose of development carried out by the region has one goal, namely to create a prosperous life in accordance with the values of Pancasila. However, as a legal state, the issuance of regional bonds certainly cannot be separated from regulations and there is also a need for certainty that protects the parties.

To avoid risks for the regions as debtors and investors as creditors, clear and definite legal instruments are needed. In fact, for the region the loss has been anticipated with strict procedures in the issuance of bonds. At the national level, the nominal amount of regional debt through the issuance of bonds has been limited and based on the amount of the previous RAPBD. In addition, bond funds must be used for development programs that provide benefits to the region, not development programs that do not have investment value.

The problem with the Bali Province in issuing regional bonds as an alternative source of financing for regional development is that there are several obstacles related to the philosophical problem, namely the absence of justice based on the fifth principle of Pancasila and regulations from the Central Government regarding the procedures for assessing, calculating and considering the issuance of regional bonds. considering letter b regarding the phrase other resources in the Law of the Republic of Indonesia Number 33 of 2004 concerning the Financial Balance between the Central Government and the Regional Government where the Province of Bali in generating income through the tourism industry is sourced and based on Balinese Culture. Related to that, there are also juridical problems in the Bali Province in issuing regional bonds, namely the incompatibility of the Central Government regulations regarding the authority to issue and approve the issuance of regional bonds which are regulated between the Financial Services Authority Regulations and the Minister of Finance Regulations as well as the many overlapping rules due to management audits. local government finances in the Revenue and Expenditure Budget of region is entirely under the responsibility of the Supreme Audit Agency (BPK), while for the management of a regional bond, is it permissible for the Supreme Audit Agency (BPK) to participate in managing it because of its nature as an examiner.[1] It can be stated further that the sociological problem lies in the lack of readiness of local governments and human resources in issuing and managing regional

[1] Abdul Manan, 2012, *The Role of Law in Economic Development*, Kencana Prenada Group, Jakarta.page. 45

bonds which are vulnerable to a game between project value (regional infrastructure financing) and the value of regional bonds offered with the possibility of a budget mark-up level occurring.

1.2. Legal Issues

1. What is the nature of regional bonds in regional development in the province of Bali?
How are Regional Bonds Issuing Regulations as a Regional Development Resource for Bali

1.3. Research Methods

This research method uses normative legal research type. The approaches used include statutory approaches, conceptual approaches and analytical approaches. The material for this research uses legal materials, namely primary, secondary and tertiary legal materials, which are collected using document study techniques which are then identified and classified and then analyzed qualitatively.[1]

1.4 Results and Discussion

1.4.1 The nature of bonds as a source of financing for regional development in Bali

The budget is a policy instrument owned by the Government to describe a comprehensive statement of state priorities. Budget can also be interpreted as government policy in the financial sector which is a guideline in making budget allocation policies and financing State tasks. Budget is generally defined as a financial calculation that describes the activities of an organization based on the calculation of expenditures supported by the calculation of income that has been planned previously. Technically a budget is a document consisting of words and numbers.[2] The elements contained in the state budget are essential things that aim to prosper the people. Budgeting is carried out through top-down and bottom-up development planning mechanisms. The annual operational planning contained in the state revenue and expenditure budget (APBD) is an elaboration of the policy points set out in the regional development plan document. The budgeting stage is very important, because an ineffective and not performance-oriented budget will be able to thwart the plans that have been prepared. So the purpose of budgeting must be understood by policy formulation.[3]

The government in implementing broad regional autonomy requires sufficient funds and continues to increase in accordance with the increasing demands of society, government activities and development. These funds are obtained from the ability to explore their own financial sources supported by the balance of central and regional finance as a source of financing. Regional finance is a benchmark for determining capacity in carrying out autonomy tasks, in addition to other benchmarks such as natural resource capabilities, demographic conditions, regional potential, and community participation. Therefore, the government in regulating regional financial budgets must have a plan in carrying out regional development.

Whereas in the implementation of regional autonomy, Regional Governments have the right and obligation to regulate and manage their government affairs, but encounter limitations in funding sources. Most districts and cities rely heavily on balancing funds provided by the Central Government, be it Revenue Sharing Funds, DAU and DAK. Another source of income comes from Regional Original Income which is also limited. This is because the three sources of funding are mostly absorbed in routine expenditures. With these financial conditions, it is certainly difficult for local governments to carry out various development projects due to budget constraints. Therefore, various breakthroughs must be made by the regional government in an effort to find sources of development financing in order to achieve the successful implementation of regional autonomy. The existence of Law Number 33 of 2004 which replaced Law Number 25 of 1999 concerning Financial Balance between the Central Government and Regional Governments provides an opportunity for regional governments to raise funds (Fund Raising) in the context of regional development and development through the issuance of regional bonds such as as set forth in Article 57 of the Law, which in more detail regulates regional bonds as a source of regional financing. Regional bonds as a source of funds have long been used as a discourse and discussion material, both in formal forums both at the regional and central levels.[4]

Regional bonds are an alternative to obtain additional sources of finance for the regions. Until now, not many regions have issued regional bonds, because regional bonds have not been fully understood and it seems that it will become a burden for the regions. So that to issue bonds, regional bonds are taken based on careful consideration from both regional heads, Regional People's Representative Assembly and also the central government.[5]

---

[1] Peter Mahmud Marzuki, 2009, *Legal Research*, Kencana, Jakarta. P. 69
[2] Gemkow, T., & Zürn, M. (2012). *Constraining International Authority through the Rule of Law: Legitimatory Potential and Political Dynamics. Rule of Law Dynamics: In an Era of International and Transnational Governance.pg. 67*
[3] Ateng Syafrudin, 2010, *Towards a Clean and Responsible State Administration, Pro Justisia Journal, Edition IV,* Parahyangan University, Bandung.pg.89
[4] Gunawan Setiardja A., 2010*, Legal and Moral Dialectic in Indonesian Community Development*, Kanisius, Jogjakarta. Pg.105
[5] Ibrahim, 2003, *Constitutional Oversight System Between Legislative and Executive Powers in Renewing the 1945 Constitution*, Unpad Postgraduate Program, Bandung.pg.56

The increase in regional revenues from the issuance of regional bonds will support the development of the public sector in the regions according to the allocation of funds originating from regional bond funds. The local government is required to pay the debt and interest and must be included in the RAPBD every year. Thus, regional bonds need to be carried out carefully and carefully because bond funds are debt not loans and the repayment of the debt is disserted with interest. At first glance, bonds are a burden for the regions, but in fact the proceeds from the issuance of bonds are very beneficial for the regions, especially for regions that need bailout funds to carry out development.

Thus, the implications of developing regional autonomy are not merely an addition to the affairs delegated, but also how much authority is delegated to provide the ability to take initiatives in regional financial management so that regions can reduce their degree of dependence on the center and can finance regional development activities.

Based on Article 1 point 7 of Law Number 17 of 2003 concerning State Finances that regional finances are all regional rights and obligations in the context of administering regional government which can be valued in money, including all forms of wealth related to the rights and obligations of the region. The financial factor is an important factor in measuring the level of regional capability in implementing its autonomy. Regional financial conditions determine the form and variety of activities to be carried out by local governments.

Regional finances can simply be formulated as all rights and obligations that can be valued in money, as well as everything in the form of money or goods that can be used as regional assets as long as they are not owned/controlled by the state or higher regions and other parties in accordance with applicable laws and regulations. From the definition above, it can be seen that in regional finance there are two important elements, namely:[1]

1. All rights are intended as the right to collect regional taxes, regional levies and/or revenues and other sources in accordance with applicable regulations constitute regional revenues so as to increase regional wealth;
2. Regional obligations may be in the form of an obligation to pay or in connection with a bill to the region in the context of financing the regional household as well as the implementation of general tasks and development tasks by the region concerned.

One of the problems in the implementation of regional autonomy is regarding the financial capacity of the regions because it involves the financing of the administration of government affairs and the implementation of development in an effort to improve the welfare of the government. [2]The problem of regional capacity means how the region can obtain and increase sources of regional income to carry out its government activities. In carrying out government, development and community activities, sources of funds are needed to finance these government expenditures.

1.4.2 Regulation of Issuance of Regional Bonds as a Resource for Regional Development of Bali

Bali's Economic Construction on the Demand Side in the first quarter of 2020 on the demand side stemmed from negative growth in the performance of foreign exports, investment and government consumption.[3] Meanwhile, household consumption performance was still able to show positive growth although it was slower than the previous period. Meanwhile, private consumption needs, the consumption component in the reporting period grew 2.25% (yoy), lower than the previous quarter's 6.58% (yoy), stemming from contraction in government consumption and slowing household consumption. In addition, the consumption performance of LNPRT also contracted during the quarter under review. The performance of private consumption, namely household consumption and LNPRT consumption, was restrained during the quarter under review. Household consumption grew by 2.90% (yoy) in the first quarter of 2020, lower than 5.70% (yoy) in the previous quarter. Meanwhile, the consumption performance of LNPRT fell from 6.00% (yoy) to -4.67% (yoy). On the other hand, the slowdown in household consumption performance in the quarter under review was caused by restrained purchasing power in line with the decline in tourism performance in the midst of the COVID-19 pandemic.[4]

Regional bonds are debt securities issued by regional governments that are offered to the public through public offerings on the capital market. These bonds are not guaranteed by the Central Government (Government) so that all risks that arise as a result of the issuance of Regional Bonds are the responsibility of the Regional Government.[5]

The loan will be repaid according to the agreed terms and conditions. Regional governments that issue regional bonds are obliged to pay interest periodically in accordance with a predetermined period of time. At maturity, the local government is obliged to repay the principal of the loan. The purpose of the issuance of

[1]Budi S. Purmono, 2006, *Regional Bonds as an Alternative for Financing Regional Development in Indonesia,* Proceedings of Kopertis Region IV, Vol. 2 No.1.
[2]Irham Fahmi, 2013, *Shares and Bonds Secret*, Alfabeta, Yogyakarta, p.90
[3]Ujang Bahar, 2009, *Regional Autonomy Against Foreign Loans Between Theory and Practice*, PT Index, Jakarta. Case. 89
[4] Setiadi, W. (2016). *Study of Regional Bonds as an Alternative Source of Financing for Regional Development (Case Study in Central Java Provincial Government).* Journal of RAK (Financial Accounting Research), 1(1), 61-74.
[5]Dewi Okta and David Kaluge, *Analysis of Opportunities for Issuing Regional Bonds as an Alternative to Regional Financing,* Journal Of Indonesia Applied Economics, Vol. 5 No. 2

Regional Bonds is to finance a public sector investment activity that generates revenue and provides benefits to the community. For this reason, it should be noted that the issuance of bonds is not intended to cover regional cash shortages. Regional Bonds will be traded on the domestic capital market in accordance with the capital market laws and regulations.

1.5 Conclusion

Based on the discussion above, it can be concluded as follows:

1. Regional bonds are debt securities issued by regional governments that are offered to the public through public offerings on the capital market. These bonds are not guaranteed by the Central Government (Government) so that all risks that arise as a result of the issuance of Regional Bonds are the responsibility of the Regional Government. Issuance of debt securities is evidence that the local government has made a loan/debt to the holder of the debt securities. The loan will be repaid according to the agreed terms and conditions. Regional governments that issue regional bonds are obliged to pay interest periodically in accordance with a predetermined period of time. At maturity, the local government is obliged to repay the principal of the loan. The purpose of the issuance of Regional Bonds is to finance a public sector investment activity that generates revenue and provides benefits to the community. The province of Bali as one of the national cultural centers and trade centers for international tourism services has the urgency of developing facilities and infrastructure, so that costs are needed from various sources that have been included in the source of regional income.
2. Regional bonds are debt securities issued by regional governments that are offered to the public through public offerings on the capital market. These bonds are not guaranteed by the Central Government (Government) so that all risks that arise as a result of the issuance of Regional Bonds are the responsibility of the Regional Government. Regional governments that issue regional bonds are obliged to pay interest periodically in accordance with a predetermined period of time. At maturity, the local government is obliged to repay the principal of the loan. The purpose of the issuance of Regional Bonds is to finance a public sector investment activity that generates revenue and provides benefits to the community. For this reason, it should be noted that the issuance of bonds is not intended to cover regional cash shortages. Regional Bonds will be traded on the domestic capital market in accordance with the capital market laws and regulations.

Reference

Abdul Manan, 2012, *The Role of Law in Economic Development*, Kencana Prenada Group, Jakarta.

Altman, E. I. (2013). *Predicting financial distress of companies: revisiting the Z-score and ZETA® models. In Handbook of research methods and applications in empirical finance*. Edward Elgar Publishing.

Ateng Syafrudin, 2010, *Towards a Clean and Responsible State Administration, Pro Justisia Journal, Edition IV,* Parahyangan University, Bandung.

Budi S. Purmono, 2006, *Regional Bonds as an Alternative for Financing Regional Development in Indonesia,* Proceedings of Kopertis Region IV, Vol. 2 No. 4.

Damon, W., and Colby, A, 2015, *The power of ideals: The real story of moral choice.* Oxford University Press, USA.

Halim Abdul and Muhammad Iqbal, 2012, *Regional Financial Management*, UPP AMP YKPN, Yogyakarta.

Gemkow, T., & Zürn, M. (2012). *Constraining International Authority through the Rule of Law: Legitimatory Potential and Political Dynamics. Rule of Law Dynamics: In an Era of International and Transnational Governance.*

Gunawan Setiardja A., 2010*, Legal and Moral Dialectic in Indonesian Community Development*, Kanisius, Jogjakarta.

Hadi, A. (2014). *Study Analysis of the Legality of Shari'a Regional Regulations in the Perspective of the Hierarchical Theory of Legal Norms*. Journal of Ummul Qura, 4(2).

Hadin Mudjad, and Nunuk Nuswardani, 2012, *Research on Contemporary Indonesian Law,* Genta Publishing, Yogyakarta.

Hans Kelsen, 2006, *General Theory of Law & Stat*e, Transaction Publishers, New Brunswik.

Hector Hawton, 1958, *Philosohy for Pleasure: An Adventure In Ideas*, IMF, Gramedia Pustaka Utama, Jakarta.

Hendry Maddick, 2004, *Democracy, Decentralization and Development. Translated freely with the title Decentralization in Practice, Printing* I, Pustaka Kendi, Yogyakarta.

Hodgson, L. P. (2012). *Realizing external freedom: The Kantian argument for a world state. Kant's political theory: Interpretations and applications*.

Ibrahim, 2003, *Constitutional Oversight System Between Legislative and Executive Powers in Renewing the 1945 Constitutio*n, Unpad Postgraduate Program, Bandung.

Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Terrorism as a Public Emergency: The Imperative for Human Rights Compliant Counter Terrorism Strategies in Nigeria

Kolawole, Adeejat Kubra A.[1*] Udombana, N. J. [2]
1.Doctoral candidate, College of Law and Security Studies, Babcock University, Ilishan Remo
2.Professor, Department of Jurisprudence and International Law, College of Law and Security Studies, Babcock University, Ilishan Remo

Abstract
Terrorism clearly has a very real and direct impact on human rights, with devastating consequences for the enjoyment of the right to life, liberty and physical integrity of victims. Globally, terrorism is now viewed as a public emergency and post 9/11 counter terrorism strategies have combated terrorism as one would a public emergency. Nigeria desired the protection of its citizens from the violations of their human rights hence the enactment of certain counter terrorism strategies. This paper investigated the extent to which counter terrorism strategies enacted and implemented by the Nigerian state resonate with international best practices for protection of human rights while confronting a public emergency. The paper found that Nigeria seemed to have designed her counter terrorism strategies to counter the very lofty ideals of human rights which she is internationally obligated to protect. The study concluded that internationally accepted norms for derogation under international human rights law in the face of public emergency has been exceeded by the Nigerian state through draconian strategies such as arbitrary arrest, unlawful detention, extra judicial killings, inhumane treatment and torture. The paper recommended both normative and institutional reforms such that the Nigerian counter-terrorism legal framework becomes anchored on internationally accepted norms of non-derogation of core rights to life, personal dignity, freedom from torture, cruel and inhumane treatment even in times of public emergency.
Keywords: Counter terrorism strategies, Human Rights, Public Emergency, Terrorism.
DOI: 10.7176/JLPG/117-06
Publication date: January 31st 2022

1. Introduction

This works seeks to determine the extent to which the Nigerian Counter terrorism strategies (CTS) resonate with international best practices while countering terrorism as a public emergency. Within the context of this study, international best practices will be distilled from international human rights norms enacted by customary international laws, human rights Conventions, guidelines, measures and practices established by both the United Nations (UN) Charter based and Treaty based monitoring institutions. As well, we shall refer to jurisprudence issuing from different jurisdictions on similar human rights norms and practices.

Together with this introduction which is the first part, this paper is presented in five parts. The second section discusses the notion of public emergency under international human rights law. The third segment analyses the requirements as set by international law as signalling public emergency and the standards laid down at international human rights law for protection of human rights. The fourth sector presents a compelling statistics on why terrorism qualifies as a public emergency in Nigeria and also measures the Counter-terrorism strategies as enacted under the Terrorism Prevention Act, (TPA) 2011 as amended in 2013 and institutionalised by National Counter-terrorism Strategy (NACTEST) vis a- vis the standards set at international law. Under that sector, a portion is devoted to a review of allegations of violations of citizen's non derogable human rights by state agents. The fifth component presents our concluding comments, observations and recommendations.

2. The Notion of Public Emergency Under International Human Rights Law

International human rights law realises that certain circumstances may arise creating serious crisis which threatens the very foundation or life of a state and which may make it imperative for such a state to protect itself by derogation from the guarantees of rights to its citizen. Such circumstances would call for declaration of state of emergency.

At the international level, the principal provision on permissible limits of derogations of human rights during state of emergency by international convention is found in Article 4 (1) of the ICCPR which provides thus:

> In the 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 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.

Similar provisions can be found in other international conventions.[1] For example, at the regional level, Article 27(1) of the American Convention on Human Rights reads as follows:

> "In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin."

Again , Article 15(1) of the European Convention on Human Rights stipulates that:

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

Paradoxically, the African Charter on Human and Peoples' Rights contains no derogation provision. In the view of the African Commission on Human and Peoples' Rights, this means that the African Charter "does not allow for states parties to derogate from their treaty obligations during emergency situations".[3] In other words, even a civil war cannot "be used as an excuse by the state (for) violating or permitting violations of rights in the African Charter".

In the exercise of its mandate to enforce the ICCPR, the Human Rights Committee adopted the UN HRC General Comment (GC) No. 29 adopted at its 1950th session on 24 July 2001 (hereinafter UNHRCGC 29). The UNHRCGC 29 by its paragraph 2 declared that before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The power to declare a state of emergency must be made by the state in accordance with the rule of law and the state's constitution in order to ensure that the declaration complies with the rule of law and the *grundnorm* regulating same in the state. [2]

Furthermore to forestall an arbitrary or frequent declaration of states of emergency we must point out that paragraph 3 of the UNHRCGC 29 cautions that not every disturbance or catastrophe is a public emergency.[3]In order to act as safeguards for the protection of the human rights of the citizens, the judiciary of the concerned state must be given the greatest possible extent of power in states of emergency.

The case of *Greece v. the UK*[4] is perhaps the oldest case in which a regional adjudicatory body/court has had to decide on what constitute a public emergency. The European Commission on Human Rights was faced with the task of interpreting a similar provision as Article 4 of the ICCPR which is Article 15 of the European Convention on Human Rights. The Commission and subsequently the Court developed the following criteria for scrutiny of application by state for derogation of human rights in times of public emergency:

1. The emergency must be actual or imminent.
2. Its effects must involve the whole nation
3. The continuance of organised life in the community must be threatened
4. The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

The ECtHR in the case of *Lawless v. Ireland*,[5]defined a "public emergency" as:

A "danger or crisis" that is

i. Present or imminent,
ii. Exceptional ,
iii. Concerns the entire population,
iv. Constitutes a "threat to the organized life of the community."[6]

3. The UN Conventions and Standards for Declaration of State of Emergency as Counter- Terrorism Measure

The proclamation of a state of emergency by a nation is regulated by international law and international human rights law and its guiding principles because it signals the curtailment of certain civil liberties which. To safeguard and prevent excesses on the parts of state agents; international law puts in place certain minimum

[1]See for example, American Convention on Human Rights (art. 27) and the European Convention on Human Rights (art. 15).
[2]See Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) para. 2, <http://hrlibrary.umn.edu/gencomm/hrc29.html> accessed 2 March 2021.
[3]See Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 3,< http://hrlibrary.umn.edu/gencomm/hrc29.html>accessed 2 March 2021.
[4]Greece v. UK, Application No157/1954-58. <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp>accessed 2 March 2021.
[5]Lawless v. Ireland, (Lawless Court) 3 Eur.Ct. H.R. (ser. A) (1961) (No. 3) (Court), at 56.
[6] Lawless, Ibid

standards by which the conduct of a state in times of emergency may be monitored, restricted or sanctioned. These measures as provided under Article 4 (1) – (3) of the International Covenant on Civil and Political Rights (ICCPR) are reviewed hereunder.

3.1 . The Normative Standards: Article 4 of the ICCPR: Setting the Standards for State of Emergency under International Human Rights Law

The ICCPR fails to describe what qualifies as "public emergency" or give an index of circumstances which would "threaten the life of the nation" to qualify as public emergency which raises the possibility of arbitrary invocation of Art 4(1) by states. Nonetheless the UN Human Rights Committee (HRC) of the United Nations which is charged with the task of implementing the ICCPR has furnished some comments[1]interpretations and decisions on this Article. This shall be the basis for distilling the best practices which has been accepted and acted upon by states as compliance with the precepts of article 4 (1) of the ICCPR

The GC29[2] sets the standard norms and procedure which every state must comply with before it can invoke article 4 (1) of the ICCPR namely:

a. Existence of a public emergency which threatens the life of that state

The GC29 notes that while not every public disturbance qualifies as a public emergency, situations such as armed conflicts be it international or non-international will however be deemed as public emergencies.[3] Thus the situation must be so serious as to constitute a threat to the life of the state. By several communications the Committee had considered this situation in and decided that not every natural catastrophes, mass demonstration or industrial action, strike or riots constitutes a life threatening situation. For example the Committee struck down the constitutional provisions of the United Republic of Tanzania declaring a state of emergency on the grounds that they are too broad and that the extraordinary powers of the President in an emergency are too sweeping".[4]

A similar provision contained in the European Convention on Human Rights (ECHR), has also been interpreted by the European Court of Human Rights (ECtHR) in the case of *Lawless v. Republic of Ireland* where the European Court on Human Rights held that "a public emergency ….is an exceptional and imminent crisis affecting the general public as opposed to particular groups which threatens the organised life of the community". Furthermore in the Greek Case the ECtHR formulated four criteria by which a nation may determine if a public emergency has arisen namely that the emergency must be actual or imminent, must involve the nation as a whole and not a segment of it, the emergency must threaten the organised life of the community and it must be exceptional in such a way that the measures and restrictions permitted under the treaty are inadequate to deal with it.

b. The proclamation of a state of emergency.[5]

The principle of proclamation is essential for the purpose of legality of the action as the GC29 notes that the proclamation of a state of emergency is dependent on whether or not the constitutional provisions of the particular state allows for same.

c. The principle of Non Derogability of certain rights

The ideal of non derogability of certain rights finds basis on both the concept of the customary international law principle of *jus cogens* and certain international Conventions.

i. The Principles of Jus Cogens and Non Derogable rights

Universally accepted as a customary international norm, *jus cogens* connotes rights which can never be derogated from by any state at any time not even it times of public emergencies, state of war or such human security threatening situations. Whenever the exercise of state sovereignty will operate to incur loss of respect and promotion of human rights, international law steps in to prevent such decision by invoking the letters of the *jus cogens*. *Jus cogens* is thus a legal method to override state prerogative to decide when to respect or dishonour human rights such.

The principle of *Jus Cogens* has its roots in the tenets of natural law postulation of universal values. The first legal restatement of the principle of *jus cogens* can be found in the provisions of article 53 of the Vienna Convention on the Law of Treaties, (VCLT)[6] which defines the jus cogens as follows:

[1]The UNHRC General comment 5 of 1981 has since been replaced by the general comment 29 of 2001

[2]See UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: https://www.refworld.org/docid/453883fd1f.html [accessed 15 January 2020] hereinafter 'UNHRC GC29 of 2001'

[3]UNHRC GC29 of 2001, paragraph 3.

[4] UN doc. *GAOR*, A/48/40 (vol. I), p. 43, para. 184, and p. 44, para. 188; see *C. Salgar de Montejo v. Colombia* (Views adopted on 24 March 1982), UN doc. *GAOR,* A/37/40, Cited in 'Administration of Justice during States of Emergency' <https://www.ohchr.org/Documents/Publications/training9chapter16en.pdf >accessed 15 January 2020..

[5]UNHRC GC29 of 2001, paragraph 2.

[6]Vienna Convention on the Law of Treaties UNTS 18232. <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> accessed on 20 November 2020.

> *For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".*

The United Nations International Law Commission describes *jus cogens* as

> A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[1]

Some of the accepted peremptory rule of general international law is provided in a non-exhaustive list include: (a) the prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; and (h) The right of self-determination.[2]

Jurisprudence from international, regional and domestic courts and human rights commissions indicate the acceptance of the *jus cogens* as compelling laws from which no state is immune from. In *Michael Domingues v. United States* [3] where that Commission linked peremptory norms of general international law (*jus cogens*) to "public morality" and, more importantly, stated that they "derive their status from fundamental values held by the international community", noting that violations of *jus cogens* "shock the conscience of humankind."

ii. International Conventions and Non-Derogable Rights

The notion of non-derogability of the peremptory norms even in the face of public emergency is a feature of numerous international conventions. First is the International Covenant on Civil and Political Rights (ICCPR). Article 4(2) of the CCPR provides that no derogation are permitted from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18. Thus the right to life[4], right to humane treatment[5], freedom from criminal ex post facto laws[6], freedom from slavery[7], from discrimination on the basis of race, colour, sex, language, religion or social origin[8], freedom from imprisonment for civil debt[9], right to legal person-hood[10] and freedom of thought, religion and conscience.[11]

Second, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides that the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment[12] is non-derogable. Third, the Convention on the Prevention and Punishment of the Crime of Genocide[13], prohibits genocide even times of public emergency.[14] Fourth, the Geneva Convention No. IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[15] Fifth is the Rome Statute of the International Criminal Court (Rome Statute) [16]prohibits war crimes[17] and crimes against humanity even in

---

[1] UN-ILC /10 GE.19-13883 Chapter V: Peremptory norms of general international law (jus cogens), 141 <https://legal.un.org/ilc/reports/2019/english/chp5.pdf> accessed 3 December 2020.
[2] See UN-ILC A/74/10 GE.19-13883, 147 Annex I.
[3] Case 12.285, Inter-American Commission on Human Rights, Report No. 62/02 of 22 October 2002, para. 49). See also European Court of Human Rights in Al-Adsani v. the United Kingdom, Application no. 35763/97, Judgment of 21 November 2001, Kaunda and Others v. President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa intervening as Amicus Curiae) 2005 (4) SA 235 (CC); Mann v. Republic of Equatorial Guinea, Case No. 507/07, Judgment of 23 January 2008, High Court of Zimbabwe, [2008] ZWHHC 1.
[4] ICCPR, Art. 6.
[5] ICCPR, Art. 7.
[6] ICCPR, Art. 1.5
[7] ICCPR. Art. 8.
[8] ICCPR, Art. 4, Art. 16.
[9] ICCPR, Art. 11.
[10] ICCPR Art. 16.
[11] ICCPR, Art. 18; See also para 7 of the UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11,<https://www.refworld.org/docid/453883fd1f.html >accessed 15 January 2020].
[12] CAT (Art. 2(2))
[13] Convention on the Prevention and Punishment of the Crime of Genocide
Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948Entry into force: 12 January 1951, in accordance with article XIII https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx> accessed 28th November 2020.
[14] Genocide Convention , Art 1.
[15] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; <http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf>accessed 28th November 2018.
[16] Rome Statute of the International Criminal Court https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> accessed 28 November 2020.
[17] Geneva Convention No.IV, Arts. 146 and 149.

times of public emergency.[1]

d. The Principle of Proportionality and Necessity

The measures adopted must be strictly required by the exigencies of the situation. The GC 29 agrees that while certain right are non-derogable explicitly by the provision of Article 4(2), the measures taken to suspend the other (derogable) rights must be proportionate to the exigencies of the circumstances.[2]In other words, "this condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures made pursuant to such proclamation.[3] Further not only must the derogation be exigent but also the measures adopted must meet the exigency of the situation. The Committee establishes a legal obligation for states to limit all derogations to measures that are required by the exigencies of the situation. To fulfil this requirement states must state the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Unarguably therefore states must provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.

e. The Principle of Consistency or Compatibility with international norms

The principle of consistency and compatibility with international norms requires that measures adopted in times of public emergency must be consistent with international norms and other obligations under international law.[4]Under international human rights law states become bound by the obligations imposed by a Convention once such a state has signed; meaning that the state has approved the Convention; and then ratified; meaning that the State recognises and accepts the full legal import of its obligation under the specific treaty or convention. International human rights law admits that States can also avoid their international obligations in either of two ways. These are where a State Party has made a specific reservation to the provisions of the Convention[5] and where a State Party has a valid reason for derogation of rights protected by a Convention, for example where the state declared a state of emergency, suspending certain rights or guarantees under an international Convention.[6]Thus where none of these exceptions apply, states who are party to the international standards are required to put in place, measures within their domestic legislation which will not be against their obligations as set by Conventions .

f. The Principle of Non Discrimination

According to article 4(1) of the ICCPR, the measures adopted must not be discriminatory of any portion of the nation solely on the ground of race, colour, sex, language, religion or social origin. The UNHRCGC 29 elaborates that although article 26 and the other provisions of the ICCPR related to non-discrimination (namely articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4(2) of the ICCPR there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.[7]

g. The Principle of Official Notification:

By the provisions of article 4(3) of the ICCPR state parties are obligated to give an official notification when they resort to their power of derogation. Thus a state party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. The UNHRCGC29 further explains that such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. Further the principle of official notification extends to when the measures are expanded or extended and when the state of emergency is lifted.

4. Terrorism as a Public Emergency in Nigeria: Applying the Standards of Article 4 of the ICCPR

4.1. The principle of Existence of a public emergency which threatens the life of that state

Unlike the ICCPR Article 4, the Constitution of the Federal Republic of Nigeria by the provision of S. 305(3) explicates the meaning of state of emergency within the Nigeria context and states that:

The President shall have power to issue a Proclamation of a state of emergency only when— (*a*) the Federation is at war;

[1]Rome Statute, Art. 7.
[2]UNHRC GC29 of 2001, paragraph 4.
[3]UNHRC GC29 of 2001, paragraph 5.
[4]UNHRCGC29 of 2001, paragraph 9.
[5]Subject to the restriction that such reservations must not be against the objective of the Convention.
[6]Subject to fulfilling the conditions of Art 4 of the ICCPR
[7] See UNHRCGC29, paragraph 8.

(*b*) The Federation is in imminent danger of invasion or involvement in a state of war;
(*c*) There is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security;
(d). there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger;
(*e*) There is an. occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation;
(*f*) There is any other public danger which clearly constitutes a threat to the existence of the Federation; or
(*g*) The President receives a request to do so in accordance with the provisions of subsection (4) of this section.

4.2. Terrorism as a Public Emergency in Nigeria

Terrorism clashes most violently with the natural dictates of human rights principles. It defies all respect for all categories of human rights. Terrorism at all levels has been employed as instrument of wanton destructions of lives and properties. Terrorism therefore poses a great threat to the individual lives and collective well-being of a nation's life and a challenge to its fiduciary duties of protection of the life of its citizenry. Since 2009, Nigeria has been engaged in a long running battle with the Islamist sect; *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad*[1]nicknamed *Boko Haram* (BH).[2] The acts of violence perpetrated by this so called 'Islamist' sect continue to have diverse impacts on the Nigerian nation.

The direct and indirect negative impacts of *Boko Haram* terrorism on the Nigerian state has been quantified in not only irreplaceable loss of human lives (human capital), but also in huge loss of properties, finance and investment. A review of reports from the Institute for Economics and Peace, publishers of the Global Terrorism Index (GTI) revealed that in 2013, for instance *Boko Haram* was the second deadliest terror group in the whole world. In that year alone *Boko Haram* was responsible for 1587 deaths of mostly defenceless non-combatant men, women and children.[3] In 2014, the number of fatalities tripled to 7512 death and *Boko Haram* became the deadliest terrorist group in the whole world,[4] an ignominious lead which it maintained in 2015 with 6644 deaths.[5] The year 2016, witnessed a slight decline in the number of deaths resulting from *Boko Haram* terrorism with a total of 1,832 fatalities. Yet Nigeria ranked the third worst hit state in the globe.[6]

Even as killings committed by *Boko Haram* terrorism dwindled yet again in 2017, there was a resurgence in Fulani herdsmen and farmers conflicts. Nigeria maintained its mortifying third rank in the orb with 1,532 casualties resulting from both *Boko Haram* terrorism and Fulani herdsmen and farmers conflicts.[7] The year 2018, opened into a new spike in Boko Haram terrorist activities after the lull witnessed in 2016 and 2017. With more than one hundred additional mortality than in 2017, Nigeria ranked again as number three and was signalled as a very high impact states of terrorism by the GTI coming after Afghanistan (1st) and Iraq (2nd) with Syria the 4th position.[8]Ironically, while the morbidity impacts of terrorism lessened across the world in 2019, an increase in morbidity rate was the case in Nigeria.[9] The 2020 GTI recorded an increase in the loss of lives occasioned by *Boko Haram* terrorists, Fulani herdsmen and kidnappers to 2,040.[10]

---

[1] Meaning 'People Committed to the Propagation of the Prophet's Teachings and Jihad"

[2]Boko Haram literally means "western education is sinful". 'Boko' in the Hausa language is a generic term associated with anything related with the West. Makaranta Boko is the Hausa equivalent for Western Education. Boko Haram. The sect protested the allegation that they are against western education and went on to clarify that they are against western civilisation and culture that is contrary to the provisions of the Glorious Quran and traditions of the Islamic faith as laid down in the *ahadith*. See MallamSani Umar, 'Boko Haram Resurrects, Declares Total Jihad' Vanguard Nigeria, 14 August 2009. The Boko Haram sect is a violent so called jihadist terrorist organization based in the Northeast of Nigeria with strong links with Al Qaeda. Since 2009 till date, the group has wrought substantial havoc on Nigerians and foreigners alike by its wanton destruction of lives and properties. <http://www.vanguardngr.com/2009/08/boko-haram-ressurects-declares-total-jihad/>accessed 15 August 2020; See Christopher Bartolotta, 'Terrorism in Nigeria: The Rise of Boko Haram', (World Policy Blog, 19 September 2011) <http://www.worldpolicy.org/blog/2011/09/19/terrorism-nigeria-rise-boko-haram> accessed 10 February 2020; W. Hansen, Boko Haram: 'Religious Radicalism and Insurrection in Northern Nigeria" (2015) Journal of Asian and African Studies: 1–19. DOI: 10.1177/0021909615615594.

3See Institute of Economics and Peace, Global Terrorism Index, 2014 Report, "*Measuring and Understanding the Impact of Terrorism*" <http://economicsandpeace.org/wp-content/uploads/2014/11/Global-Terrorism-Index-2014.pdf> accessed 14 January 2020.

[4]See Institute for Economics and Peace , Global Terrorism Index,2015 Report "*Measuring and Understanding the Impact of Terrorism*", <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf> accessed 14 January 2020.

[5] See Institute for Economics and Peace, *Measuring and Understanding the Impacts of Terrorism* 2016, GTI <http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>accessed 14 January 2020.

[6] See Institute for Economics and Peace, *Measuring and Understanding the Impacts of Terrorism* 2017, GTI <http://economicsandpeace.org/wp-content/uploads/2017/11/Global-Terrorism-Index-2017.2.pdf>accessed 14 January 2020.

[7] See Institute for Economics and Peace, *Measuring and Understanding the Impacts of Terrorism* 2018, GTI <https://www.economicsandpeace.org/wp-content/uploads/2020/08/Global-Peace-Index-2018-2-1.pdf>accessed 14 January 2020.

[8] See Institute for Economics and Peace, *Measuring and Understanding the Impacts of Terrorism* 2019, GTI <https://www.economicsandpeace.org/wp-content/uploads/2020/08/GTI-2019web.pdf >accessed 14 January 2020.

[9] Save for Afghanistan which maintained its lead position, the rates of morbidity occasioned by terrorism fell even in Iraq and Syria.

[10] See Institute for Economics and Peace, *Measuring and Understanding the Impacts of Terrorism* 2020, GTI https://visionofhumanity.org/wp-content/uploads/2020/11/GTI-2020-web-1.pdf accessed 2 October 2021.

Terrorism definitely impacted negatively on Nigeria on many counts. First, the economic loss occasioned by terrorism and consequent loss in Foreign Direct Investment due to *Boko Haram* terrorism was put at US$6.0 billion as at 2016.[1] Second, the cost of countering terrorism is exorbitant. For example, Nigeria is projected to have spent about US$9.4 billion to containment of terrorism in the year 2019, the highest in the African region.[2] Third, the displacement of agrarian communities North East of Nigeria resulted into food scarcity first in that geo-political zone and then food insecurity which still plague Nigeria till date.[3] Fourth and certainly not the least, the repercussions on human rights are humongous. Terrorists attacks violate the basis of all human rights, as it often targets the destruction of lives and properties.

Although *Boko Haram* terrorism attacks were concentrated in the North East of Nigeria and especially in Adamawa, Borno and Yobe states, the palpable negative impacts of *Boko Haram* terrorism reverberated all over Nigeria. Thus the direct and indirect negative impacts of *Boko Haram* terrorism on the Nigerian state has been quantified in not only irreplaceable loss of human lives (human capital), but also in huge loss of properties, finance and investment.

We submit that the pervasive nature of the breach and violation of human rights by acts of terrorism clearly puts terrorists' attacks in the category of circumstances which justify a declaration of state of emergency.

We submit further that the Nigerian state was justified in its construing of the situation as a state of emergency in the states under study and that the declaration of state of emergency is consistent with both national and international norms.[4]

4.3. The proclamation of a state of emergency

In the case of Landinelli *Silva and Others v. Uruguay,*[5] the Human Rights Committee considered this situation and decided that to fulfil this requirement. A concerned state must explicate the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Three requirements are therefore expected to be complied with here namely: Duration of the measures, the geographical location of the states of emergency and the material scope or measures that are to be enacted and put in place by the government in the realisation of her aim of achieving normalcy.

Section 305(1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN'99) empowers the Nigerian President to declare state of emergency by means of Proclamation. In her determination to curb the menace of terrorism, on 30 January 2012, the then President Goodluck Ebele Jonathan acting under his constitutional powers declared a state of emergency for six months in some local government of four states of the North East geo-political zone, namely, Adamawa, Borno, Jigawa and Yobe states.

The Proclamation lapsed in June 2012.[6] On 12 June 2012, the President established Joint Task Force for Operation Restore Order in the North East.[7]

The intensity and frequency of terrorists; attacks compelled the President to declare yet again state of emergency in three states namely: Adamawa, Borno and Yobe states on 20 May 2013.[8] Outstandingly, however the official gazette of the Federal Government of Nigeria proclaiming the commencement of the second declaration of the state of emergency did not state the duration of the state of emergency.

This we hold is a contravention of required standard as the Committee expressed a similar concern in the case of the Syrian Arab Republic, where "Legislative Decree No. 51 of 9 March 1963 declaring a state of

[1] Institute for Economics and Peace, *Measuring and Understanding the Impacts of Terrorism* 2016, GTI <http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>accessed 14 January 2020.

[2] See Institute for Economics and Peace, *Measuring and Understanding the Impacts of Terrorism* 2020, GTI <https://visionofhumanity.org/wp-content/uploads/2020/11/GTI-2020-web-1.pdf.> p. 37, accessed 2 October 2021.

[3] See The United Nations Food and Agriculture Organization, Tackling food insecurity in Nigeria https://www.fao.org/resilience/news-events/detail/en/c/1256858 accessed 11 November 2021.

[4] See D. Scott, 'The Systematic Failure to Interpret Article IV of the ICCPR: Is there A Public Emergency in Nigeria? American University International Law Review, Volume 15 | Issue 5, Article 5, 2000, 1164-1209<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1283&context=auilr&sei-redir=1&referer >accessed 20 November 2020.)

[5] *Landinelli Silva and Others v. Uruguay,* Communication No. R. 8/34, *J. Landinelli Silva and Others v. Uruguay* (Views adopted on 8 April 1981) in UN doc. *GAOR*, A/36/40, p. 132, para. 8.3. Communication No. R. 15/64, see also *C. Salgar de Montejo v. Colombia* (Views adopted on 24 March 1982), UN doc. *GAOR,* A/37/40, Cited in 'Administration of Justice during States of Emergency' <https://www.ohchr.org/Documents/Publications/training9chapter16en.pdf> accessed 15 January 2020.

[6] See the Constitution of the Federal Republic of Nigeria, 1999, Cap. C20, LFN 2004, S. 305;
M.T. Ladan, "Human Rights in Counter-Terrorism Environments: With Particular Reference To Nigeria" A Paper delivered at A Train The Trainer Course On Human Rights in Military Operation and Civil Military Co-operation Organized By The Office Of The National Security Adviser And EU Delegation Technical Assistance To Nigeria On CIMIC On 13th – 20th October 2014.

[7] M.T. Ladan, "Human Rights in Counter-Terrorism Environments: With Particular Reference To Nigeria" A Paper delivered at A Train The Trainer Course On Human Rights in Military Operation And Civil Military Cooperation Organized By The Office Of The National Security Adviser And EU Delegation Technical Assistance To Nigeria On CIMIC On 13th – 20th October 2014.

[8] See State of Emergency (Certain States of the Federation), Proclamation, 2013; Federal Government Gazette No. 27 of 20th May 2013. (Government Notice No 84); Emergency Powers (General Regulations), 2013, Federal Government Gazette No. 28 of 20th May 2013. (Government Notice No 85).

emergency has remained in force ever since that date, placing the territory of the Syrian Arab Republic under a quasi-permanent state of emergency, thereby jeopardizing the guarantees of article 4".[1]The implication of this state of affair is that presently Adamawa, Borno and Yobe states are in perpetual state of emergency contrary to Article 4 of the ICCPR.

However, the geographical limits were clearly spelt out (in the Schedule to the Proclamation) as affecting three states in the N and worth being the area of this study, Adamawa, Borno and Yobe states and the material scope of the state of emergency are as contained in the Emergency Powers (General Regulations), 2013, Federal Government Gazette No. 28 of 20th May 2013. (Government Notice No 85).[2]

We submit that the proclamation by the then President Goodluck Jonathan was legitimate it being legally guaranteed by the constitution and having proceeded from the legitimate authority who is vested with the power to invoke same.[3]

4.4. The principle of Non Derogability of certain rights

By its Constitution and other domestic laws, Nigeria guarantees respect for civil and political rights and provides for the justiciability of same.[4]Nigeria by the provision of S. 45(1) however places limitations on the rights to private and family life, [5]thought conscience and religion,[6] freedom of expression and the press,[7] peaceful assembly and association[8] and the right to freedom of movement[9] in the interests of the public or for the purpose of protecting the rights of others. S. 45(2) of the 1999 CFRN however enacts the derogation clause in times of public emergencies and provides thus:

> An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any such act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency;
> Provided that nothing in this section shall authorise any derogation from the provisions of section 33 of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of section 36 (8) of this Constitution.

The provision of S.45 (2) is not explicit as to the rights which are non-derogable in times of emergencies. While the rights to life (S.33) and the right to personal liberty (S.35) were singled out as rights which may be derogated from by a valid Act of the National Assembly, the proviso to S.45 (2) recapitulates by saying that the right to life is not to be derogated from except when death occurs from acts of war. Again the proviso refers to the right to freedom from *ex post facto* laws and retroactive punishment (S. 36 (8)) as being non derogable.

While the intention of the drafters of the Constitution is not clear as to which rights are derogable and which are not; what is clear from a community reading of S.45 (1), S.45 (2) and proviso can be highlighted as follows:

i. Rights guaranteed under S. 37- 41 are limited in nature and are restricted even in time of peace leading to the conclusion that they are also derogable in times of public emergency.
ii. All rights guaranteed by the constitution may be derogated from in times of public emergency by a valid Act of the National Assembly.
iii. Specifically the right to life is derogable where death occurs as an act of war.
iv. Categorically, the right to personal liberty as mentioned in conjunction with the right to life may be derogated from in time of public emergency by a valid Act of the National Assembly.
v. Significantly, the right to freedom from *ex post facto* laws and retroactive punishment is non derogable.

From the above highlights we submit that the standard of non derogability of certain human rights as laid down by the standard setting Article 4 has not been complied with. The rights to the right to life,[10]the right to human dignity, physical integrity, freedom from torture, inhuman or degrading treatment,[11] freedom from slavery,[12]right to freedom from retroactive punishment,[1] right to equality before the law,[2] right to freedom of

[1] UN doc. *GAOR*, A/50/40 (vol. I), p. 69, paras. 429-430.
[2] See State of Emergency (Certain States of the Federation), Proclamation, 2013; Federal Government Gazette No. 27 of 20th May 2013. (Government Notice No 84); Emergency Powers (General Regulations), 2013, Federal Government Gazette No. 28 of 20th May 2013. (Government Notice No 85).
[3] The legality of proclamation of state of emergency in Nigeria has been canvassed in Williams v. Majekodunmi (1962) All NLR (Pt. 1) 327 at 335, Abubakar v. Attorney – General, Federation (2008) All FWLR (pt. 44) 47 at 908 paras A –C and a host of other.
[4] See the Constitution of the Federal Republic of Nigeria, 1999, Cap. C20, LFN 2004, S. 33 -44
[5] CFRN, S.37.
[6] CFRN, S.38.
[7] CFRN, S.39.
[8] CFRN, S.40.
[9] CFRN, S.41.
[10] ICCPR, Article 6.
[11] ICCPR, Art. 7.
[12] ICCPR, Art. 8.

thought, conscience and religion[3] which are expressed as non-derogable under the ICCPR are derogable under the Nigerian Constitution.

This inconsistency and blatant disregard for international norm has been the subject of concern to the Human Rights Committee and the subject of Reports and Recommendations on Nigeria issued by the Committee. First is the Committee comment and recommendation of 1 April 1996 [4]wherein members of the Committee expressed their total disenchantment with the state of human rights in Nigeria particularly on the spate of extra judicial killings, unlawful detentions and torture which was prevalent in Nigeria during the regime of General Sani Abacha.

A recent report and review on Nigeria by the Human Rights Committee was issued on 4 July 2019.[5] Featuring a detailed interview session with the Nigerian Permanent Representative of Nigeria to the United Nations Office at Geneva, members of the Committee experts expressed concerns about the lack of respect for the international norms and the resulting overreaching and extreme applications of the Nigerian counter-terrorism framework. The Committee recommended that since Nigeria had not indicated any reservations to the ICCPR it must take necessary steps to ensure her compliance with the norms enshrined therein.

We submit that not only has Nigeria refused or failed to comply with the principle of non-derogability of human rights under the ICCPR, Nigeria is also in breach of her international obligation under the African Charter on Human and Peoples' Right (hereinafter ACHPR). Interestingly, while the ACHPR allows limitation of rights (also called draw back clauses) it does not recognise derogation of any right. While a host of scholars have contended that the lack of a derogation clause in the ACHPR is a minus,[6] others have argued that the non-inclusion of a derogation clause in the ACHPR was a deliberate act and a right step in the right direction as it shows a positive trend in the development of human rights norms in the African region.[7]

Albeit, most state parties by their constitution permit derogations of rights in times of peace and in times of public emergencies.[8] The jurisprudence of the African Commission on Human Rights (hereinafter African Commission) however reveals its commitment to the spirit of its tenets and have unambiguously shown that while rights may be limited, declaration of public emergency and derogation of rights consequent to same are not

[1] ICCPR, Art. 15.
[2] ICCPR, Art. 16.
[3] ICCPR, Art. 18.
[4] See United Nations Human Rights Committee Begins Consideration of Nigeria's Report (Press Release) HR/CT/467 of 1 April 1996 <https://www.un.org/press/en/1996/19960401.hrct467.html> accessed 15 December 2020.
[5] See Human Rights Committee reviews the situation of Civil and Political Rights in Nigeria <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24792&LangID=E >accessed 15 December 2020.
[6] See Heyns C "The African regional human rights system: In need of reform?" (2001) 1 African Human Rights Law Journal155; Ouguergouz F. The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable development (2003); Sermet L "The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion" (2007) 7 African Human Rights Law Journal142; Murray R. The African Commission on Human and Peoples' Rights and International Law (2000); Allo A K "Derogation or limitation? Rethinking the African human rights system of derogation in light of the European system" (2009) 2 Ethiopian Journal of Legal Education. Cited by Abdi Jibril Ali " Derogation from Constitutional rights and its Implication under the African Charter on Human and Peoples' Rights" <http://www.ldd.org.za/images/stories/Ready_for_publication/ali_abdi_article.pdf >accessed 15 January 2020.
[7] See Abdi Jibril Ali " Derogation from Constitutional rights and its Implication under the African Charter on Human and Peoples' Rights" <http://www.ldd.org.za/images/stories/Ready_for_publication/ali_abdi_article.pdf>
[8] The Constitution of Burkina Faso, adopted on 2 June 1991, promulgated on 11 June 1991, amended on 27 January 1997 and on 11 April 2000, art 58; Constitution of the Republic of Cameroon adopted on 18 January 1996, amendment to the Constitution of 2 June 1972, art 9; Constitution of the Central African Republic, adopted on 28 December 1994, promulgated on 14 January 1995, art 29; Constitution of the Republic of the Congo January 2002,, art 131; Constitution of the Republic of Cote d'Ivoire, adopted on 24 July 2000, art 48; Constitution of the Republic of Equatorial Guinea, adopted on 17 January 1996, Item 41; Constitution of the Gabonese Republic, adopted on 26 March 1991, amended on 22 April 1997, art 25; Fundamental Law of the Second Republic of Guinea, approved on 23 December 1990, art 74; The Constitution of the Republic of Mali, art 49; Constitution of the Fifth Republic of Niger, adopted on 18 July 1999, promulgated on 9 August 1999, art 54 & 86; Constitution of the Republic of Senegal, adopted on 7 January 2001, art 69; Constitution of the Fourth Republic of Togo, adopted on 27 September 1992, promulgated on 14 October 1992, art 94; Constitution of the Republic of Madagascar, adopted on 19 August 1992, amended in 1995 and 1998, art 59; Constitution of Djibouti, approved on 4 September 1992, art 62; Cited by Abdi Jibril Ali " Derogation from Constitutional rights and its Implication under the African Charter on Human and Peoples' Rights" <http://www.ldd.org.za/images/stories/Ready_for_publication/ali_abdi_article.pdf >accessed on 15January 2019;Constitution of the Republic of Seychelles, approved on 18 June 1993, amended by Act No 14 of 1996, art 41. See for example, The Constitution of the People's Democratic Republic of Algeria, adopted on 19 November 1976, and amended on 28 November 1996 and on 10 April 2002, art 91; Constitution of Mauritania, adopted on 12 July 1991, arts 39 & 71. However, the 1998 Constitution of Sudan authorizes derogation from constitutional rights under art 132. ; The Constitution of the People's Democratic Republic of Algeria, adopted on 19 November 1976, and amended on 28 November 1996 and on 10 April 2002, art 91.
Constitutional Law of the Republic of Angola, adopted on 25 August 1992, art 52; Constitutional Law of the Republic of Cape Verde, adopted on 25 September 1992, amended on 23 November 1995 and in 1999, art 26; Constitution of the Republic of Guinea-Bissau, adopted in 1984, amended in 1991, 1993, 1996, art 31; Constitution of the Republic of Mozambique, approved on 16 November 2004, art 72; Political Constitution of São Tomé and Príncipe, adopted on 5 November 1975, amended on 10 September 1990 through Law 7/90, art 18. Constitution of Mozambique, art 286. Art 52(2) of the Constitution of Angola, art 31(2) of the Constitution of Guinea-Bissau, and art 269 of the Constitution of Cape Verde contain an almost identical list of non-derogable rights.

in conformity with the ACHPR's standard.[1]
We submit that Nigeria cannot hide under the provision of S. 12 of the constitution as the ACHPR is a treaty which has been transformed into Nigerian domestic law by a valid Act of the National Assembly; the African Charter on Human and People's Right (Ratification and Enforcement) Act.[2]

4.5. The Principle of Proportionality and Necessity
The Human Rights Committee has observed that the principle of strict proportionality is "a fundamental requirement for any measures derogating from the Covenant" and that it is a requirement that relates "to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency".[3]

We submit that as to the material scope of the measures, the principle of proportionality and necessity has to do with the measures put in place in times of public emergencies. Crucially, the material scope of the measures are the rules regulating the conduct of state agents during public emergencies and to safeguard and prevent excesses on the parts of state agents. This principle regulates how states as fiduciary of her citizens recognise and protect human rights of her citizen by ensuring that measures put in place in times of public emergencies are designed to resolve and not escalate the conflict and are intended to return the State back to normalcy. Put in other words measures adopted under this principle must not annihilate human rights but be complementary to protection of human rights.

By a Presidential broadcast upon the proclamation of the State of Emergency, the President directed the Chief of Defence Staff to deploy more troops to the states under emergency and that such troops shall have powers to take all necessary action which may " include:

a. Imposition of Dusk to Dawn Curfew
b. Search with or without search warrants
c. Arrest and detention of suspects
d. Taking possession of any premises, buildings or structure in use by terrorists or for terrorists' purposes.
e. Lock down of areas seen as operation [4]

We must point out the above strategies by which it hoped to curb the menace of terrorism, were enacted into Nigerian Legal framework for combating terrorism. We submit that the above can be summed up to three of the strategies which are germane to the discourse on proportionality of Counter terrorism measures as they bear direct relevance and impact on the rights to personal dignity and personal liberty of the Nigerian residents of the area under study. The strategies are:

a. Imposition of Dusk to Dawn curfew

The imposition of the Dusk to Dawn Curfew curtails the right to personal liberty of residents of the areas in which it is declared. Be that as it we submit that to the extent which terrorism has been construed as a public emergency, the imposition of dusk to dawn curfew are reasonably justified in such state of emergency. We therefore align ourselves with the view of the Committee that the imposition of a state of emergency is an indication that law, order and indeed respect for human rights have broken down and that the situation calls for measures designed to restore normalcy such that human rights may yet again be respected.[5]

While it seems paradoxical to attempt to protect human rights by violating some human rights; a situation which is akin to righting a wrong with another wrong, we recall the postulations of Thomas Hobbes in his social contract theory that men submitted their rights to the states such that such rights may be collectively protected by the state.[6]

Further, we agree that the restriction on the freedom of movement of citizen between the dusk and dawn of each day is necessary to protect them from the marauding *Boko Haram* terrorists and also a way to clear the 'field' in the event of likely exchange of fire between the terrorists and the state agents.[7]

While we submit that the principle of necessity is satisfied by this measure, we however query its proportionality in line with allegations of mass abuse of human rights by state agents as has been revealed by the literature in terms of enforcement of this measure. There are allegations that the hours between dusk and dawn have been construed subjectively by Nigerian law enforcement and security agents. On certain days 'dusk' to

[1] See for example J*awara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999), *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004), para 78; *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004); Media Rights Projects & Ors v. Nigeria Comm. No. 224/98 (2000).
[2] Cap. A 10 LFN, 1990.
[3] General Comment No. 29, in UN doc. *GAOR*, A/56/40 (vol. I), p. 203, para. 4.
[4] See Presidential Broadcast of 14 May 2013, The Guardian, Wednesday, 15 May, 2013.
[5]General Comment No. 29, in UN doc. *GAOR*, A/56/40 (vol. I), 206, para. 8.
[6] See Thomas Hobbes, "Leviathan", 1651, Republished by Forgotten Books, 2008 <https//.www, forgottenbooks.org..>accessed 20 November 2020.
[7] Human Rights Watch World Report, 2018, Section on Nigeria; 391-398. <https://www.hrw.org/sites/default/files/wr2018_web.pdf, >> accessed 20 November 2020.

state agents may mean 7pm while on other days may be later or earlier. There are allegations that targeted persons were sometime detained before dusk and then accused of having violated the dusk to dawn curfew thus leading to arbitrary arrest and unlawful detention of such innocent citizens.[1]

According to a Human Rights Watch report on Nigeria, in Damaturu, Yobe state, a military detention camp code named 'Alpha Sector' said to be housing the high risk suspects. The detention camp is also nicknamed 'Guantanamo' in deference to the notorious torture centre established by the United States Government in Guantanamo Bay, Cuba. The camp is believed to have housed not less than 1,000 of undocumented detainees who were held under untold tales of horrific, torturous and terror- laden counter terrorism strategies some of which are routinely subjected to extra judicial killings when all efforts to get incriminating evidence from them fail.[2]

Amnesty International's report of 2018 disclosed that in Yola, the Adamawa state capital, the 23 Brigade Barracks housed some of the suspects of Boko Haram terrorism while a few suspects. Amnesty International estimated that between 2009 and 2017 a total of 20, 000 persons must have been subjected to prolonged detention without trial at the various military detention centres.[3]

There are also large scale allegations of torture employed by the MJTF against terror suspects or detainees.In *FRN v. Murktar Ibrahim*[4] the defendant was arraigned on a five count charge of diverse terrorism offences. The defendant pleaded not guilty to all counts. At the trial, the prosecution sought to rely on four 'confessional statements' ; Exhibits "6", "7", "8" and "9" allegedly made by the defendant. The defendant who testified for himself however rebutted the voluntariness of the said statements and averred that the statements were obtained from him under duress, coercion, torture and intimidation while he was in the custody of the officers of the State Security Services (SSS).[5] The court found that the documents were indeed made by the defendant at "'gun point' in line with the ready made statement provided by the State Security Services officer.[6] The court therefore resolved that the prosecution failed to discharge the burden of proof placed on it by S. 135 (1) of the Evidence Act and accordingly discharged and acquitted the defendants on all counts.[7]

We submit that the large scale allegation of torture and inhumane treatment of terror suspects as reviewed above contradict Nigeria's international obligations to protect against contracted vide the UN Convention against Torture, which Nigeria ratified on 28 June 2001. The obligation requires states to prevent acts of torture or other ill-treatment and to eliminate defences such as 'superior orders,' 'public emergency' or other any other 'exceptional circumstances' in relation to such offences. Nigeria also ratified the optional protocol to the Convention against Torture on 27 July 2009 and has also signed into law the Anti-Torture Act in July 2019.[8]
We do not find the proportionality of this measure as justifiable in the case of Nigeria.

b. Investigation by Search without Warrant

The right to personal liberty implies freedom from "external coercion in the use of one's goods or faculties. It is the status of not being the property or chattel of another."[9] By its S. 35, the Nigerian constitution guarantees the right to personal liberty to the extent that they are restricted by the provisions of S. 35(1) (a-f) and also to the extent that they are derogable under S. 45 of same Constitution which we have submitted earlier contravenes the international standards set by the ICCPR vide Article 4.

Search without warrant constitutes one of the measures enacted by the TPA which potentially violates the right of citizen to use one's self or one's goods (properties) without any external coercion. While we agree that investigation is key to tracing terrorist's movements, cells, goods and finance, the imposition of search without warrant is not a constitutional provision and does not have a place in the administration of criminal justice system in Nigeria.

As a counter-terrorism measure, search without warrant is in the spirit of the 'ticking time bomb hypothetical case'.[10] The TPA provides for search without warrant where there is a verifiable urgency, or life is

[1] Human Rights Watch World Report, 2018, Section on Nigeria; pgs. 391-398. <https://www.hrw.org/sites/default/files/wr2018_web.pdf, >> accessed 20 November 2020.
[2] Human Rights Watch World Report, 2018, Section on Nigeria; pgs. 391-398, <https://www.hrw.org/sites/default/files/wr2018_web.pdf, >> accessed 20 November 2020.
[3] See Amnesty International, *Willingly Unable: ICC Preliminary Report and Nigeria's Failure to Address Impunity for International Crimes,* Amnesty International Report of December 10 2018. <https://www.amnesty.org/en/documents/afr44/9481/2018/en/>accessed 20 November 2020.
[4] Unreported Judgement of Hon Justice G.O. Kolawole of the Federal High Court of Nigeria, Abuja in Charge No. FHC/ABJ/CR/178/2012 delivered on the 26th day of November 2015. (Source: Federal Ministry of Justice, Abuja).
[5] Unreported Judgement of Hon Justice G.O. Kolawole of the Federal High Court of Nigeria, Abuja in Charge No. FHC/ABJ/CR/178/2012 delivered on the 26th day of November 2015. (Source: Federal Ministry of Justice, Abuja), page 54 of judgement.
[6] Ibid, page 56.
[7] *Ibid* pages 57-62 of the judgement.
[8] Anti -Torture Act, 2017 assented to and signed into law by President Muhammadu Buhari on the 20th December 2017, available http://placng.org/wp/wp-content/uploads/2018/01/Anti-Torture-Act-2017.pdf accessed 18 January 2020.
[9] See the dictum of Orojo J in *Oba Gabriel Orogie v. Attorney General of Ondo State* 1982, 3 NCLR, 349 at 355.
[10] See David Luban 'Liberalism, Torture and the Ticking Time Bomb', (2005) (91)*Virginia Law Review,* 1425-1461, 1437.< https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1163&context=facpub> accessed 2 March 2021;Jeremy Wisnewsky,

threatened, or in acting to prevent the commission of an offence; obtaining a warrant from the court would cause delay that may be prejudicial to the maintenance of public safety or order.[1] Law enforcement and security agencies are thus imbued with the power to enter any premises to search the premises or persons found in them. While the power endures we submit however that this power is subject to the limitation of necessity for reasonable suspicion and also to proportionality. Without such limitations, the power is manifestly prone to abuse and could lead to illegal, arbitrary and unlawful search of persons, premises and conveyances.

The arrest of a person upon reasonable suspicion of his having committed a criminal offence or to as may be reasonably necessary to prevent him from committing a criminal offence is justifiable and thus lawful. Arrest however becomes unlawful when it is not within the constitutional guarantee.[2] By same reasoning, detention of a person for bringing him before a court in for trial (subject to bail for bail able offences) or for the execution of the sentence or order of court in respect of a criminal offence of which he has been found guilty is also lawful. It may however become lawful and thus arbitrary in nature where it is not in accordance with the law and stands null.[3]

Under the TPA the powers of arrest and detention are vested in the law enforcement and security agencies. Arrest may be made while conducting a search (or at other times) as any person found on any premises or place or in any conveyance may be detained by the relevant law enforcement officer of any agency until the completion of the search or investigation under the provisions of the Act.[4]

The Act however seems to overreach the Constitution by the provision of S. 41 whereby it empowers any law enforcement agency to obtain an ex-parte order for the detention of a suspect for a period not exceeding 90 days with subsequent renewal(s) for similar period(s) until the conclusion of the investigation and prosecution of the matter.[5]

We submit that this provision fosters arbitrary and unlawful detention of persons which is inconsistent with the guarantee of the right to personal liberty as enshrined in section 35 of the 1999 Constitution as amended. Specifically, S. 35(4) provides that an arrested person shall be arraigned within a reasonable time.[6] Second, the constitution provides that arrested persons shall be tried within two months in the case of persons in custody and three months for a person who is on bail or be released either conditionally or unconditionally and without prejudice to further or other proceedings against him.[7] Again, although it has been held by the Supreme Court that the personal liberty rights of citizens stand subdued in the interest of national security,[8] it is clear that not only is the TPA inconsistent with the provision of S. 35 (4) and is thus null and void to the extent of its inconsistency, it also clashes violently with the provision of the ICCPR and the ACHPR on the inviolability of the rights to freedom from torture and inhumane treatment.

The UN Human Rights Committee has noted and commented on similar situations that the guarantees contained in article 9 (3) and (4) (the right to personal liberty) must be effectively enforced at all times, even in public emergencies threatening the life of the nation.[9] This has also been found upon in several communications involving arbitrary detention of persons under what is now called euphemistically called 'administrative detention'.[10]

The Committee also referred to a host of other Guidelines on minimum standards of detention conditions upon which detainees may be held even in times of emergencies.[11] Particularly, in *Chani v. Algeria*, the

'Hearing A Still Ticking time Bomb: A Reply to Bufacci and Arrigo' <https://www.academia.edu/2573114/Hearing_a_Still-Ticking_Bomb_Argument_A_Reply_to_Bufacchi_and_Arrigo> accessed 2 March 2021.

[1] S.39 as amended by substitution of Sections 24 of the 2011 Act.

[2] See Bobade Olutide & Ors v. Adams Hamzat & Ors 2016 LPELR-26047(CA)

[3] See Bobade Olutide & Ors v. Adams Hamzat & Ors 2016 LPELR-26047(CA)

[4] S.41 (3) As amended by substitution of Section 27 of the 2011 Act.

[5] S. 41 (1) as amended by substitution of Section 27 of the 2011 Act.

[6] Interpreted to mean one day where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day; and in any other case, a period of two days or such longer period as the court may deem fit in the circumstances of the case. See the Constitution of the Federal Republic of Nigeria, S. 35(5).

[7] See S. 35(4) of the constitution.

[8] See dictum of Muhammad JSC in Dokubo –Asari v. FRN 2007 12 NWLR (Pt. 1048), 320 at 329.

[9] See GC 29, paragraph 7.

[10] See comments/concluding observations of the Committee on Reports from Peru (1992), CCPR/C/79/Add.8, paragraph 10; Ireland (1993), CCPR/C/79/Add.21, paragraph 11; Egypt (1993), CCPR/C/79/Add.23, paragraph 7; Cameroon (1994), CCPR/C/79/Add.33, paragraph 7; Russian Federation (1995), CCPR/C/79/Add.54, paragraph 27; Zambia (1996), CCPR/C/79/Add.62, paragraph 11; Lebanon (1997), CCPR/C/79/Add.78, paragraph 10; India (1997), CCPR/C/79/Add.81, paragraph 19; Mexico (1999), CCPR/C/79/Add.109, paragraph 12.Cited in General Comment 29.

[11] Reference is made to reports of the Secretary-General to the Commission on Human Rights submitted pursuant to Commission resolutions 1998/29, 1996/65 and 2000/69 on minimum humanitarian standards (later: fundamental standards of humanity), E/CN.4/1999/92, E/CN.4/2000/94 and E/CN.4/2001/91, and to earlier efforts to identify fundamental rights applicable in all circumstances, for instance the Paris Minimum Standards of Human Rights Norms in a State of Emergency (International Law Association, 1984), the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the final report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (E/CN.4/Sub.2/1997/19 and Add.1), the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), the Turku (Åbo) Declaration of Minimum Humanitarian Standards

Committee took note of the author's allegations that he was arrested on 17 September 2009 and held incommunicado, without contact with the outside world, including counsel or his family for over seven days. The Committee held that his detention in an unknown location was not subject to the oversight of the prosecutor's office and found a violation of the author's rights to personal liberty even in times of public emergency. [1]

In the European regional court of human rights, despite "the unquestionably serious problem of terrorism in South-East Turkey and the difficulties faced by the State in taking effective measures against it", a similar measure which gave power to detain persons for up to seven days was shot down by the in *Aksoy v. Turkey.*[2]

The foregoing showcases allegations of abuse of the unlawful counter terrorism measures which resulted multifarious alleged violations of the rights to personal dignity and liberty by Nigerian state agents.

We conclude that these measures cannot be justified on the ground of necessity or proportionality to the exigencies of public emergencies under international standards.

The principle of consistency of measures with other international obligations of the state is germane to ensuring that states do not hide under public emergency (as allowed by Art. 4) to breach their other international obligations be it by the norms of another treaty or by the norms of international humanitarian law or other general principles of the law so long as they relate to protection of a human rights which is affected by derogation in times of public emergencies. The Committee mandates that every State party's periodic reports must account for and present information on her other international obligations to enable the Committee to consider whether such international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency are duly take into account of and are protected in times of public emergencies.[3] In other words, no state party may hide under public emergency as allowed under Article 4 of the ICCPR to breach her international obligations under another treaty, for example under the Child's Rights Convention.

Regional courts of human rights have also pronounced on the principle of consistency and are adamant in holding that a state of emergency does not permit a derogation from rights which though are derogable under Article 4 but are non derogable under other international treaty, for example the European Convention on Human Rights.[4]

We submit that Nigeria as a state party to many other treaties apart from the ICCPR, has not complied with her other international obligations as enshrined by other treaties. We have noted above that while Nigeria is a state party to the African Charter, Nigeria is in breach of her obligation as she fails to recognise the principle of non-derogability of human rights as ordained by the African Charter. We hold that Nigeria fails this test.

4.6. The Principle of Non Discrimination

The principle of equality and non-discrimination is the bedrock of both international human rights law and general international law. Thus any measure which seeks to derogate from the enjoyment of human rights must embed the principle of non-discrimination. Therefore any measure which discriminates between persons or groups of persons to whom the measures apply cannot stand under the provision of Article 4 and cannot be made to stand under any other treaty even when such a treaty does not expressly enshrine the non-discrimination rule. The Human Rights Committee noted that although the right to non-discrimination is not a non derogable right, it becomes enforceable however under the provision of Article 4 which mandates that measures introduced during emergency must not discriminate between persons on any basis whatsoever.[5]

The European Court of Human Right had cause to consider this question in the case of *Ireland v. United Kingdom*. The Irish government had argued that the anti-terrorism measures of arrest without warrant and administrative detention put in place in Ireland in the period of emergency between 30 March 1971 to March 1972 were targeted towards members of the Irish Republican Army (IRA) only and not directed (or if directed at all, it was to a lesser extent) to the 'Loyalist' troops who were also engaged in terrorist activities. Although the court did not find such discrimination in the circumstances of the case, it held that the requirement of non-discrimination must be observed at all times of emergency rule.[6]

(1990), (E/CN.4/1995/116).

[1] UN HRC DECISIONS, Case No. 2297/2013 Published 7 October 2016 From 1April 2015 to 3 April 2016 and the 114th, 115th and 116th sessions of the Committee (A/71/40https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f116%2f3&Lang=en accessed 15 January 2020.

[2] *Eur. Court HR, Aksoy v. Turkey, judgment of 18 December 1996, Reports le 4tic1996-VI*, p. 2281, para. 71, and p. 2282, para. 77.

[3] UN GC 29, paragraphs 9 and 10

[4] See Eur. Court HR, *Lawless Case* (Merits), judgment of 1 July 1961, Series A, No. 3, p. 60, paras. 40-41;Eur. Court HR, *Case of Ireland v. the United Kingdom,* judgment of 18 January 1978, Series A, No. 25, p. 84, para. 222; Eur. Court HR, *Case of Brannigan and McBride v. the United Kingdom,* judgment of 26 May 1993, Series A, No. 258-B, p. 57, para. 72.

[5] UN doc. *GAOR*, A/56/40 (Vol. I), *Report HRC*, 204, para. 8.

[6] See *Eur. Court HR, Case of Ireland v. the United Kingdom, J*udgment of 18 January 1978, Series A, No. 25, p. 95.

In the case of Nigeria, none of the literature suggests that there have been any discriminatory index in the enforcement of the measures. We hold therefore that Nigeria has complied with this requirement by default means.

4.7. The Principle of International and Official Notification:

The principle of international or official notification is enshrined in the provision of Article 4(3) of the ICCPR which provides:

"Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."[1]

According to the Human Rights Committee, this provision is a device meant to enable the Committee assess the nature and extent of the derogation by a state and also to enable other states monitor the state's (under emergency) compliance with international standards.[2] States are required under this principle to issue a communication to the United Nations Secretary General (UNSG) making full disclosure of the necessity of the emergency rule, the extent and scope of derogation as contained in the instrument of proclamation and the duration of the said measures. Communication in this regard is a two time communication which must be made at the commencement of the emergency and upon cessation of same.[3] The timeliness of the communication is also of essence as the ICCP requires' immediate' notification. We submit that although Nigeria first declared a state of emergency on 30 of January 2012 and then on 20th of May 2013, both were done without any notification to the UNSG. As at November 2019, the Nigerian state has not made the necessary communications to the UN Secretary General (UNSG) as it is required to do on why such rights have been derogated from. A visit to the UN website on communications from member states to the UNSG reveals the fact that the last communications made by the Nigerian state to the UNSG was in 2007.[4]

We conclude in this regard that the obligations laid down by the Art. 4(1) of the ICCPR as regards the communication to the UNSG of the declaration of the states of emergency, the reasons for and when same will abate have not been complied with by the Nigerian state.

5. Conclusion and Recommendations

5.1. Conclusion

In sum we submit that states obligation to respect, protect and fulfil human rights do not become extinct in times of public emergencies. Nigeria's obligation to respect international norms even in times of public emergency does not abate, as it must comply with certain standards of human rights protection even in times of public emergency.

Nigeria however seems to have perfected its counter terrorism strategies to counter the very lofty ideals of human rights which she is internationally obligated to protect. We submit that internationally accepted norms for derogation under international human rights law in the face of public emergency has been exceeded by the Nigerian state through draconian strategies such as arbitrary arrest, unlawful detention, extra judicial killings, inhumane treatment and torture. We submit that the general disregard for the international standards laid down for the protection of human rights continue to fan the embers of insecurity, insurgency and terrorism leading to a waning human security in Nigeria. It is imperative that Nigeria retract this trend. Our humble recommendations in this regard are laid below.

5.2. Recommendations

This study advocates that both the normative and institutional frameworks for countering terrorism in Nigeria needs urgent reforms to make it compliant with international standards as distilled herein.

First ,we recommend the need for compliance with international best practices and the five pillars of the UN Global Counter Terrorism Strategy. Currently the implementation of NACTEST is not in compliant with international best practices and the five pillars of the UN Global Counter Terrorism Strategy. Again, there is an imperative for Nigeria to further amend her TPA to make it compliant with her *grundnorm.* Specifically, we prescribe the amendment of section 42 of the TPA which legitimises *incommunicado* detention of arrested persons as same conflicts with not only S.35 of the constitution but also violates the guarantee of the right to fair

[1] Similar provisions can be found in Article of the ECHR 15(3) and Article 27(3) of the ACHR.
[2] UN doc. *GAOR*, A/56/40 (vol. I), p. 207, para. 17.
[3] UN doc. *GAOR*, A/56/40 (vol. I), p. 207, para. 17.
[4] UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Manfred Nowak, Mission to Nigeria' (22 November 2007) UN Doc A/HRC/7/3/Add.4 para 37. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/149/66/PDF/G0714966.pdf?OpenElement> accessed 7 January 2020.

hearing as enshrined under the provision of S. 36 of the constitution.[1]We hold further that section 42 also constitute a breach of Nigeria's international obligations under the provisions of Article 7 of the ACHPR and Article 14 of the ICCPR.[2]

Second, we recommend that while the necessary amendments are made to the TPA as recommended above, the institutional framework as constituted by the Office of the National Security Adviser, (ONSA), other law enforcement and security agencies be sensitised on the need to respect and protect human rights while countering violent extremism and terrorism. Sensitisation will be achieved through programmes such as seminars, trainings and workshops for ONSA, law enforcement and security agencies.

Third, we hold that there is the need for quick dispensation of justice in the trial of terror suspects. With such prompt dispensation of justice, there would be less congestion of police and prisons custodial or detention facilities. Periodical trainings for prosecutors, forensic experts, the anti- bomb devices experts and such other expert units, officers of the ONSA other law enforcement and security agencies are also essential to eliminating the delay in trial of terror suspects often caused by unavailability of expert witnesses.

References

Cases

Abubakar v. Attorney – General, Federation (2008) All FWLR (pt. 44) 47.
Al-Adsani v. the United Kingdom, Application no. 35763/97, Judgment of 21 November 2001,
Amnesty International v Zambia (2000) AHRLR 325 (ACHPR 1999).
Aksoy v. Turkey, Judgment of 18 December 1996, Reports le 4tic1996-VI, p. 2281,
Bobade Olutide & Ors v. Adams Hamzat & Ors 2016 LPELR-26047(CA)
Brannigan and McBride v. the United Kingdom, Judgment of 26 May 1993,
Chani v. Algeria UN HRC DECISIONS, Case No. 2297/2013 Published 7 October 2016 From 1April 2015 to 3 April 2016 and the 114th, 115th and 116th sessions of the Committee (A/71/40https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f116%2f3&Lang=en
Greece v.UK, Application No157/1954-58.
Dokubo –Asari v. FRN 2007 12 NWLR (Pt. 1048), 320 at 329.
Interights and Others v Mauritania (2004) AHRLR 87 (ACHPR 2004).
Ireland v. the United Kingdom, judgment of 18 January 1978,
Jawara v The Gambia (2000) AHRLR 107 (ACHPR 2000).
J. Landinelli Silva and Others v. Uruguay, Communication No. R. 8/34.
Kaunda and Others v. President of the Republic of South Africa & Others 2005 (4) SA 235 (CC);
Zimbabwe, [2008] ZWHHC 1.
Lawless v. Ireland, (Lawless Court) 3 Eur.Ct. H.R. (ser. A) (1961) (No. 3) (Court), at 56.
Mann v. Republic of Equatorial Guinea, Case No. 507/07, Judgment of 23 January 2008, High Court of Media Rights Projects & Ors v. Nigeria Comm. No. 224/98 (2000).
Oba Gabriel Orogie v. Attorney General of Ondo State 1982, 3 NCLR, 349 at 355.
Prince v South Africa (2004) AHRLR 105 (ACHPR 2004).
Salgar de Montejo v. Colombia UN doc. GAOR, A/37/40
Williams v. Majekodunmi (1962) All NLR (Pt. 1) 327.

Multilateral Conventions

American Convention on Human Rights.
European Convention on Human Rights.
Convention Against Torture.
Convention on the Prevention and Punishment of the Crime of Genocide.
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T.
International Covenant on Civil and Political Rights.
Rome Statute of the International Criminal Court Geneva Convention No. IV, Arts. 146 and 149.
Vienna Convention on the Law of Treaties UNTS 18232.

United Nations'Agencies Documents: Comments and Guiding Principles

Human Rights Committee, General Comment 29, States of Emergency.
Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2),

[1] See S. 36 (6)(b & c) of the Constitution.
[2] See Nsongurua J. Udombana, "The African Commission On Human And Peoples' Rights And The Development of Fair Trial Norms In Africa"2006 (6) (2) AHRLJ ; 298 – 332, 303-304 <http://www.ahrlj.up.ac.za/images/ahrlj/2006/ahrlj_vol 6_no. 2_2006_nsongurua_j_udombana.pdf> accessed 20 November 2020.

Paris Minimum Standards of Human Rights Norms in a State of Emergency
Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Right.
Turku (Åbo) Declaration of Minimum Humanitarian Standards (1990), (E/CN.4/1995/116).

Foreign Statutes
Constitution of Burkina Faso.
Constitution of the Republic of Cameroon.
Constitution of the Central African Republic.
Constitution of the Republic of the Congo.
Constitution of the Republic of Cote d'Ivoire.
Constitution of Djibouti.
Constitution of the Republic of Equatorial Guinea.
Constitution of the Gabonese Republic.
Fundamental Law of the Second Republic of Guinea.
Constitution of the Republic of Madagascar.
Constitution of the Republic of Mali.
Constitution of the Fifth Republic of Niger.
Constitution of the Republic of Senegal.
Constitution of the Fourth Republic of Togo.
Constitution of the Republic of Seychelles.
Constitution of the People's Democratic Republic of Algeria.
Constitution of Mauritania
Constitution of Sudan
Constitutional Law of the Republic of Angola,
Constitutional Law of the Republic of Cape Verde,
Constitution of the Republic of Guinea-Bissau
Constitution of the Republic of Mozambique,
Political Constitution of São Tomé and Príncipe,
Constitution of Mozambique
Constitution of Cape Verde

Nigerian Statutes and Gazettes
Anti -Torture Act, 2017State of Emergency (Certain States of the Federation), Proclamation, 2013; Federal Constitution of the Federal Republic of Nigeria, 1999, Cap. C20, LFN 2004, S. 305;
Government Gazette No. 27 of 20th May 2013. (Government Notice No 84);
Emergency Powers (General Regulations), 2013, Federal Government Gazette No. 28 of 20th May 2013. (Government Notice No 85).

Textbooks
Thomas Hobbes, "Leviathan", 1651, Republished by Forgotten Books, 2008

Journal Articles
Abdi, Jibril Ali "Derogation from Constitutional rights and its Implication under the African Charter on Human and Rights.
Allo, A.K. "Derogation or limitation? Rethinking the African human rights system of derogation in light of the European system" (2009) 2 Ethiopian Journal of Legal Education.
Bartolotta Christopher, 'Terrorism in Nigeria: The Rise of Boko Haram', (World Policy Blog, 19 September 2011) <http://www.worldpolicy.org/blog/2011/09/19/terrorism-nigeria-rise-boko-haram>
Hansen, W. 'Boko Haram: Religious Radicalism and Insurrection in Northern Nigeria" (2015) Journal of Asian and African Studies: 1–19. DOI: 10.1177/0021909615615594.
Heyn,s C "The African regional human rights system: In need of reform?" (2001) 1 African Human Rights Law Journal, 155.
Luban, David 'Liberalism, Torture and the Ticking Time Bomb', (2005) (91)*Virginia Law Review,* 1425-1461, 1437.
Murray, R. The African Commission on Human and Peoples' Rights and International Law (2000)
Ouguergouz, F. The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable development (2003).
Scott, D. 'The Systematic Failure to Interpret Article IV of the ICCPR: Is there A Public Emergency in Nigeria?

American University International Law Review, Volume 15 | Issue 5, Article 5, 2000, 1164-1209.
Sermet, L. "The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion" (2007) 7 African Human Rights Law Journal 142.
Udombana, Nsongurua J. 'The African Commission on Human and Peoples' Rights and The Development of Fair Trial Norms In Africa' 2006(6)(2) AHRLJ;298–332,303-304
Wisnewsky, Jeremy 'Hearing A Still Ticking time Bomb: A Reply to Bufacci and Arrigo' <https://www.academia.edu/2573114/Hearing_a_Still-Ticking_Bomb_Argument_A_Reply_to_Bufacchi_and_Arrigo>

Conference Paper
Ladan, M.T. "Human Rights in Counter-Terrorism Environments: With Particular Reference To Nigeria" A Paper delivered at A Train The Trainer Course On Human Rights in Military Operation and Civil Military Co-operation Organized By The Office Of The National Security Adviser And EU Delegation Technical Assistance To Nigeria On CIMIC On 13th – 20th October 2014.

Reports
AdministrationofJusticeduringStatesofEmergency'<https://www.ohchr.org/Documents/Publications/training9chapter16en.pdf >UN-ILC /10 GE.19-13883.
Amnesty International, "Willingly Unable: ICC Preliminary Report and Nigeria's Failure to Address Impunity for International Crimes", December 10 2018.
Chapter V: Peremptory norms of general international law (jus cogens), 141.
Human Rights Watch World Report, 2018, Section on Nigeria; 391-398.
Human Rights Watch World Report, 2018, Section on Nigeria; pgs. 391-398.
Human Rights Watch World Report, 2018, Section on Nigeria; pgs. 391-398.
Institute for Economics and Peace, Global Terrorism Index (GTI), *Measuring and Understanding the Impacts of Terrorism*, 2014.
Institute for Economics and Peace, (GTI) *Measuring and Understanding the Impacts of Terrorism*, 2015.
Institute for Economics and Peace, *(*GTI) *Measuring and Understanding the Impacts of Terrorism* 2016.
Institute for Economics and Peace, *(*GTI) *Measuring and Understanding the Impacts of Terrorism* 2017.
Institute for Economics and Peace, *(*GTI) *Measuring and Understanding the Impacts of Terrorism* 2018.
Institute for Economics and Peace, *(*GTI) *Measuring and Understanding the Impacts of Terrorism* 2019.
Institute for Economics and Peace, *(*GTI) *Measuring and Understanding the Impacts of Terrorism* 2020.
United Nations Food and Agriculture Organization,"Tackling Food Insecurity in Nigeria"., 2020 <https://www.fao.org/emergencies/fao-in-action/stories/stories-detail/en/c/1256858/>
United Nations Human Rights Committee Begins Consideration of Nigeria's Report (Press Release) HR/CT/467 of 1 April 1996.
UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Manfred Nowak, Mission to Nigeria' (22 November 2007) UN Doc A/HRC/7/3/Add.4.

Newspapers Reports
Presidential Broadcast of 14 May 2013, The Guardian, Wednesday, 15 May, 2013.

Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Model of Legal Protection Against Children of Sexual Harassment According to Qanun Jinayah Law in Aceh Indonesia

Muhammad Nur* Harun Yusrizal
Law Faculty, University of Malikussaleh Indonesia

Abstract
Child crime should not be equated with adult crime. Children have their characteristics, for that, should be handled with care. Given that legal protection of children is still weak in practice, more research is needed on the Model of Protection of Children of Sexual Abusers Based on Qanun Jinayah in Aceh. This study is an analytical descriptive study on the Model of Legal Protection against Child Sexual Abusers Based on Qanun Jinayah in Aceh. Considering that legal protection for children is still weak in practice, further research is needed on the Model of Legal Protection Against Child Perpetrators of Sexual Harassment Based on Qanun Jinayah in Aceh. This research is descriptive-analytical research on the Model of Legal Protection Against Child Perpetrators of Sexual Harassment Based on Qanun Jinayah in Aceh. Descriptive research aims to precisely describe the traits of an individual, circumstance, symptom, or group in society. The juridical review is used with the consideration that the applicable legal rules can be influenced by various factors, such as the society it governs, the developing culture, and the law and society influencing each other, while the empirical review is intended to see the law from reality. Based on the results of the study, it can be seen that the legal protection model for child sexual abuse perpetrators according to the jinayah legal qanun is in the form of protection through diversion, protection against the application of caning sanctions, and protection of other children's rights, both the right to education, the right to receive religious guidance and right to work. It is hoped that the Aceh government will improve the Qanun on Jinayah Law, especially on child protection, so that the material in the Qanun on Jinayah Law can be applied consistently by law enforcers.
Keywords: Model, Legal Protection, Child Abuser, *Jinayah* Aceh Law, Indonesia
DOI: 10.7176/JLPG/117-07
Publication date: January 31st 2022

1. Introduction

Violation of the law committed by children is a form of child delinquency which is a characteristic of human life in the period of growth. Child delinquency means that in addition to behavior that violates the law, it also violates moral values. Child delinquency has a conflicting purpose, namely, the act or behavior is contrary to the values or social norms that exist in their environment.[1]

The term child delinquency according to the Law of the Republic of Indonesia Number 11 of 2012 concerning the Criminal Justice System of Children mentioned that children who face the law, one of the forms is the child of the perpetrator of the crime. Children as perpetrators of crime are still given legal protection. Therefore the unlawful actions of a child should not be equated with crimes committed by adults, because he has his characteristics. The handling should be done differently from the handling of adult crimes.

Child criminal law aims to heal the psychiatric state of children who have been shaken by the criminal acts they have committed. Therefore, the purpose of the criminal is not merely to punish the guilty child, but to foster and resuscitate the child who has made a mistake or has committed a deviant act. This is important considering that what he has done is wrong that violates the law. A criminal conviction is not the only attempt to process a child who has committed a criminal offense.[2]

Article 59 of the Law of the Republic of Indonesia Number 35 of 2014 concerning Child Protection determines:

Special Protection for Children in conflict with the law as referred to in Article 59 of the Law of the Republic of Indonesia Number 35 of 2014 concerning Child Protection, paragraph (2) letter b is carried out through:

a. liberation from torture, punishment, or other cruel, inhuman, and degrading treatment;

[1] Ny. Singgih Gunarso dan Singgih Gunarso. 1985, Psikologi Remaja, Gunung Mulia, Jakarta, p. 30. The term child delinquency with the enactment of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Criminal Justice System of Children, is called a child who is in conflict with the law. Look Unayah, Unung and Muslim Sabarisman, The Phenomenon of Juvenile Delinquency and Criminality, "Sosio Informa", 1.2. (2016). Siregar Risdalina, Pengaruh Mass Media Terhadap Kenakalan Remaja Ditinjau dari Psikologi Kriminal, "Jurnal Ilmiah Advokasi, 5.2 (2017), p. 94-109.

[2] Marlina. 2009, Peradilan Pidana Anak di Indonesia, Refika Aditama, Bandung, p. 158 see also, Rahayu, Sri. "Diversi Sebagai Alternatif Penyelesaian Perkara Tindak Pidana Yang Dilakukan Anak Dalam Perspektif Sistem Peradilan Pidana Anak." Jurnal Ilmu Hukum Jambi 6.1 (2015): 43317. see also, Sekhroni, Sekhroni. "Criminal Liability dan Diversi Terhadap Tindak Pidana Anak dalam Sistem Peradilan Anak di Indonesia." UNIFIKASI: Jurnal Ilmu Hukum 3.1 (2016). Wahyudi, Dheny. "Perlindungan terhadap anak yang berhadapan dengan hukum melalui pendekatan restorative justice." Jurnal Ilmu Hukum Jambi 6.1 (2015): 43318.

b. avoidance of the death penalty and/or life imprisonment;

Protection of children who violate criminal law, first; note that the main focus in the legal system dealing with child offenders; Especially in criminal justice should emphasize or prioritize the welfare of children and principles to avoid the use of solely punitive sanctions. Second, the principle is a tool to curb the use of punitive sanctions in the sense of retaliating solely.[1]

The rationale of juvenile criminal justice, namely; Children who commit violations of criminal law should not be judged as criminals. But it should be viewed as a small creature that needs help. The juridical approach to children should prioritize persuasive-educative and approach (psychiatric/psychological) that is as far as possible avoid legal processes that are solely punishing, mental degradation, and discouragement and avoid stigmatization processes that can inhibit the process of development of maturity and independence in a reasonable manner.[2] Therefore, when talking about something that is best for the child, then the keyword is in a way that is not punishing.[3]

Violations of law by children in Aceh Province today, especially the crime of sexual abuse are alarming but juridically in Aceh Province has been applied Qanun Jinayah Law in the enforcement of crimes, so that against children is also enforced Qanun Jinayah Law. Based on data shows the criminal acts of sexual violence committed by children are relatively many. Throughout 2019, there were 280 cases of sexual violence against children, recorded in the Aceh Office of Women Empowerment and Child Protection (BP3A).

Sanctions that can be applied to children who commit crimes are stipulated in Article 67 Qanun of Aceh Jinayah Law. The child offender is threatened with corporal punishment or imprisonment. The regulation of sanctions against children stipulated in Qanun Aceh Number 6 of 2014 concerning Jinayah Law. In Article 67, it is stated that: If the child who has reached the age of 12 (twelve) years but has not reached the age of 18 (eighteen) years or unmarried commits an act of finger, then the child can be subject to Uqubat at most 1/3 (one-third) of the 'Uqubat that has been determined for adults and/or returned to his parents/guardians or placed in a place provided by the Government of Aceh or the Regency or City Government. The policy of Qanun Jinayah Law which imposes criminal sanctions for deprivation of independence (imprisonment) against children or other bodily punishment (flogging), is not following child protection efforts. Legally, the policy of criminalization of children is an act of violating the basic right to fair legal protection and certainty and equal treatment before the law.[4]

Juridically against the child perpetrator of a criminal act, there is still a waiver of his right to protection. Base on the explanation in the background above, it can be formulated the problem, how is the model of legal protection against child sexual abusers based on the Jinayah Law Qanun in Aceh?

2. Research Methods

This research is an empirical juridical study on the Model of Legal Protection against Children of Sexual Abusers Based on Jinayah Law Qanun in Aceh. Juridical review is used with the consideration that the rules of applicable law can be influenced by various factors, both the society it regulates, the culture that develops, and the laws and societies that each other. Empirical studies are meant to look at the law from reality.[5] The source of the research data used is primary data in the form of interviews with respondents. The respondents consisted of:

1. Banda Aceh City Police Investigator one person,
2. The prosecutor at banda Aceh City State Prosecutor one person,
3. Syar'iyyah Court Judge of Banda Aceh City one person,
4. Aceh Besar Police Investigator one person.
5. Prosecutor at the Aceh Besar State Prosecutor one person,
6. Syar'iyyah Court Judge Jantho one person
7. Syar'iyyah Kuala Simpang Court Judge one person

Data analysis in this study is by qualitative method, which is to interpret quality about the opinions or

[1] Maidin Gulto m, *Perlindungan Hukum Terhadap Anak*, Refika Aditama, Bandung, 2008, p. 2. See also Hambali, Azwad Rachmat. "Penerapan diversi terhadap anak yang berhadapan dengan hukum dalam sistem peradilan pidana." Jurnal Ilmiah Kebijakan Hukum 13.1 (2019): 15-30. See also Hartoyo, Nuri, Herman Fikri, and Adi Purnama. "*Perlindungan Hukum Terhadap Anak Yang Berhadapan Dengan Hukum Melalui Restoratif Justice*." Lex Librum: Jurnal Ilmu Hukum (2020): 102-113

[2] Waluyadi, *Hukum Perlindungan Anak*, Mandar Maju, Bandung,2009,p. 46. See also, Yudaningsih, Lilik Purwastuti, and Sri Rahayu. "*Reformasi Perlindungan Hukum terhadap Anak Sebagai Pelaku Tindak Pidana dalam Peradilan Pidana di Indonesia.*" *INOVATIF*| Jurnal Ilmu Hukum 6.2 (2013)

[3] Prasetyo, Harsanto Diyan. *Kebijakan Hukum Pidana Dalam Upaya Perlindungan Hukum Terhadap Anak Pelaku Tindak Pidana (Juvenile Deliquency). dissertation*, Universitas Diponegoro, 2012. See also Simatupang, Taufik H. "*Sistem Hukum Perlindungan Kekayaan Intelektual dalam rangka Meningkatkan Kesejahteraan Masyarakat*." *Jurnal Penelitian Hukum De Jure* 17.2 (2017) p. 195.

[4] Hadi Supeno. 2010, *Kriminalisasi Anak,* Gramedia Pustaka Utama, Jakarta, p. 128 see also Mushaddiq, Nur Wahid. *Tinjauan Yuridis terhadap Eksploitasi Seksual pada Anak Berdasarkan Hukum Perlindungan Anak dan Hukum Islam*. dissertation, Universitas Islam Negeri Alauddin Makassar, 2015.see also Akbar, Amellia Putri. *Pelanggaran HAM dalam Pemidanaan (Perbandingan Hukuman Cambuk dengan Penjara)*. dissertation, UIN Ar-Raniry Banda Aceh, 2017.

[5] *I b I d.,* p. 9.

responses of respondents, then explain it in full and comprehensively about various aspects related to the subject matter.[1]

3. Discussion

3.1 Child Protection

Children are defined as young humans or immature humans.[2] Law of the Republic of Indonesia Number 11 of 2012 concerning the Criminal Justice System of Children, Article 1 number 3 affirms that children who conflict with the law which is further called a child are a human who has aged 12 (twelve) years but has not been 18 (eighteen) years old who is suspected of committing a criminal act.

According to the Islamic Penal Code, a woman has mukallaf when she is fifteen years old, which has shown the development of her adult body shape. As for the *taklif* of men, based on the opinion of scholars if he has had a dream (having sex with women secreting sperm).[3] *Taklif* is old enough to be of birth, and signs of adult men appear in sons, adult signs appear in women in girls. This is a natural adult, which usually does not exist before the age of 12 years in men, and 9 years in women. The age limit of the child when he has dreamed then he has puberty. One of the signs of puberty is that it is fifteen years old.[4]

Child protection is any activity to ensure and protect the child and his rights to live, grow, develop, and participate, optimally following the dignity of humanity, and to be protected from violence without discrimination. The recognition and legal protection of various rights and freedoms of the child are intended to fulfill various interests related to the welfare and future of the child.[5]

Special protection is the protection provided to children in emergencies, children facing the law, children from minority and isolated groups, children who are exploited economically and/or sexually, the Law of the Republic of Indonesia No. 35 of 2014 on Child Protection affirms that the accountability of parents, families, communities, governments, and countries is a series of activities that are carried out continuously to protect the rights of children.

3.2 Sexual Harassment

Child sexual abuse can be defined as a relationship or interaction between a child and an older person or child, more reason or adult such as a stranger, sibling, or parent where the child is used as an object of consent for the sexual needs of the perpetrator.[6] Criminal acts of sexual harassment are committed by using coercion, threats, bribery, deception, or pressure.[7]

3.3 Qanun Jinayah Law

Jinayah law is the terminology used in Islam to refer to Islamic criminal law. The term law comes from Arabic, namely from the word *hakama*, *yahkumu*, *hukmun*, which means preventing or rejecting, namely preventing injustice, preventing injustice, preventing persecution, and rejecting other forms of disobedience.[8] Jinayah is the

---

[1] Ronny Hanitjo Soemitro.2005. *Metode Penelitian Hukum.Jakarta*, Ghalia Indonesia, p. 93

[2] Poerwdarminta. 1984, *Kamus Umum Bahasa Indonesia*, Balai Pustaka; Armico, Jakarta, p. 25.see also Fitriani, Rini. "*Peranan Penyelenggara Perlindungan Anak Dalam Melindungi Dan Memenuhi Hak-Hak Anak*." Jurnal Hukum Samudra Keadilan 11.2 (2016): 250-358.

[3] Muhammad Ismail Al-Kahlani. 1960, Subul as-Salam. Syarh Bulugh al- Maram, juz III, Mustafa al-Babi al-Halabi, Mesir, 1960, p. 181 see also Nahrowi, Nahrowi. "Penentuan Dewasa Menurut Hukum Islam Dan Berbagai Disiplin Hukum." Kordinat| Jurnal Komunikasi Antar Perguruan Tinggi Agama Islam 15.2 (2016): 253-274. See also Lukman"Penentuan Dewasa Menurut Hukum Islam Dan Berbagai Disiplin Hukum." Kordinat| Jurnal Komunikasi Antar Perguruan Tinggi Agama Islam 15.2 (2016): 253-274. See also Lukman, Lukman. "Relevansi Hukum Islam Dan Hukum Positif Tentang Usia Dewasa Dalam Perkawinan."Qiyas: Jurnal Hukum Islam dan Peradilan 4.1 (2019).

[4] Sayyid Sabiq, *Fiqh Sunnah*, Jilid. 3, Toha Putra, Semarang, 1986, p.. 410. See also Aperani, Rika. "*Hukum Pertanggungjawaban Pidana Anak Dalam Batasan Usia (Studi Analisis Hukum Pidana Islam dan Undang-Undang Nomor 11 Tahun 2012)*." (2020). See also Hermawati, Nety. "Kejahatan Anak Menurut Hukum Pidana Positif dan Hukum Pidana Islam." Istinbath: Jurnal Hukum 12.1 (2015): 82-132.

[5] Meily dkk., Perlindungan Hukum Terhadap Hak Anak Pelaku Tindak Pidana Pemerkosaan Dalam Sistem Peradilan Pidana, e Jurnal Katalogis, Vol. 5, No. 2, Februari 2017. See also Prasetyo, Andik. "Perlindungan Hukum Bagi Anak Pelaku Tindak Pidana."Mizan: Jurnal Ilmu Hukum 9.1 (2020): 51-60. See also Mahfiana, Layyin. "Perlindungan hukum Terhadap tersangka anak sebagai upaya melindungi hak anak." Jurnal Muwâzâh 3.1 (2011).

[6] Suseni, Komang Ayu, and I. Made Gami Sandi Untara. "upaya penanggulangan tindak pidana kekerasan seksual terhadap anak."Pariksa 1.1 (2020). Rohmah, Nurur, et al. "Kekerasan Seksual Padaanak: Telaah Relasi Pelaku Korban Dan Kerentanan Pada Anak."Psikoislamika: Jurnal Psikologi Dan Psikologi Islam 12.2 (2015): 5-10.

[7] Noviana, Ivo. "Kekerasan seksual terhadap anak: dampak dan penanganannya." Sosio Informa 1.1 (2015).see also Sumera, Marchelya. "Perbuatan Kekerasan/Pelecehan Seksual Terhadap Perempuan."Lex et Societatis 1.2 (2013).see also Arliman, Laurensius. "Reformasi Penegakan Hukum Kekerasan Seksual Terhadap Anak Sebagai Bentuk Perlindungan Anak Berkelanjutan." Kanun Jurnal Ilmu Hukum 19.2 (2017): 305-326. See also Simbolon, Dewi Fiska. "Kurangnya Pendidikan Reproduksi Dini Menjadi Faktor Penyebab Terjadinya Pelecehan Seksual Antar Anak." Soumatera Law Review 1.1 (2018): 43-66.

[8] Hamka Haq. 2002, *Filsafat Ushul Fiqh*, Yayasan Al -Ahkam, Makassar, p. 20. see also Badawi, Ahmad. "Politik Hukum Islam: Teori Keberlakuan Hukum Islam di Indonesia." Al-Fikru 12.2 (2019).see also Suryani, Lilis. *Sanksi bagi pelaku aborsi hamil diluar nikah perspektif Hukum Pidana Islam*. Diss. UIN Sunan Gunung Djati Bandung, 2019.

name for an act that Syara prohibits', both about the soul, property and other than the soul and property.[1] So, the meaning of jinayah is all actions that are forbidden. Prohibited actions are actions that are prohibited or prevented.

Based on the laws and regulations in Aceh all statutory products formed jointly by the executive and legislature (Governor and House of Representatives of Aceh) are called Qanun Aceh. Qanun in Aceh consists of two categories, namely Qanun which regulates the material of government administration, and Qanun which regulates the material for the implementation of Acehnese life. Qanun Law Jinayah belongs to the category of qanun related to the maintenance of Acehnese life.

The Law of the Republic of Indonesia number 11 of 2006, requires several organic laws and regulations, especially Qanun Aceh to implement Islamic sharia. Qanun serves as operational legislation to make Sharia law as positive legal material.

4. Model of Protection Against Children of Sexual Offenders According to *Qanun Jinayah* Aceh

Qanun Jinayah Aceh is a rule of law in the framework of crime prevention in Aceh using the principles of Islamic law. This *Qanun* not only applies to adult criminals but also applies to children who commit criminal acts. Article 67 specified that if a child who has reached the age of 12 years but has not reached the age of 18 years or is unmarried commits a criminal act, then the child may be subject to *'Uqubat* at most 1/3 of the *'Uqubat* that has been determined for adults and or returned to his parents/guardians or placed in a place provided by the Government of Aceh or the Regency / City Government. The provisions of the above article seem to place the child as the perpetrator because against the child perpetrator of the crime (*jarimah*) must be sanctioned (*uqubah*) both *uqubat* whip and prison one-third of the *uqubah* against adults. Based on the results of research that has been conducted in Banda Aceh City, Aceh Besar Regency, and Aceh Tamiang Regency, the child still gets the protection of his rights as a child even though he has done *jarimah*. The model of legal protection against child abusers that have been carried out by law enforcement are:

1. Protection through diversion

Qanun jinayah law does not recognize diversion in the settlement of child cases, because *qanun* only regulates material law, does not regulate formal law, and formal law is regulated separately in other *qanuns*. However, *Qanun* Law *Jinayah* accommodates the process of examining the child perpetrators of crimes by using provisions in the Law on the Criminal Justice System of Children (SPPA). Article 66 Qanun of Jinayah Law specified that: If a child who has not reached the age of 18 years does jarimah or allegedly performs jarimah, then the child is carried out an examination guided by the laws and regulations regarding juvenile criminal justice. Article 7 paragraph 1 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Criminal Justice System of Children explains that at the level of investigation, prosecution, and examination of child cases in the District Court must be attempted diversion. At the investigation stage, the case of the child as a sexual abuser must be resolved through diversion in the family and social care, which is an environment that provides a sense of security by being monitored by the officers who have been determined, so that the child is no longer a victim. According to Suprianto, at the investigative stage of sexual abuse cases, child suspects get legal protection through settlement efforts outside the criminal justice process. So the child suspect is not directly examined by investigators but is attempted to resolve it by peaceful means through the family. Where the process of peaceful settlement is carried out without involving elements of the police because the case has been excluded from the legal process. However, after the diversion effort is completed, it needs to be made in a news event, then submitted to the court to decide that the sexual abuse case has been resolved by diversion.[2]

2. Protection from whip sanctions

The Aceh jinayah law implicitly does not specify how the application of caning sanctions to children who are perpetrators of sexual crimes, article 67 only stipulates that the application of caning sanctions to children can be applied to a third of the number of sanctions against adults. Based on the results of the study, the application of caning sanctions was only applied to children if the child was over 15 years old. According to Surya, if the sexual harassment case cannot be resolved by diversion at the judicial level, the judge after going through the judicial process will not impose a caning sanction on the child who is the perpetrator of sexual abuse. This is because children under the age of fifteen years are still unstable, their minds are not yet full to accept the sanctions imposed by law so that the actions taken by the child cannot be fully accounted for, then the application of the law should not be carried out optimally.[3]

[1] Abdul Kadir Audah, *At-Tasyrik Al- Jina'iy Al-Islamy*, Darul Kitab Al-Araby,Juzu.I, Bairut, p. 67 see also Surbakti, Natangsa. "*Penegakan Hukum Pidana Islam (Jinayah) Di Provinsi Nanggroe AcehDarussalam.*" Jurnal Media Hukum 17.2 (2010).see also Mubarok, Nafi. "Tujuan Pemidanaan dalam Hukum Pidana Nasional dan Fiqh Jinayah." Al-Qānūn: Jurnal Pemikiran dan Pembaharuan Hukum Islam 18.2 (2015): 296-323.

[2] Suprianto, Kasubnit PPA Polresta Banda Aceh, Personal Interview, date 11 November 2020

[3] Surya, Child Judge in court Syar'iyyah Kota Banda Aceh, Personal interview, date 10 November 2020

3. Protection of children's rights

Children as perpetrators of criminal acts are still fulfilled their rights both in the judicial process and after being executed to the child development institution. In the process of child justice, the perpetrator of sexual abuse is still fulfilled his rights such as the right to attend education in the school where the child attends school. The child suspect will be escorted to school by officers and will get an education fulfilled even though he is in the judicial process.[1]

If the verdict has permanent legal force, the child will be executed to the Aanak Special Penitentiary to undergo development or rehabilitation, the child will still get his rights both the right to education and the right to be trained certain skills or the right to attend religious education. So the child after rehabilitation can return to the community or his family with a health condition.[2]

Children's Criminal Justice in Indonesia serves as a judicial system that protects children without having to sacrifice the interests of the community in upholding justice because the purpose of juvenile criminal justice is essentially no different from other courts. Children's criminal justice hearings are also known as child trials where law enforcement officers on duty and authorized to examine, disconnect and resolve child regulations based on the provisions of the laws and regulations are as follows:

1. Article 1 number 1 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System of the Children's Criminal Justice System is the entire process of resolving child cases that face the law, starting from the investigation stage to the guidance stage after undergoing criminal proceedings."
2. Article 16 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System The provisions of the Criminal Procedure Law apply also in the event of juvenile criminal justice unless otherwise specified in this Law."

One of the law enforcement efforts carried out by the state is through juvenile justice as a state effort in providing protection to children who commit crimes and educating children without having to ignore the enforcement of justice because juvenile justice is made to re-educate and improve the attitude and behavior of the child so that the child can leave the bad behavior that he has done, Child protection is carried out by providing guidance and education in the framework of rehabilitation and resocialization to be the foundation of juvenile criminal justice. Article 1 point 1 a law of the Republic of Indonesia Number 4 of 1979 on Child Welfare explains that "the welfare of children is a child's life and livelihood that can guarantee the growth and development of it reasonably both spiritually, physically and socially because realizing the welfare of children in upholding justice is the main duty of the Child Justice according to the Law of the Criminal Justice System of children because juvenile criminal justice is designed not only. Limited to imposing criminal sanctions only but also providing protection for the future of children, the philosophy of juvenile criminal justice is to realize the welfare of children so that the laws and regulations of child welfare and the juvenile criminal justice system are interrelated. Therefore, the model of protection of child abusers that has been implemented by law enforcement in the process of juvenile criminal justice in Aceh Province is following the philosophy of juvenile criminal justice.

5. CONCLUSION

The model of legal protection against child abusers according to the *jinayah* law that has been applied by law enforcement in Aceh Province, in the form of; protection through diversion, protection against the application of flogging sanctions, and protection of other children's rights, both the right to education, the right to religious guidance and the right to work. It is expected of the Aceh government to perfect the *Jinayah* Law *Qanun* especially against child protection provisions so that the material in *Qanun Jinayah* Law can be applied consistently by law enforcement.

REFERENCES

A. Buku/Kitab

Abdul Kadir Audah, *At-Tasyrik Al- Jina'iy Al-Islamy*, Darul Kitab Al-Araby,Juzu.I, Bairut,

Al-Kahlani, Muhammad Ismail. 1960, *Subul as-Salam*. *Syarh Bulugh al- Maram*, juz III, Mustafa al-Babi al-Halabi, Mesir.

Hadi Supeno. 2010, *Kriminalisasi Anak,* Gramedia Pustaka Utama, Jakarta,

Hamka Haq. 2002, *Filsafat Ushul Fiqh*, Yayasan Al -Ahkam, Makassar,

Maidin Gulto m, *Perlindungan Hukum Terhadap Anak*, Refika Aditama, Bandung, 2008

Marlina. 2009, *Peradilan Pidana Anak di Indonesia,* Refika Aditama, Bandung,

Poerwadarminta. 1984, *Kamus Umum Bahasa Indonesia*, Balai Pustaka; Armico, Jakarta,

[1] Taqdir, Prosecutor to the Jantho State Prosecutor's Office, Aceh Besar, personal interview, date 1 December 2020
[2] Taqdir Prosecutor to the Jantho State Prosecutor's Office, personal interview, date 1 Desember 2020

Ronny Hanitjo Soemitro.2005. *Metode Penelitian Hukum.Jakarta*, Ghalia Indonesia,
Sayyid Sabiq. 1986, *Fiqh Sunnah*, Jilid. 3, Toha Putra, Semarang,
Singgih Gunarso, Ny.dan Singgih Gunarso. 1985, *Psikologi Remaja***,** Gunung Mulia, Jakarta.
Waluyadi. 2009, *Hukum Perlindungan Anak*, Mandar Maju, Bandung,
Mushaddiq, Nur Wahid. 2015, *Tinjauan Yuridis terhadap Eksploitasi Seksual pada Anak Berdasarkan Hukum Perlindungan Anak dan Hukum Islam*. *Disertasi,* Universitas Islam Negeri Alauddin Makassar,
Prasetyo, Harsanto Diyan. 2012, Kebijakan Hukum Pidana Dalam Upaya Perlindungan Hukum Terhadap Anak Pelaku Tindak Pidana (Juvenile Deliquency). *Disertas*i, Universitas Diponegoro,
Suryani, Lilis. 2019, Sanksi bagi pelaku aborsi hamil diluar nikah perspektif Hukum Pidana Islam. Diss. UIN Sunan Gunung Djati Bandung,
Aperani, Rika. "Hukum Pertanggungjawaban Pidana Anak Dalam Batasan Usia (Studi Analisis Hukum Pidana Islam dan Undang-Undang Nomor 11 Tahun 2012)." (2020).
Arliman, Laurensius. "Reformasi Penegakan Hukum Kekerasan Seksual Terhadap Anak Sebagai Bentuk Perlindungan Anak Berkelanjutan." Kanun Jurnal Ilmu Hukum 19.2 (2017):
Badawi, Ahmad. "Politik Hukum Islam: Teori Keberlakuan Hukum Islam di Indonesia." Al-Fikru 12.2 (2019).
Fitriani, Rini. "Peranan Penyelenggara Perlindungan Anak Dalam Melindungi Dan Memenuhi Hak-Hak Anak." Jurnal Hukum Samudra Keadilan 11.2 (2016)
Hambali, Azwad Rachmat. "Penerapan diversi terhadap anak yang berhadapan dengan hukum dalam sistem peradilan pidana." Jurnal Ilmiah Kebijakan Hukum 13.1 (2019)
Hartoyo, Nuri, Herman Fikri, and Adi Purnama. "*Perlindungan Hukum Terhadap Anak Yang Berhadapan Dengan Hukum Melalui Restoratif Justice*." Lex Librum: Jurnal Ilmu Hukum (2020)
Hermawati, Nety. "Kejahatan Anak Menurut Hukum Pidana Positif dan Hukum Pidana Islam." Istinbath: Jurnal Hukum 12.1 (2015)
Lukman"Penentuan Dewasa Menurut Hukum Islam Dan Berbagai Disiplin Hukum." Kordinat| Jurnal Komunikasi Antar Perguruan Tinggi Agama Islam 15.2 (2016):
Lukman, Lukman. "Relevansi Hukum Islam Dan Hukum Positif Tentang Usia Dewasa Dalam Perkawinan." Qiyas: *Jurnal Hukum Islam dan Peradilan* 4.1 (2019).
Mahfiana, Layyin. "Perlindungan hukum Terhadap tersangka anak sebagai upaya melindungi hakanak." Jurnal Muwâzâh 3.1 (2011).
Meily dkk., Perlindungan Hukum Terhadap Hak Anak Pelaku Tindak Pidana Pemerkosaan Dalam Sistem Peradilan Pidana, *e Jurnal Katalogis*, Vol. 5, No. 2, Februari2017.
Mubarok, Nafi. "Tujuan Pemidanaan dalam Hukum Pidana Nasional dan Fiqh Jinayah."Al Qānūn: Jurnal Pemikiran dan Pembaharuan Hukum Islam 18.2 (2015)
Nahrowi, Nahrowi. "Penentuan Dewasa Menurut Hukum Islam Dan Berbagai Disiplin Hukum." Kordinat| Jurnal Komunikasi Antar Perguruan Tinggi Agama Islam 15.2 (2016):
Noviana, Ivo. "Kekerasan seksual terhadap anak: dampak dan penanganannya." Sosio Informa 1.1 (2015).
Prasetyo, Andik. "Perlindungan Hukum Bagi Anak Pelaku Tindak Pidana." Mizan: Jurnal Ilmu Hukum 9.1 (2020):
Rahayu, Sri. "Diversi Sebagai Alternatif Penyelesaian Perkara Tindak Pidana Yang Dilakukan Anak Dalam Perspektif Sistem Peradilan Pidana Anak." Jurnal Ilmu Hukum Jambi 6.1 (2015)
Sekhroni, Sekhroni. "Criminal Liability dan Diversi Terhadap Tindak Pidana Anak dalam Sistem Peradilan Anak di Indonesia." Unifikasi: Jurnal Ilmu Hukum 3.1 (2016).
Simatupang, Taufik H. "Sistem Hukum Perlindungan Kekayaan Intelektual dalam rangka Meningkatkan Kesejahteraan Masyarakat." *Jurnal Penelitian Hukum De Jure* 17.2 (2017) Akbar, Amellia Putri. *Pelanggaran HAM dalam Pemidanaan (Perbandingan Hukuman Cambuk dengan Penjara)*. *Disertasi,* UIN Ar-Raniry Banda Aceh, 2017.
Simbolon, Dewi Fiska. "Kurangnya Pendidikan Reproduksi Dini Menjadi Faktor Penyebab Terjadinya Pelecehan Seksual Antar Anak." Soumatera Law Review 1.1 (2018):
Siregar Risdalina, Pengaruh Mass Media Terhadap Kenakalan Remaja Ditinjau dari Psikologi Kriminal, "Jurnal Ilmiah Advokasi, 5.2 (2017), halaman 94-109
Sumera, Marchelya. "Perbuatan Kekerasan/Pelecehan Seksual Terhadap Perempuan." Lex et Societatis 1.2 (2013).
Surbakti, Natangsa. "Penegakan Hukum Pidana Islam (Jinayah) Di Provinsi Nanggroe AcehDarussalam." Jurnal Media Hukum 17.2 (2010).
Suseni, Komang Ayu, and I. Made Gami Sandi Untara. "*Upaya Penanggulangan Tindak Pidana Kekerasan Seksual Terhadap Anak*."*Pariksa* 1.1 (2020). Rohmah, Nurur, et al. "Kekerasan Seksual Padaanak: Telaah Relasi Pelaku Korban Dan Kerentanan Pada Anak."*Psikoislamika: Jurnal Psikologi Dan Psikologi Islam* 12.2 (2015)
Unayah, Unung and Muslim Sabarisman, Fenomena Kenakalan Remaja dan Kriminalitas, "Sosio Informa", 1.2.

(2016).
Wahyudi, Dheny. "Perlindungan terhadap anak yang berhadapan dengan hukum melalui pendekatan restorative justice." Jurnal Ilmu Hukum Jambi 6.1 (2015)
Yudaningsih, Lilik Purwastuti, and Sri Rahayu. "Reformasi Perlindungan Hukum terhadap Anak Sebagai Pelaku Tindak Pidana dalam Peradilan Pidana di Indonesia." *INOVATIF*| Jurnal Ilmu Hukum 6.2 (2013)

Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Ownership of Employee Inventions in Nigeria: Need for a Paradigm Shift

Oluwakemi Amudat Ayanleye[1, 2*] Bankole Sodipo[1] Ayoyemi Arowolo[1]
1. College of Law and Security Studies, Babcock University, Ilishan-Remo, Ogun State Nigeria
2. Dept. of Business & Industrial Law, Olabisi Onabanjo University, Ago-Iwoye, Ogun State, Nigeria

Abstract
In the current knowledge-driven, private sector oriented economic development paradigm, Intellectual property (IP) is the backbone of any modern organisation. Technological development combined with globalisation have brought the issue of IP protection to the fore. The incentive theory regarding the patent system holds that incentives are given to enable 'innovation'. The issue of ownership of employee inventions has continued to generate debates globally. The issue of ownership of employee inventions brings about an intersection of employment law and intellectual property rights. While IP law provide the basic rules governing ownership, this can be modified by contract between the employer and the employee.
Keywords: Employee inventions, Intellectual property rights, Ownership.
DOI: 10.7176/JLPG/117-08
Publication date: January 31st 2022

1. Introduction

In the current knowledge-driven, private sector oriented economic development paradigm, the different types of intangible assets of a business are often more important and valuable than its tangible assets. This non-tangible form of capital is, increasingly, the largest form of business investment and a key contributor to growth in advanced economies.[1] A key subset of intangible assets is protected by what are labelled collectively as intellectual property rights (IPRs). These include trade secrets protection, copyright, design and trademark rights, and patents, as well as other types of rights. IPRs create tradable assets out of products of human intellect, and provide a large array of IPR tools on which businesses can rely to help drive their success through innovative business models.[2] All businesses, especially those which are already successful, nowadays have to rely on the effective use of one or more types of intellectual property (IP) to gain and maintain a substantial competitive edge in the marketplace. The world economy has witnessed unfathomable transformation due to the changing conditions which help in the determination of the wealth of nations. These changes have led to an increase in commercial flow whereby the interest in IP has increased and the activities related to their protection. The technological advances have led to the demand for the creation of new forms of protection and the acclimation of existing ones. Intellectual Property plays a pre-eminent role in any business entity and lies at the core of it.[3] Intellectual Property of a company is indispensable to the development and maintenance a successful business.[4] The rapid rate of development, globalisation, advancement of technology, increase in commercial activities, development of international business and increase in knowledge has made the business entities perceive the importance of IP assets and its stipulation in the growth of business.[5] Intellectual property is one of the most vital assets for any organisation.

Innovation has always been an important activity of individuals and businesses. Businesses rely on innovative and resourceful employees to meet and exceed customer expectations. Occasionally, those innovative and resourceful employees come up with an invention. Companies often hire and invest in employees to develop new products, improve processes, create new technologies and develop new markets. The push for technological advancement means that innovation-driven companies engage the services of individuals with the intellectual skill to develop new products and processes. This creates an opportunity for individuals to engage in research activities which would otherwise have been too expensive or risky to undertake on their own.[6] In today's knowledge economy, companies must constantly innovate and come up with new ideas and solutions to stay in

[1] OECD, (2013) *New Sources of Growth: Knowledge-Based Capital – Key Analyses and Policy Conclusions – Synthesis Report* (OECD).
[2] ICC and WIPO (2013) , Making Intellectual Property Work for Business - A Handbook for Chambers of Commerce and Business Associations Setting up Intellectual Property Services (ICC and WIPO 2013) 1.
[3] Shreya Negandhi, (2019) 'The Importance of Intellectual Property Rights to Businesses'<https://www.lawyered.in/legal-disrupt/articles/importance-intellectual-property-rights-businesses/> accessed 28 December 2020; IDEAS, (2019) 'The importance of Intellectual Property Rights for progress A reform agenda for ASEAN countries' <https://www.ideas.org.my/wp-content/uploads/2021/04/IPR-ASEAN.pdf> accessed 21 January 2022.
[4] Shreya Negandhi, (n 3).
[5] Shreya Negandhi, (n 3)..
[6] Lee-Ann Tong, (2016) The Development of a South African Legal Framework relating to Patentable Inventions made by Employees (PhD Thesis University of Cape Town) <https://open.uct.ac.za/bitstream/handle/11427/20334/thesis_law_2016_tong_lee_ann.pdf?sequence=1> accessed 17 May 2021.

the forefront and ahead of competitors.

Issues often arise as to the ownership of patent for an invention made by an employee in the course of employment. For an employee who comes up with an invention that falls within the employer's operational area, there are certain limitations to the inventor's right to the invention. The limitations are dependent on how close the connection is between the employee's work tasks and the invention. Does the right inure in the employee/inventor who has exercised skills and exerted inventive faculty in devising the new product or process, or in the employer who has provided the equipment, materials and facilities which made the invention possible?[1] For the academia, who are expected to come up with innovative ideas in the course of their research, the issue of ownership of the inventions is also very important, especially in the era of increased entrepreneurial drive by the universities. In the course of their activities, university staff members often develop innovative approaches in the conduct of their works. These often raise complex issues and challenges vis-à-vis ownership, the proper and equitable utilisation, obligation and rewards associated with innovations.

This article appraises ownership of employee inventions in Nigeria. It reviews the provisions of the law on ownership of employee inventions. It also reviews the intellectual property policies of some Nigerian universities. The article is divided into five sections. Section one is the introduction, section two discusses the justifications for patent protection, section three reviews of the extant law on ownership of employee inventions, section for appraises the IP policies of some select universities while section five is the conclusion and recommendations.

2. Theoretical Justifications for IP Rights

IP is essentially the expression of innovative ideas or practices which can be used simultaneously by more than one person at the same time. To incentivise and/or reward those who invest time and resources in such innovation, legal rights of limited duration are granted to allow them to benefit from the innovation and to control its exploitation by third parties.[2] There are a number of traditional justifications for intellectual property rights which tend to provide support for, or to influence, the jurisprudence and general objective of intellectual property. Despite subtle or nuanced distinctions between competing justifications, some of the reasons adduced for intellectual property tend to overlap.[3] Legal protections for intellectual property have a rich history that stretches back several centuries and as different legal systems matured in protecting intellectual works, there was a refinement of what was being protected within different areas.[4] Over the same period several strands of moral justification for intellectual property were offered.[5]

IP has evidently been founded and validated overtime by natural, social, moral and economic narratives.[6] The philosophical, legal and economic rhetoric for protecting the creations and innovations of authors, inventors and producers, dating back to Roman times has employed terms as 'incentive', 'reward', 'natural rights', 'public interest', 'utilitarian', 'welfare' and more recently 'stakeholder'.[7] Consequently, theories have been constructed around these terminologies as jurisprudential foundations of modern intellectual property rights. The Kant or the Hegelian natural right, ethical or human right justification for the protection of authorial personality and the Lockean concept of property have formed the cornerstones of modern IP rights systems.[8]

Justifications for creation of patents fall within four fundamentally different lines of argument each of which starts from a different point but arriving at the same conclusion.[9] The first type of argument is that a man has a natural property right in his own ideas. The appropriation of such ideas by others must be condemned as stealing and society is morally obligated to recognise and protect this property right. Enforcement of the exclusive property right by the use of a patented invention is the only appropriate way for society to recognise this property right.[10] The second type of argument posits that justice requires that a man receive, and the society secure to him, reward for his services in proportion to the usefulness of these services to society. Inventors render useful services and the most appropriate way to secure to inventors rewards commensurate with their services is by means of exclusive patent rights in their inventions. The third type of argument posits that industrial progress is desirable to society and inventions and their exploitation are necessary to secure industrial

[1] Adejoke O. Oyewunmi, (2014) *Nigerian Law of Intellectual Property* (University of Lagos Press & Bookshop Ltd) 164.
[2] ICC and WIPO (n 2) 6.
[3] Chidi Oguamanam, (2008-2009) 'Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy' 9(2) Wake Forest Intellectual Property Law Journal, 105.
[4] Adam Moore and Ken Himma (2014) 'Intellectual Property' *The Stanford Encyclopedia of Philosophy* Edward N. Zalta (ed), <http://plato.stanford.edu/archives/win2014/entries/intellectual-property/> accessed on 20 September 2021.
[5] Adam Moore and Ken Himma (n 10).
[6] Adebambo Adewopo, (2012) *According to Intellectual Property: A Pro-Development Vision of the Law and the Nigerian Intellectual Property Law and Policy Reform in the Knowledge Era* (NIALS) 5.
[7] Adebambo Adewopo, (n 12)) 5.
[8] Adebambo Adewopo, (n 12) 6-7. See also Graham Dutfield and Uma Suthersanen (2008) , *Global Intellectual Property Law* (Edward Elgar Publishing Limited) 47, 48.
[9] Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) 10 (1) The Journal of Economic History 1, 10.
[10] Fritz Machlup and Edith Penrose, (n 15) 10.

progress. Neither invention nor exploitation of invention will be obtained to any adequate extent unless inventors and capitalists have hopes that successful ventures will yield profits which make it worth their while to make their efforts and risk their money. The simplest, cheapest, and most effective way for society to extend these incentives is to grant exclusive patent rights in inventions.[1] Argument Type Four holds that industrial progress is desirable to society and to secure it at a sustained rate it is necessary that new inventions become generally known as parts of the technology of society. In the absence of protection against immediate imitation of novel technological ideas, an inventor will keep his invention secret. The secret will die with him, and society will thereby lose the new art. Hence it is in the interest of society to induce the inventor to disclose his secret for the use of future generations. This can best be done by granting exclusive patent rights to the inventor in return for public disclosure of his invention.[2] The theories can be categorised into two, the non-utilitarian theory and the utilitarian theory. The non-utilitarian theory is concerned with the philosophical basis for the grant of property rights in respect of ideas whilst the utilitarian theory explains the economic reasons.[3]

Several theoretical patterns dominate the present intellectual property discourse. Most of the recent theoretical writing on IP consists of struggles among and within four approaches.[4] In his 'Theories of Intellectual Property',[5] Fisher identified four analytical constructs which run through discussions on IP. Wilkof referred to these constructs as 'theories',[6] namely utilitarian for maximising net social value, labour theory which is ascribed to John Locke (one has the right to the fruits of his intellectual labour); protection of personality in works which he ascribed to Kant and Hegel; and fostering a just and attractive culture ascribed to the writings of Marx, and early realists.[7] These constructs fall under four broad categories, the economic theory, the natural rights theory, the reward/incentive theory and the development theory.[8] Justifications for protection of intellectual property centre on two basic principles, the utilitarian and non-utilitarian principles. The utilitarian principles are basically the economic justifications for IPR while the non-utilitarian principles are the philosophical justifications for the grant of property rights to IP. They all however meet at the convergence of incentive, that is the need to grant some concession to the inventor in order to induce him to invent more and ultimately for the benefit and betterment of the society.

3. Right to a Patent – Employer vs. Employee

As a general rule, the right to apply for a patent belongs to the inventor. However, this right can be transferred or assigned to another person, thus an applicant for a patent need not be the true inventor. Under the Nigeria Patents and Designs Act, the right to a patent in respect of an invention is vested in the statutory inventor. A statutory inventor is the person who is the first to file or validly claim a foreign priority for a patent application in respect of the invention, whether or not he is the true inventor.[9] This is the first to file approach which places the onus of prompt filing on an inventor. However, the true inventor is entitled to be named as such in the patent, whether or not he is also the statutory inventor. This entitlement is absolute and is not modifiable by contract.[10] The PDA further goes on to protect the true inventor in the event of a misappropriation of the invention by another person. It provides that if the essential elements of a patent application have been obtained by the purported applicant from the invention of another person (or from that other person's successor in title) without the consent of that other person (or his said successor) both to the obtaining of those essential elements and to the filing of the application, all rights in the application and in any patent granted in pursuance of it shall be deemed to be transferred to that other person or his said successor, as the case may be.[11]

In the case of joint invention, all the parties may jointly apply for the patent. However, a person who has merely assisted in doing work connected with the development of the invention without contributing to inventive activity is not an inventor for the purposes of the act.[12] In *Norris Patent*[13] the court held that a person whose idea forms a significant aspect of the invention disclosed in the patent has some right in the invention and is entitled

[1] Fritz Machlup and Edith Penrose, (n 15) 10.
[2] Fritz Machlup and Edith Penrose, (n 15) 10.
[3] E.E. Udoaka, 'An Analysis of the Theories of Intellectual Property' (2008-2009) 1 (2) Lead City University Law Journal 494, 495.
[4] William Fisher, Theories of Intellectual Property (2001) <https://cyber.harvard.edu/people/tfisher/iptheory.pdf> accessed 15 May 2021.
[5] William Fisher, (n 20).
[6] Neil Wilkof, (2014) 'Theories of Intellectual Property: Is it worth the effort?' Journal of Intellectual Property Law and Practice <http://jiplp.blogspot.com/2014/03/theories-of-intellectual-property-is-it.html> accessed 15May 2021.
[7] Neil Wilkof, (n 22); William Fisher, (n 20); Ned Snow, (2021) Moral Bars to Intellectual Property: Theory & Apologetics, 28 UCLA ENT. L. REV. 75, 77-78.
[8] Adejoke Oyewunmi, (2015) 'Setting the Context for Public-Private Partnership Through Intellectual Property Technology Transfer from University to Industry in Nigeria' in Edward Oyelowo Oyewo and Abiola Sanni (Eds.) *Commemorative Essays on 50th Anniversary of Faculty of Law University of Lagos* (Faculty of Law University of Lagos) 30, 39.
[9] Patents and Designs Act (PDA) Cap P2 Laws of the Federation of Nigeria (LFN) 2004, Section 2(1).
[10] PDA, Section 2 (2).
[11] PDA, Section 2 (3).
[12] PDA, Section 2 (5).
[13] [1988] RPC 159.

to be named in the patent.

Issues often arise as to the ownership of patent for an invention made by an employee in the course of employment. For an employee who comes up with an invention that falls within the employer's operational area, there are certain limitations to the inventor's right to the invention. The limitations are dependent on how close the connection is between the employee's work tasks and the invention. Does the right inure in the employee/inventor who has exercised skills and exerted inventive faculty in devising the new product or process, or in the employer who has provided the equipment, materials and facilities which made the invention possible?[1] The basis of any employment relationship is the employment contract, which determines the rights and obligations of each party. The employment contract provides the nexus between the parties and determines the ownership of the invention. At common law, the invention is generally regarded as belonging to the employer in the absence of an agreement to the contrary. It is an implied term in the contract of service of any workman that what he produces by the strength of his arm or the skill of his hand or the exercise of his inventive faculty shall become the property of the employer.[2] Thus for an employee to claim patent rights in respect of inventions made in the course of employment, such has to be stated in the contract of employment. However, most employees are unlikely to dictate their terms of employment considering the fact that they do not have equal bargaining powers with their employers. Often, employers have standard contracts of employments which the employees are expected to execute.

In line with the common law position, the PDA provides that "where an invention is made in the course of employment or in the execution of a contract for the performance of specified work, the right to a patent in the invention is vested in the employer or, as the case may be, in the person who commissioned the work."[3] However, in recognition of the efforts of the employee, the PDA further provides that where the contract of employment does not require an employee to exercise any inventive activity but the employee has in making the invention used data or means that his employment has put at his disposal[4] or the invention is of exceptional importance,[5] the employee is entitled to fair remuneration taking into account his salary and the importance of the invention.[6] For an employee to be entitled to additional remuneration, the invention must have occurred outside of the employee's normal job schedule, that is, the contract of employment does not require the employee to exercise any inventive activity but he has in making the invention used data or means provided by the employer. The employee is also entitled to additional remuneration where the invention is of "exceptional importance."[7]

The PDA did not indicate the nature of the invention that would be considered 'exceptionally important' for the purpose of entitling an employee to remuneration, neither did it lay down a procedure for determining an exceptionally important invention. In practical terms, this could lead to difficulties as it may be complicated to determine what constitutes an 'exceptionally important' invention. While it may be easy to determine situations where an employee has utilised the data or facilities of the employer for an inventive activity, it is not clear when an invention would be considered to be of 'exceptional importance' and who should make that determination for purposes of remunerating the inventor. There is no doubt that, given the option, any inventor would consider his work to be 'exceptionally important', while most employers might think otherwise.

The PDA also provides that a fair remuneration should be paid to the employee taking into account his salary and the importance of the invention.[8] Anchoring a fair remuneration on the employee's salary and the importance of the invention is problematic and may work some injustice to the employee.[9] On the one hand, the quantum of the remuneration that will be regarded as fair is subjective depending on the individual concerned. Secondly, the salary of the employee/inventor may be meagre compared to the pecuniary benefit accruing from the invention and this may work injustice to the employee. The importance of the invention may not be immediately evident, it may acquire great importance over time and yield so much money and the true inventor will be at a loss because he is paid once.[10]

The test of what constitutes exceptional importance should be the usefulness of the invention to the society especially in meeting the long felt need of the society. It has been suggested that giving the employer a choice of

[1] Adejoke O. Oyewunmi, (2014) *Nigerian Law of Intellectual Property* (University of Lagos Press & Bookshop Ltd) 164.
[2] *Patchet v Sterling*, [1955], AC 534 per Lord Simmonds at 544.
[3] PDA, Section 2 (4). See also See *Uwemedimo v Mobil Producing (Nig.) Unltd.*[2011] 4 NWLR 83.
[4] PDA, Section 2 (4)(a) (i).
[5] PDA, Section 2 (4)(a) (ii).
[6] PDA, Section 2 (4)(a).
[7] PDA, Section 2 (4)(a) (ii).
[8] PDA, s 2(4) (a) (ii).
[9] Oladiran Akinsola Ayodele and Falade Olugbenga Damola, (2017) 'Patentability of Inventions under the Nigeria's Patents and Designs Act: An Examination 8(2) Nnamdi Azikiwe University Journal of International
Law and Jurisprudence 56.
[10] Mary Imelda Obianuju Nwogu, (2015) 'The Dialectics of the Right of Ownership of Patentable Inventions under the Nigerian Legal System' 3(3) International Journal of Social Science Studies 96, 99, doi:10.11114/ijsss.v3i3.758. See also Oladiran Akinsola Ayodele and Falade Olugbenga Damola, (n 38) 56.

election to either relinquish the title to the invention if the work is not considered exceptionally important enough to warrant compensating the inventor. Otherwise, the inventor should be entitled to remuneration once the employer or any other person entitled to claim title over the invention has elected to claim such a title. This obviates a situation where someone elects to claim title to an invention and still refuses to remunerate the inventor on the ground of the invention not being exceptionally important.[1] This approach also has its own shortcoming as it envisages a once and for all payment to the inventor. The PDA further provides that the entitlement to remuneration is not modifiable by contract and may be enforces by civil proceedings.[2] Considering that the employer and employee do not have equal bargaining strengths, this would forestall a situation where an employee may be coerced into contracting out his right.

The law relating to ownership of IP differs under the PDA and the Copyright Act. While under copyright, authorship vests initially in the author irrespective of whether the work was created under a contract of employment.[3] This constitutes a radical departure from the position in UK and US.[4] For the employer to enjoy ownership, it must be clearly stated in an agreement in writing. The employer does not enjoy automatic transfer of ownership. The rational for this radical departure from the norm is that the Nigerian author usually bargains from a weaker position when being employed. Divesting such an employee of ownership automatically in the absence of any agreement to the contrary would amount to double jeopardy.[5] However, s.10(5) provides that 'copyright conferred by section 4 of this Act shall vest initially in the Government on behalf of the Federal Republic of Nigeria, in the State authority on behalf of the State in question, or in the international body in question, as the case may be and not in the author.

The law relating to ownership employee invention differs from country to country. Under the Chinese patent regime, Articles 6 and 16 of the Patent Law set out the general position with regard to ownership of patent rights and remuneration of inventors.[6] Article 6 of the Patent Law provides that a "service invention" is an invention made in the course of employment duties or mainly using the material and technical resources of the employer. Although the default position under Article 6 is that the right to apply for a patent over a service invention belongs to the employer, whereas the right to apply for a patent over a non-service invention remains with the inventor or designer, companies can expressly override the default rules and determine the ownership of patent rights and the right to apply for patents by contract. Article 16 of the Patent Law provides that a company that obtains a patent over a service invention must, upon exploitation of the patent, pay the inventor a reasonable remuneration taking into account the extent to which the patent is exploited and the income earned from such exploitation. Employee compensation must be paid within three months of the issuance of a patent, and the compensation amount must be reviewed annually over the life of the patent. The parties are free to agree contractually to the amount payable for the invention; should they fail to do so, the statute stipulates that an annual remuneration is payable of at least 2% of the profits resulting from the invention's exploitation, or 10% in the case of a license. Given the potential for huge pay-outs, it is wise to fix an amount in a contract.[7]

In Germany, Section 6 of the German Patent Act (PatG) provides that the right to obtain a patent vests in the inventor as an individual. An invention made by an employee belongs to the employee. The invention and the proprietary rights relating to it remain the property of the employee until they are transferred to the employer, which will only happen if the employer claims the invention in return for monetary compensation. If the inventor is an employee, there is no "work for hire" doctrine.[8] If the employer desires ownership of the invention and the issuance of a patent, it is necessary for the employer to comply with specific statutory requirements under the German Act on Employee Inventions (GAEI) and, depending on the facts of the case, the contractual obligations in any employment agreements and agreements with third party inventors. The GAEI distinguishes between inventions which are subject to the full provisions of the Act (defined as "service inventions") and "free inventions". Service inventions are those made during the term of employment which either result from the employee's activities in the business or public service, or are significantly based upon the experience or activities of the business or public service. In practice, most inventions made in the course of the employment relationship are service inventions. All other inventions are free inventions which are owned by the employee but subject to the limitations of Sections 18 and 19, namely that the employee inventor has an obligation to notify the employer

[1] Templars, 'Patentability under the Nigerian Patents and Designs Act (PDA): An Introductory Analysis' Templars IP Newsletter, <https://www.templars-law.com/wp-content/uploads/2015/05/Patentability-Under-the-Nigerian-Patent-Act.pdf> accessed 21 October 2021.
[2] PDA, s 2 (4) (b).
[3] Copyright Act Cap C28 LFN 2004 s 10.
[4] Adejoke O. Oyewunmi, (n 7) 63.
[5] Bankole Sodipo, *Copyright Law: Principles, Practice and Procedure* (2nd ed Swan Publishing 2017) 96.
[6] Morrison & Foerster LLP, 'Employees' rights to inventions and rewards under the revised Patent Law' 2010 <https://www.lexology.com/library/detail.aspx?g=93ee3a62-f04a-47aa-88f2-34dff7233385> accessed 11 November 2021.
[7] Stuart Buglass, 'Who Owns an Employee Invention?' <https://www.radiusworldwide.com/blog/2015/9/who-owns-employee-invention> accessed 5 November 2021.
[8] Latham & Watkins, LLP, 'Employee inventions and improvements: a perspective from employers and investors', 2012, <https://www.lexology.com/library/detail.aspx?g=6870be6e-2eb3-43d3-8275-3464e674c8be> accessed 11 November 2021.

of the invention and offer the employer at least a non-exclusive license, if it wishes to exploit the invention.[1] The GAEI does not adhere to "work for hire" principles, but instead gives an employer the option to claim an invention made by an employee, provided that certain requirements are fulfilled.[2]

The Act also entitles the employee to additional compensation. The GAEI applies to inventions and to technical improvement proposals made by employees in private employment, by employees in public service, by civil servants, and by members of the armed forces.[3] The compensation takes into account the economic value of the invention. The amount paid to the employee will depend on the level of his or her contribution and the degree of inventiveness required of his or her role. A claim for additional compensation persists for the life of the patent issued for the invention.[4]If the employer no longer wants to maintain a patent or utility model, the employer must offer the patent or utility model to the inventor. The GAEI in Section 42 expressly provides that inventions made by professors, lecturers and scientific assistants, in their capacity as such, at universities and higher schools of science shall be free inventions.

4. Ownership of Intellectual Property in the Academia in Nigeria

Universities are established for three basic purposes. The first is teaching and it is the primary role of universities in transmission of knowledge and the training of minds. The second is research and this is a central role of universities, to conduct research that could lead to the advancement of knowledge and contribute directly and indirectly to economic progress and the quality of life. The third is community service which places on the universities the duty to serve as change agents by diffusing knowledge, skills and technology to the transformation of the society through enhancing the production of goods and services, better hygiene and improved efficiency.[5]

From the early history of tertiary education in Nigeria, the goals of manpower development, the development of cultured citizens and the promotion of basic research have been conferred on the university system. The National Policy on Education states that, 'The teaching and research functions of higher education have an important role to play in national development, particularly in the development of high-level manpower. Furthermore, universities are one of the best means for developing national consciousness'.[6]

In the last few decades, tertiary education worldwide has moved from the periphery to the centre of governmental agendas as universities are now seen as crucial national assets in addressing many policy priorities.[7] There is a growing interest in the economic utilisation of university research results with both developed and developing countries seeking to increase the contribution that university researches make to national economic growth and in maximising the translation of government funded research into commercial outcomes across the world.[8] In most countries, universities that rely heavily on public funding are pressured to 'pay back' the community and this has created what is known as the third role of the universities.[9] This has led governments to restructure the legal and institutional environment, usually through establishing intellectual property ownership policies in favour of universities, and by providing support programmes for the commercialisation of technology.[10]

The development of the knowledge economy has placed universities at the heart of economic and social development processes in relation to their teaching, research and outreach functions.[11] This places pressure on universities to consider the need for internal transformations to make them 'fit for purpose' to meet their new more 'entrepreneurial' roles.[12] Many universities are now obliged to contribute to the society through research

[1] Gesetz über Arbeitnehmererfindungen (German Act on Employee Inventions (of July 25, 1957, as last amended by the Law of June 24, 1994) Section 4.
[2] Latham & Watkins, LLP (n 47).
[3] Gesetz über Arbeitnehmererfindungen (German Act on Employee Inventions (of July 25, 1957, as last amended by the Law of June 24, 1994) Section 1.
[4] Latham & Watkins, LLP (n 47).
[5] Is-haq Oloyede, (2010) 'Research and National Development: Challenges and the Way Forward', A Keynote Address Presented by the Vice-Chancellor, University of Ilorin, CODAPNU Workshop at the University of Ilorin on October 26, 2010.
[6] A. I. Odebiyi and Olabisi I. Aina, (1999) 'Alternative Modes of Financing Higher Education in Nigeria and Implications for University Governance' *Final Report* Submitted to Association of African Universities, Accra, Ghana, 1999, <http://www.ppv.issuelab.org/resources/19599/19599.pdf> accessed 5 October 2021, citing the National Policy on Education.
[7] Geoffrey Boulton, (2009) 'What are universities for?' *University World News* 29 March 2009 Issue No:69, <http://www.universityworldnews.com/article.php?story=20090326200944986> accessed 1 October 2021.
[8] IP Australia, 'University–Industry Collaboration and Patents' 2017 <https://www.ipaustralia.gov.au/sites/g/files/net856/f/reports_publications/university-industry_collaboration_and_patents.pdf> accessed 5 September 2021.
[9] Shiri M. Breznitz, *The Fountain of Knowledge: the Role of Universities in Economic Development,* (Stanford University Press 2014) 2.
[10] Ramika Bansia and Karunanidhi Reddy, 'Intellectual Property from Publicly Financed Research and Intellectual Property Registration by Universities: A Case Study of a University in South Africa' (2015) 181 *Procedia - Social and Behavioral Sciences* 185, 186.
[11] Michael Harloe and Beth Perry, 'Rethinking or Hollowing out the University? External Engagement and Internal Transformation in the Knowledge Economy' (2005) 17:2 *Journal of the Programme on Institutional Management in Higher Education: Higher Education Management and Policy* 29, 29.
[12] Michael Harloe and Beth Perry (n 58) 29.

and development, collaborations, and technology transfer with industries.[1]

While many universities in Nigeria now appreciate the need to be entrepreneurial and have specific offices for entrepreneurship, research and innovation, many have not yet appreciated the role of IP in the equation as many do not have IP policies.[2] For those universities of who have IP policies, most of the policies identify a broad range of IP rights, including patents, copyright, trade secrets, industrial designs;, while also referring to the university logo and technology-based materials, research proposals, traditional knowledge and other IP-related assets, created by persons covered by the policies.[3] An appraisal of the policies of those universities that have IP policies shows that ownership of IP vests firstly in the university. The statutory provisions for additional remuneration in case of exceptional invention appears to be gaining ground in universities and research institutions as the intellectual property policies of some of these institutions provide for researcher/inventor's right to share profits from commercialisation of inventions.[4]

4.1 Babcock University

Babcock has a Research, Innovation and International Cooperation unit that has the responsibility of promoting the commercialisation of IP generated in the University as well as provision of necessary linkage of researchers with sponsors and/or external partners among other obligations.[5] Babcock developed an IP policy that spells out a reward system for inventors. Under the Policy, Babcock would provide financial and moral support that enhances effective administration of IP, while taking steps legally to protect university generated IP against unauthorised use for the benefit of the institution and creator of the IP.[6] Under the policy, Babcock would own the intellectual property created by any person hired or commissioned for that purpose. Ownership of IPRs derived from collaborative research between Babcock and any organisation would be governed by the agreement between Babcock and such organisation.[7] Where there is no written agreement between Babcock and a grantor or funding agency or where the agreement fails to address the issue of who owns the attendant IP rights, the rights in the result of such research would be vested in the Babcock.

Babcock would retain 100% of revenue derived from commercialisation of IP until all out of pocket expenses associated with the legal protection, exploitation of the patent or copyright have been reimbursed, thereafter the net income would be shared in the following ratio: 30% to the inventor/author; 35% to Babcock; 10% to the School of the inventor/author; 10% to RIIC for use in research work and 15% to the department of the inventor/author.[8]

4.2 University of Lagos

Under the University of Lagos (UNILAG) Policy,[9] the general rule is that the UNILAG owns all rights in IP developed by researchers in the course of their employment or engagement with the University and developed as a result of the University's support.[10] Where the research has been funded by a sponsor under a grant or sponsored research agreement, ownership shall be mutually agreed upon by all the parties with guidance from the policy. For UNILAG, where the IP is disclosed in a manner prescribed in the policy to the Research and Innovation Office, and if the Office decides to pursue protection of IP, the office shall take steps to file relevant

[1] Shiri M. Breznitz, (n 56) 2 - 3.
[2] OOU has a Centre for Entrepreneurship and Innovation in addition to a Directorate for Research, Innovation and International linkages. It however does not have an IP Policy.
[3] The UNILAG policy for instance covered a wide range of IP assets. The policy covers all IP including but not limited to patents, trade and service marks (including the logo and insignia of the university), industrial designs, copyright, utility models, discoveries, indications of geographical origin, new plant varieties, trade secret (confidential data or information, including formulae, patterns, compilations, programmes, devices, methods, techniques, or processes used in research and business), technology-based materials in online courses and distance learning, research proposals, indigenous and traditional knowledge as well as any other intellectual property-related assets that may be created by persons covered by the policy. UNILAG IP Policy 2014 Article 4 Part A.
[4] Adejoke O. Oyewunmi, (n 7) 164.
[5] Nathaniel Adebayo, 'Babcock University Develops Intellectual Property Policy' *NILPWatch* 6 September 2017 <https://nlipw.com/babcock-university-develops-policy-on-intellectual-property/> accessed 1 March 2020.
[6] Nathaniel Adebayo, (n 64).
[7] Comms Week, 'Babcock Develops Policy on Intellectual Property' 1 September 2017, <https://www.nigeriacommunicationsweek.com.ng/babcock-develops-policy-on-intellectual-property/> accessed 1 March 2020. See also 'Babcock Develops Policy on Intellectual Property' *The Nation* 31 August 2017 <https://thenationonlineng.net/babcock-develops-policy-intellectual-property/#comments> accessed 26 December 2020.
[8] Comms Week, (n 66).
[9] University of Lagos Intellectual Property Policy 2014, Article 1 Part B.
[10] This includes investigators who use the facilities or resources of the university or who participate in university research to develop IP. Specifically included are all full-time and part-time faculty and non-faculty members of staff; students who participate in research and use facilities of the university research fellows; and visitors to the university's faculties, colleges whether academic collaborators from other universities or collaborators from industry; non-employees who use university funds, facilities or other resources, or participate in University-administered research, including visiting faculty, industrial personnel and fellows, regardless of obligations to other companies or institution. University of Lagos Intellectual Property Policy, Article 3 Part A.

applications for the registration of the IP and bear the costs.[1]

UNILAG IP Policy provides that the university will share royalties, equities and other incomes derived from licensing, assignment or other activities including transfers of technology involving non-patented technology and material transfer agreement with the inventor, unless prohibited or restricted by a third-party agreement. Equity sharing shall be on the net income. The royalty is to be shared as follows:

50% to researcher(s) in their personal capacity

25% shall be allocated pro rata to the environment(s) of the researcher(s) as follows:

8% shall be allocated to the University Research account of the researchers for use in their research work;

7% shall be allocated to the Department/Unit/Research Centre of the Researcher;

10% shall be allocated to the Researchers Faculty. These funds shall be applied for research only and shall not be allocated to any individual for personal gains;

25% shall be allocated to the Central Account of the University for general research purpose.[2]

4.3 University of Ibadan

The University of Ibadan (UI) Policy provides that the University shall own any IP that is made, designed, discovered or created by its members of staff, research students, visiting scholars in the course of their employment and responsibilities and/or makes significant use of University of Ibadan's resources in connection with its development.[3] Under the UI policy, researchers must disclose any information available to them in the course of carrying out a research which could potentially lead to IP asset(s). Unless otherwise agreed, all costs associated with the application for the IP protection of IP assets for which UI is seeking protection and commercialisation shall be borne by UI.[4] The provisions of UI IP policy on sharing of net profit are *in pari materia* with the UNILAG IP policy.[5]

4.4 Covenant University

For Covenant University, all students and faculty with patentable materials are required to file their applications for patents through the Covenant University Centre for Research, Innovation and Discovery (CUCRID) at no cost. The inventor(s) and Covenant University will jointly own the patent on award in line with the commercialisation policy. Where an external body is involved in the research with Covenant University, both organisations will own the Intellectual property rights together with the team of investigators as agreed on in the Memorandum of Understanding (MoU) or other legal documents. Where external funding is used for the research, such shall be declared at the onset and the conditions of ownership agreed.[6] For the purpose of sharing profit among the parties, only the net profit indicated by audited account documents shall be shared. Before such sharing, 62.5% shall be credited to the financiers, (investors), while the remaining 37.5% shall be shared as follows: Inventor (personal share) -26% (9.75%) Inventor (research share) -12% (4.5%) University -27% (10.125%) Proprietor -15% (5.625%) Departments -20% (7.5%).[7]

Universities like Olabisi Onabanjo University (OOU) and Federal University of Agriculture Abeokuta (FUNAAB) have research policies in which issues of IP ownership are not properly articulated. For OOU, while the research policy objectives were elaborately enumerated, the issue of intellectual property was perfunctory. On IP, the policy provides that 'Research activities in the university shall comply with extant provisions on Intellectual Property Rights. These include, but not limited to trademarks, patents, designs and copyright'.[8] The FUNAAB research policy provides that the University shall develop and operate a policy on intellectual property and that staff, students and visiting scholars shall abide by the intellectual property policy. It further provides that staff, students and visiting scholars shall acknowledge the contribution of the university to the success of their research activities in all publications and research outputs.[9]

The essence of an IP policy is to protect IP, facilitate optimal utilisation of intellectual knowledge generated by researchers within and outside the university, harmonise conflicting interests of stakeholders relating to ownership of IP, distribution of income, commercialisation, marketing, and licensing of patents and faculty, staff

[1] Article 3.1 Part C.
[2] University of Lagos Intellectual Property Policy, 2014, Article 2 Part E.
[3] University of Ibadan Intellectual Property Policy, 2012, Article 3.1.
[4] Article 5.3.
[5] See Article 5.5.2 of the University of Ibadan IP Policy 2012.
[6] Covenant University Centre for Research, Innovation and Discovery (CUCRID) Policy, Terms and Conditions <http://m.covenantuniversity.edu.ng/Research2/Policy-Terms-and-Conditions#.XxXTj2hKjDc> accessed 20 July 2020.
[7] Covenant University Centre for Research, Innovation and Discovery (CUCRID) Policy, Terms and Conditions <http://m.covenantuniversity.edu.ng/Research2/Policy-Terms-and-Conditions#.XxXTj2hKjDc> accessed 20 July 2020.
[8] OOU, *University Research Policy* approved by Senate 1st December 2014, 17.
[9] FUNAAB Policy on Research approved by Senate on 2nd October 2012, Article 13.

and students ownership of IP.[1] An IP policy provides structure, predictability and a beneficial environment in which entrepreneurs and researchers can access and share knowledge, technology and IP. The absence of intellectual property and innovation policies in many universities and research institutes in the country hinders the stimulation of entrepreneurship among researchers and students.

5. Conclusion

Rules surrounding intellectual property created by employees can be complicated. The protection of employee inventors' right to remuneration is critical to maintaining a balance between the employee inventors and the employers. The PDA has tried to strike a balance between the need to incentivise the employee and encourage the creation of employee inventions and the need to ensure return on investment for the employer. However, the PDA has not laid down the modalities for determining inventions that are of exceptional importance for which the employee would be entitled to remuneration. Anchoring the employee's compensation to the present salary may work injustice to an employee of meagre salary who has come up with an exceptional invention. The compensation should be based on the importance of the invention and the pecuniary benefits to the employer.

The adoption of intellectual property policies by some Nigerian universities is apt and timely. It is imperative for other universities to formulate IP policies that would incentivise creativity and innovation.

References

'Babcock Develops Policy on Intellectual Property' *The Nation* 31 August 2017 <https://thenationonlineng.net/babcock-develops-policy-intellectual-property/#comments> accessed 26 December 2020.

Adebayo N., (2017) 'Babcock University Develops Intellectual Property Policy' *NILPWatch* 6 September 2017 <https://nlipw.com/babcock-university-develops-policy-on-intellectual-property/> accessed 1 March 2020.

Adewopo A., (2012) According to Intellectual Property: A Pro-Development Vision of the Law and the Nigerian Intellectual Property Law and Policy Reform in the Knowledge Era (NIALS) .

Bansia R. and Reddy K., (2015) 'Intellectual Property from Publicly Financed Research and Intellectual Property Registration by Universities: A Case Study of a University in South Africa' 181 *Procedia - Social and Behavioral Sciences* 185, 186.

Breznitz S.M., (2014) *The Fountain of Knowledge: the Role of Universities in Economic Development,* (Stanford University Press) .

Buglass B., (2015) 'Who Owns an Employee Invention?' <https://www.radiusworldwide.com/blog/2015/9/who-owns-employee-invention> accessed 5 November 2021.

Comms Week, (2017) 'Babcock Develops Policy on Intellectual Property' 1 September 2017, <https://www.nigeriacommunicationsweek.com.ng/babcock-develops-policy-on-intellectual-property/> accessed 1 March 2020.

Covenant University Centre for Research, Innovation and Discovery (CUCRID) Policy, Terms and Conditions <http://m.covenantuniversity.edu.ng/Research2/Policy-Terms-and-Conditions#.XxXTj2hKjDc> accessed 20 July 2020.

Dutfield G. and Suthersanen U., (2008) *Global Intellectual Property Law* (Edward Elgar Publishing Limited).

Fisher W., (2001) Theories of Intellectual Property <https://cyber.harvard.edu/people/tfisher/iptheory.pdf> accessed 15 May 2021.

FUNAAB Policy on Research approved by Senate on 2 October 2012, Article 13.

Geoffrey Boulton, (2009) 'What are universities for?' *University World News* 29 March Issue No:69, <http://www.universityworldnews.com/article.php?story=20090326200944986> accessed 1 October 2021.

Harloe M. and Perry B.,(2005), 'Rethinking or Hollowing out the University? External Engagement and Internal Transformation in the Knowledge Economy' 17:2 *Journal of the Programme on Institutional Management in Higher Education: Higher Education Management and Policy* 29, 29.

ICC and WIPO, (2013) Making Intellectual Property Work for Business - A Handbook for Chambers of Commerce and Business Associations Setting up Intellectual Property Services (ICC and WIPO).

IP Australia, (2017) 'University–Industry Collaboration and Patents' <https://www.ipaustralia.gov.au/sites/g/files/net856/f/reports_publications/university-industry_collaboration_and_patents.pdf> accessed 5 September 2021.

Latham & Watkins, LLP, (2012) 'Employee inventions and improvements: a perspective from employers and investors', <https://www.lexology.com/library/detail.aspx?g=6870be6e-2eb3-43d3-8275-3464e674c8be> accessed 11 November 2021.

[1] Ransome A. Oboh and Oshiotse A. Okwilagwe, (2017) 'Intellectual Property Policy as Factor Influencing Creation of Intellectual Property in Universities in South West, Nigeria' 8(3) Information Impact: Journal of Information and Knowledge Management 39, 42.

Machlup F and Penrose E, (1950) 'The Patent Controversy in the Nineteenth Century' 10 (1) The Journal of Economic History 1.

Moore A and Himma K (2014)'Intellectual Property', *The Stanford Encyclopedia of Philosophy* Edward N. Zalta (ed), <http://plato.stanford.edu/archives/win2014/entries/intellectual-property/> accessed on 20 September 2021.

Morrison & Foerster LLP, (2010)'Employees' rights to inventions and rewards under the revised Patent Law' 2010 <https://www.lexology.com/library/detail.aspx?g=93ee3a62-f04a-47aa-88f2-34dff7233385> accessed 11 November 2021.

Negandhi S., 'The Importance of Intellectual Property Rights to Businesses' <https://www.lawyered.in/legal-disrupt/articles/importance-intellectual-property-rights-businesses/> accessed 28 December 2020.

Neil Wilkof, (2014) 'Theories of Intellectual Property: Is it worth the effort?' Journal of Intellectual Property Law and Practice <http://jiplp.blogspot.com/2014/03/theories-of-intellectual-property-is-it.html> accessed 15May 2021.

Nwogu M.I.O.(2015) , 'The Dialectics of the Right of Ownership of Patentable Inventions under the Nigerian Legal System' 3(3) International Journal of Social Science Studies 96, 99, doi:10.11114/ijsss.v3i3.758.

Oboh R.A. and Okwilagwe O.A, (2017) 'Intellectual Property Policy as Factor Influencing Creation of Intellectual Property in Universities in South West, Nigeria' 8(3) Information Impact: Journal of Information and Knowledge Management 39.

Odebiyi A.I and Aina O.I, (1999) 'Alternative Modes of Financing Higher Education in Nigeria and Implications for University Governance' *Final Report* Submitted to Association of African Universities, Accra, Ghana, <http://www.ppv.issuelab.org/resources/19599/19599.pdf> accessed 5 October 2021.

OECD, (2013) *New Sources of Growth: Knowledge-Based Capital – Key Analyses and Policy Conclusions – Synthesis Report* (OECD).

Oguamanam C., (2008-2009) 'Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy' 9(2) Wake Forest Intellectual Property Law Journal.

Oladiran A. A. and Falade O. D., (2017) 'Patentability of Inventions under the Nigeria's Patents and Designs Act: An Examination' 8(2) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 56.

Oloyede I., (2010) 'Research and National Development: Challenges and the Way Forward', A Keynote Address Presented by the Vice-Chancellor, University of Ilorin, CODAPNU Workshop at the University of Ilorin on October 26, 2010.

OOU, *University Research Policy* approved by Senate 1 December 2014, 17.

Oyewunmi A., (2015) 'Setting the Context for Public-Private Partnership Through Intellectual Property Technology Transfer from University to Industry in Nigeria' in Edward Oyelowo Oyewo and Abiola Sanni (Eds.) *Commemorative Essays on 50th Anniversary of Faculty of Law University of Lagos* (Faculty of Law University of Lagos 2015) 30.

Oyewunmi A.O., (2014) *Nigerian Law of Intellectual Property* (University of Lagos Press & Bookshop Ltd).

Snow N., (2021) Moral Bars to Intellectual Property: Theory & Apologetics, 28 UCLA ENT. L. REV. 75, 77-78.

Sodipo B., (2017) *Copyright Law: Principles, Practice and Procedure* (2nd ed Swan Publishing 2017).

Templars, (2015) 'Patentability under the Nigerian Patents and Designs Act (PDA): An Introductory Analysis' Templars IP Newsletter, <https://www.templars-law.com/wp-content/uploads/2015/05/Patentability-Under-the-Nigerian-Patent-Act.pdf> accessed 21 October 2021.

Tong L., (2016) The Development of a South African Legal Framework relating to Patentable Inventions made by Employees (PhD Thesis University of Cape Town 2016) <https://open.uct.ac.za/bitstream/handle/11427/20334/thesis_law_2016_tong_lee_ann.pdf?sequence=1> accessed 17 May 2021.

Udoaka E.E., (2008-2009) 'An Analysis of the Theories of Intellectual Property' 1 (2) Lead City University Law Journal 494.

University of Ibadan Intellectual Property Policy, 2012,

University of Lagos Intellectual Property Policy 2014.

WIPO, (2011) Making Intellectual Property Work For Business: A Handbook For Chambers Of Commerce And Business Associations Setting Up Intellectual Property Services, (ICC, WIPO).

Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.117, 2022

Succession Rights under Esan Customary Law in Nigeria: The Problems of Applicability of Esan Customs and the Challenges of Fundamental Rights

Mr Paul Okhaide Itua*
Department of Commercial and Industrial Law, Ambrose Alli University,
P.M.B. 14, Ekpoma Edo State, Nigeria

Abstract
Esan Native Law and Customs like any other customary laws in Nigeria is recognised as law that regulated the customary aspect of the people subject to its jurisdiction. One of such aspect, is succession and inheritance rights. Although, Esan customary law has from time immemorial made adequate and sufficient rules that regulate and govern succession rights, recently these rules have come under vigorous legal scrutiny concerning their applicability *vis-à-vis* the enforcement of fundamental rights of citizens that are constitutionally guaranteed. This article therefore seeks to examine critically the application of Esan Native Law and Customs regulating succession and inheritance rights in general, identify its deficiencies and advocate for sustainable ways to harmonise them by making them to conform with the current state of the law dealing with the enforcement of fundamental rights of citizens. This approach has become imperative in other to prevent certain aspect of Esan Native law and customs dealing with succession rights from being adjudged repugnant to natural justice equity and good conscience.
Keywords: Succession Rights, Esan Customary Law, and Fundamental Rights
DOI: 10.7176/JLPG/117-09
Publication date: January 31st 2022

1. Introduction

1.1 Origin and brief history of Esan people

The term Esan has more than one meaning depending on the context in which it is used. According to Izibili[1] the word Esan is a nomenclature for a territory occupied by a people of a known location and land.[2] Linguistically, it is a language spoken in that locality. Historically, there were already existing fixed names for the people that lived in the present-day location now called Esan, for mere political and social reason. For example, fixed names like Ugboha, Uromi, Ubiaja, Ebhoikhimi.[3] On the historical account concerning the origin of the Esan people, "there is a rather popular school of thought that believed that the Esan came or migrated from Benin Empire at different period and the earliest batch of such migrations which happened in about 1025 BC actually met some inhabitant at Egbelle in the present day Uromi"[4]. Okojie on the other hand asserted that "all Esan people came directly and indirectly from Benin as could be seen from the uniformity of their features, languages and custom,"[5] but he was quick to add that "the history of the Ruling Houses, that is the Enijie, is quite different from that of the subjects or commoners".[6] This narrative seems to give credence to the "*Esan fia*" theory which literally means they have fled.[7] Commenting on the origin of the Esan people Bradbury[8] observed that there are a few references in Ishan tradition to aboriginal people who lived in the area before the migrations, which resulted in the founding of the present- day communities. The implication of this statement is that most accounts about the origin of the Esan are based on the individual account as it affects a particular village, clan, or kingdom. For example some elements in the population of Egoro, Okpoji, Ewu, Uromi

* LL.M, LL. B (Hons) BL. Senior Lecturer and Notary Public
[1] See Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021. Page 6
[2] Izibili., M.A. *Esanology Essays and Reflection on Esan worldview: Yesterday, Today and the Future*. (2020 Mauritius: Ks Omniscriptum Publishing) pp-2-3.
[3] See footnote 1 above.
[4] Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021. Page 6. See also, Ojiefo. A.P. Uromi Chronicles 1025-2002 (2002 Aregbeyeguale Publisher Uromi) page 2.
[5] Okojie. C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin.) p 17.
[6] Ibid.
[7] For further reading on the nature of the theory, see Okojie. C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin.) p17-24
[8] Bradbury R.E., The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) 63.

and Ewohimi claimed to be descended from ancestors who "dropped from the sky" or who emerged from the ground or from rivers.[1] In Iruekpen, according to available written materials, supported by local oral account, human settlement existed in Iruekpen during the reign of the *Ogisos'* in ancient Benin around 1000 A.D. -1170 A.D. it is not particularly clear under which *Ogiso* the settlement began or flourished. Oral sources tell of the arrival in Iruekpen of a powerful military group from Benin led by one Chief Iken of Uselu quarters. This group were said to settled and intermixed with the aborigines of the settlement now called Iruekpen.[2] Also, in Ewu tradition it is generally believed that one of their ancestors fell from the sky and was conquered by the Oba of Benin who gave him a wife and followers, and later sent him back with the title *Onogie.* However, most oral traditions are particularly concerned with the origins and growth of their respective kingdoms, villages, and village-groups that claim to have been founded directly or indirectly from Benin or by natives of other areas (especially Ife and Ifeku Island) who were absorbed, peacefully or by conquest, into the Benin empire. Traditional history provide that emigrant from Benin fled from injustice or oppression though a few Enigie[3] were apparently deliberately placed by the Oba of Benin to look after shrines or to guard his interest in the area.[4] It has been suggested that some of the chiefdoms were undoubtedly offshoots of the other already established communities and that their Enigie did not, perhaps, in all cases, secure the Oba's recognition.[5] Existing literatures concerning the origin of the Esan suggested that it is not possible to say with precise accuracy the date these chiefdom were formed. According to Okojie the actual event that came to bring them together was Ewuare's wooing of 1463. At Benin the leader or *Ekakulos* (war lords) met and were given similar titles to enable them to rule their respective communities. Yearly they went personally or through accredited agent to pay homage to their overlord, the Oba of Benin. Their re-union in the place of their origin with the common description of how they broke away resulted in the group name of ESAN.[6] On the other hand, Bradbury is of the view that it is possible to date satisfactory the founding of the kingdoms though the traditions of Igueben and Urohi, because accounting to oral tradition, they were founded by warriors who followed the Oba of Benin to the war against the Ata of Idah, presumably the one which historian recorded to have taken place early in the 16th century.[7] Also, he went further to posit that the 26 kingdoms for which information were available could recall the names of their *Onojie* i.e., king from the six (6) to the sixteen (16) *Enigie*, with the exception of Igueben which could names twenty-six (26) *Ekaigu*. Sixteen kingdoms list a succession of between Twelve (12) and sixteen (16) Enigie but in a few cases the list is said to be incomplete, some names having been forgotten. In terms of demography, all the kingdoms appear to have grown by the addition of immigrants of widely diverse Edo-speaking origins, who have accepted the authority of the *Onojie* in whose territory they have settled. This has resulted in all the Kingdom having heterogeneous composition. Also, there is another school of thought which postulated that most of the people claim descent from people who emigrated from the Benin kingdom for widely very reasons. They included warriors who did not return to Benin after fighting campaigns (e.g., against Idah and Uzia); relatives of the Oba and others who offended him; individual placed by the Oba to guard the shrines; craft, trading and ritual specialist who came to seek their fortunes or were invited by the *Enigie*; slaves or servants sent down to farm for chief in Benin who were responsible to the Oba for administration of Ishan, etc. The *Enigie* often encouraged settlers by giving them title and other honours and privileges.[8]

Some historians have questioned the account that seem to suggest that the original founder of Esan migrated from Benin Kingdom from about the late 14th century AD, thereby classifying such an account as one of the stereotypes in history.[9] According to Oseghale,[10] "on the question of origin of the Esan people, there appears to be a consensus in the historical writings that the Esan and Benin people have a common ancestry. The narratives are to be found not only in oral histories[11] of both people but also in written texts[12] over several decades."

[1] Ibid.
[2] For further reading, see Iregbeyen. X., Iruekpen *History, People & Culture* (2012 Anointed Publishing Company Benin) page 2.
[3] The plural form of Onigie.
[4] Amongst such Enigie were the Onogie of Urohi and the Okaigū of Igueben.
[5] See Bradbury, R.E The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) at 63.
[6] Okojie C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin. P1.
[7] Bradbury, R.E The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) at 64.
[8] Ibid.
[9] Oseghale. E.B., *Stereotypes in History.* An inaugural lecture series No 81 of Ambrose Alli University Ekpoma, Edo State 2019, 16-17.
[10] Ibid.
[11] See Oseghale. B.E., "Warfare and Diplomacy in Pre- Colonial Esanland (1463-1900)" Long Essay submitted to the Department of History, Bendel State University, Ekpoma, June 1987; Oseghale. B.E., "Esan -Benin Relations 1500-1800 AD; A study in inter-group relations", M.A. Dissertation submitted to the Department of History, University of Ibadan, Ibadan, September 1990. Oseghale. B.E., "On ideological development pre-colonial Esan; the role of Benin", A.I. Okoduwa (ed) Studies in Esan History and Culture: Evolution of Esan Polities. Vol.1 pp-23-36. Oseghale. B.E., *Issues in Ishan History and Relation, 1500-1800* (2003 Rasjel Publisher) p1, Oseghale. B.E., "The Benin Factor in Esan origin Traditions*" Journal of Teacher Education and Teaching,* Vol.7 Nos 1 and 2, 2004 pp.130-139.
[12] See for example, Egharevba. J.U. *A Short History of Benin*. (1968 University of Ibadan Press Ibadan). Omokhodion. O.J., The Sociology of Esan, (1998 Pearl Publication Chicago-Illinois)

Explaining further, he posted that:

> …the overriding submission are claims to the effect that Esan people and their socio-political institution derived directly from Benin through waves of migrations, which started from about the late 14th Century AD. The migration from Benin to an area which became Esan was said to have been triggered, in most cases by conflicting interest inside the monarchy in Benin Kingdom. Hence, the original Esan ancestors, comprised aggrieved Benin dissident as well as those that fled from socio-economic persecution.

Oseghale then articulate the bases of the Benin migration theory of Esan origin as formulated and developed around the following parameters by the proponent of the theory.

1. That the predominance of Benin origin claims contained in "received traditions" and transmitted through oral interviews and field work to researchers and historians;
2. The contiguity of Esan and Benin landmasses and the apparent absence of absolute borderlines;
3. The Esan and Benin language belonging to the same Kwa family group of languages and are mutually intelligible;
4. The political institutions in Esan and Benin, notwithstanding the absence of an all- encompassing central monarchical system in former, have visible similarities;
5. Social organization in both Esan and Benin including family and age-group stratifications having strong similarities; and
6. There are commonalities in cultural belief, marriages, birth, and death rites, among others.

Finally, Oseghale concluded by stating his own understanding of what this stereotype explanation of Esan origin translate into as follows:

a) That Esan people and their polities did not exist until about 500years ago when the said waves of migration from Benin occurred;
b) That the entire land mass, which eventually became Esan land (the entire 2,814 sq km), was a cul-de-sac meaning an empty place or space, devoid of human habitation, until it was peopled by migrants from Benin in the late 14th century;
c) That Esan political and socio-cultural institutions and practice are direct carry-over from Benin King.[1]

From Oseghale's understanding of what the stereotype means to the search of the historical origin of the Esan people, it means that that stereotype is totally misleading and a distortion of history. Thus, for Okojie, the name Esan "came to be applied to all the district now forming what the British had corrupted to ISHAN, during the reign of OBA EUARE the selfish. By then, many of the important districts in this territory were already in existence as important groups, e.g., URUWA (Irrua), URONMU (Uromi), EKUNMA (Ekpoma), UBIAZA (Ubiaja) etc, but they were known by their individual names and there were no common names. They knew they had a common stock and that was all" [2]

From the foregoing, the origin of Esan people can be traced to three categories of persons that later came together to eventually formed what is today known as the Esan tribe in Edo Central Senatorial District of Edo State. The first group were the aborigine people who were already leaving in places like Irrua and Ekpoma. The second groups were the immigrant that came from Benin kingdom and the final group were the warriors that accompanied the Oba Esigie of Benin to fight in the war between the Attah of Idah, in the Idah war of 1515-1516. One of the warriors' called Eben on his return to Benin later settled with his party at a place that later became known as Igueben. Thus, this explain the fact that in computing the history of all the kingdoms in Esan land, Igueben is the youngest.[3]

In the fifties, Esan was administered through eleven Native Authorities. They are as follows.

1. Uromi (*Urhomu*)[4] – Uzea (*Uzeea)* Native Authority.
2. Unbegun (Ugbegü) Native Authority.
3. Southwest Federation:
    a) Amahor (*Amaho*) Clan};

[1] Oseghale. E.B., *Stereotypes in History.* An inaugural lecture series No 81 of Ambrose Alli University Ekpoma, Edo State 2019, 17.
[2] Okojie C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin). P1.
[3] For further reading concerning the origin and history of all the thirty -five (35) kingdoms in Esan land. See Okojie C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin. Pp 236-586.
[4] The phonetic spellings in parentheses are taken from the speech of Dr Okojie, a native of Irrua and Ugboha. Also, for the corresponding numbers of villages under each Kingdom see [4] Bradbury, R.E The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) at 64. For the table containing the names and villages that made up each Kingdom. The column is based on the names of the villages given in Administrative Report and does not include temporary or recent "camps" distinguishable by the prefixes *eko* or *ago*, which may be or may not have the social organization and social status of villages. The numbers of villages do not coincide with those given in the 1952 Census report where the term village is apparently not used in the same sense or consistently. In any case it is probable that the same criteria for distinguishing villages from wards on the one hand and village group on the other have not been used in all our sources. For further reading see Bradbury, R.E. *The Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) at 64.

b) Ebelle (*Ebene*) Clan};
c) Ogwa (*Orwa*) Clan} with its Headquarters at Ebelle;
d) Ugun (*Ugü*) Clan};
e) Ujiogba (*Ujogba*) Clan}.

4. Southeast Federation:
   a) Emu (*Emunu)* Clan};
   b) Ohordua (*Ohodua*) Clan};
   c) Okhuesan (Oxuesâ) Clan} with its Headquarters at Emu;
   d) Orowa (Orowa) Clan}.
5. Northeast Federation:
   a) Ubiaja (Ubiaza) Clan};
   b) Illushi (*Ozigono*) Clan};
   c) Udo (Udo) Clan} with its Headquarters at Ubiaja;
   d) Ugboha (*Owoha*) Clan};
   e) Oria (*Oria*) - Onogholo (*Onogholo*)}.
6. Ivie -Uda – Esaba Federation:
   a) Ekpoma (*Ek'ma*) Clan};
   b) Egoro (*Egholo)* Clan};
   c) Opoji (*Ukpozí*) Clan} with its Headquarters at Ekpoma;
   d) Ukhun (*Uxü*) – Idoa (*Idoa*) Clan};
   e) Urhohi (*Uroí*) Clan};
7. Ewohimi Federation:
   a) Ewohimi (Evoíxíví or Oríxíví)};
   b) Ewatto (Evoato)} with its Headquarters at Ewohimi;
   c) Ewossa (Evoosa)}.
8. Ekpon (Ekpo) Native Authority.
9. Ewu (*Éilu)* Native Authority.[1]
10. Igueben (Iguebé) Native Authority.
11. Irrua (*Urua*) Native Authority.

From the eleven Native Authorities of the fifties emerged single Divisional Council at the centre. The then Military Government of Bendel State set up Ishan Divisional Development Council under the chairmanship of late Dr Christopher Gbelokoto Okojie OFR, with thirty-four Development Committees. (One for each town) in 1975. However, there were agitation that Esan should be divided into two local government area because of its size; and for adequate economic development. Eventually, two local government councils were established. They were Agbazilo and Okpebho local Government Councils. Agbazilo Local Government Area, which had it headquarter at Ubiaja, consisted of the following towns/clans. Uromi, Ewohimi, Ubiaja, Ugboha, Emu, Ohordua, Ewatto, Ewossa, Illushi, Okhuesan, Ifeku, Uroh, Oria, Onogholo, Orowa, Iyenlen, Uzea, and Udo. On the other hand, Okpebho Local Government Area, which had it headquarters at Ekpoma, was made-up of the following towns/clans as well. Ekpoma, Irrua, Igueben, Ewu, Ebelle, Opoji, Egoro, Ogwa, Amahor, Urhohi, Ujiogba, Ekpon, Ugun, Ugbegun, Ukhun, Idoa, and Okalo.

Furthermore, on the 27th of August 1991, Esan was further spit into four Local Government Areas. These are Esan West with its headquarters at Ekpoma, Esan Central with it headquarter at Irrua, Esan North-East with its headquarters at Uromi, Esan South East with its headquarters at Ubiaja. A fifth local government Area known as Igueben Local Government Area, with its headquarters at Igueben was further created in 1996 by the administration of late General Sani Abacha.

On the political and administrative structure, a total of 35 (thirty-five) autonomous kingdoms[2] consisting of large villages / township ruled traditionally by monarchs known as *Enijies*[3] constitute Esan land.[4] Esan people presently occupy an area of land approximately about 298.52 sq. Km and is bounded on the north by Owan East, Etsako West and Etsako Central; Owan West in the Northeast, Orhionmwon in the South and river Niger by East. The Northern half is a plateau with the highest point of some 450m above sea level.[5]

[1] Ujagbe village was formally under Ewu, during the British Colonial administration. However, under the present democratic dispensation, they are now grouped with the Agbede in the present day Etsako West Local Government Area of Edo State.
[2] The kingdoms are as follows: Amahor, Ebelle, Egoro, Ewohimi, Ekekhenlen, Ekpoma, Ekpon, Emu, Ewu, Ewatto, Ewossa, Idoa, Ifeku, Igueben, Ilushi, Inyelen, Irrua, Ogwa, Ohordua, Okalo, Okhuesan, Onogholo, Opji, Oria, Orowa, Uromi, Udo, Ugbengun, Ugboha, Ubiaja, Urhohi, Ugun, Ujiogba, Ukhun and Uzea.
[3] The plural form of the word "Onojie", which means a traditional ruler or King.
[4] For further reading, see "Esan people on Wikipedia, the free encyclopaedia" available at: http://en.wikipedia.org/wiki/Esan_people (last accessed on the 14 of August 202).
[5] Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the

2.0 Succession and inheritance rights

According to Black Law dictionary[1], succession is defined as "the devolution of title to property under the law of descent and distribution. The act or right of legal or official investment with a predecessor's office, dignity, possession, or functions; also, the legal or actual order of so succeeding from that which is or is to be vested or taken. The word when applied to realty, denotes persons who take by will or inheritance and excludes those who take by deed, grant, gift or any form of purchase contract." Inheritance on the other hand is equally defined by the same Black law dictionary as "that which is inherited or to be inherited. Property which descends to an heir on the intestate death of another. An estate or property which a person has by descent, as heir to another, or which he may transmit to another, as his heir." Right has also being defined as "a legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act."[2] Thus, the law of Succession involves the transmission of the rights and obligation of the deceased persons in respect of his estate to his heirs and successors. The term succession has also been defined as the act or right of legally or officially taking over a predecessor's office, rank, or duties. It goes further to state that it is the acquisition of rights or property by inheritance under the laws of descent and distribution. In *Audu v. Shedrack*[3] the Court of Appeal define inheritance as follows: "inheritance means Property received from an ancestor under the law of intestacy…2 Property that a person receives by bequest or devise" On the other hand, Emiola emphasised that 'Succession' has "broader meaning of the acquisition of rights upon the death of another. The word encompasses what, in English law, are governed by three different rules of law, viz, the law of wills, the law of intestacy, and the law relating to accession to titles and dignities.[4]

Under Islamic law, the word succession has the same terminology in Arabic language. The Arabic word for succession is "*Al-Mirath*" especially with due regard to instance of intestate and partial testate succession under the Islamic law[5]. The term "*Mirath"* is not a novel term under the Islamic law. Indeed, as a noun, it appears among the beautiful name of Allah [SWT] in Qur'an 2:180 as Al-warith. An Arabic term which translates to mean "the successor" in English language. As a literal concept, this term lends itself to two significant meaning. One of such translation means "the transfer of something from one person to another". This is term that is relevant to the focus of this research. Thus, the things that are capable to be transferred under this context includes tangible or intangible asset, e.g., like money, houses, and choses in action or chattels either personal or real. Therefore, the term *Mirath* is simply used under the legal context of the Islamic law to refer to "Any property or right (legal or equitable) distributable to the legal heir(s) of a person upon the demise of a praepositus person"[6].

From the definitions examined above it become clearer why most times, issues that qualify as succession matters are most times interwoven with inheritance, thereby requiring a careful consideration and examination in other to be able to make the correct distinction. Some scholars and authors[7] classify matters concerning inheritance and succession as Human Rights issues. In Nigeria, this classification might not be out of place because of some discriminatory customary practises that are prevalent in some communities. Under Esan customary law, for example most customary practices concerning inheritance and succession appears to be highly discriminatory against women. The reasons for this sourly state of affairs are not farfetched. Succession and inheritance under Esan Customary law is primarily regulated and governance by the rule of primogeniture that ensures male domination at the detriment of the women. Gender sensitivity in matters concerning inheritance and succession is almost non-existence.

3.0 Inheritance as Human Right issue

Rights *simplicita*, is a claim which is supported by law.[8] It could also be power, privilege or immunity which is guaranteed a person by the law. As it concerns Human Rights, inheritance is seen as the right one has to benefit from the estate or interest of a deceased ancestor or relative, while inheritance which includes succession is the acquisition of the rights to property under the law of descent and distribution. In *Osondu & Anor v. A-G Enugu State & Ors*[9] the Court of Appeal defined the term "fundamental Right" and Human Rights in the following manner. "Fundamental Right - means any of the rights provided for in chapter IV of the Constitution and includes any of the rights stipulated in the Africa Charter on Human and People's Rights (Ratification and

throne of his fathers on 22nd June 2021. Page 6
[1] Black Law Dictionary with Pronunciations. 6th Edition, P 1431.
[2] Ibid at 1325.
[3] (2016) LPELR-40771(CA)
[4] Ibid,
[5] Yusuf, A. and Sheriff, E. E. Okoh *Succession under Islamic law* (2011) Malthouse Press Limited. Page 3.
[6] Ibid.
[7] Ogugua v. c. *Gender Dynamics of Inheritance Rights in Nigeria Need for Women Empowerment* (2009) Folmech Printing & Pub.Co. Ltd page 17.
[8] Ibid.
[9] (2017) LPELR-43096(CA).

Enforcement) Act. Human Rights – includes fundamental rights." Therefore, inheritance here encapsulates the receipt of property or interest from or an ancestor under the law of intestacy.[1] This further demonstrate that inheritance qualify as a Human Right. The Protocol to the Africa Charter on Human and Peoples' Rights (Pro-ACHPR) which was adopted in Mozambique in 2003 and came into force in 2005 provides on the right to inheritance thus: "A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house; in case of remarriage, she shall retain her right if the house belongs to her or she has inherited it. That women and men shall have rights to inherit in equitable shares their parents' properties.[2] Also relevant, are some provisions of the 1999 Constitution (as amended) dealing with fundamental rights. The provisions of section 42 (1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which specifically prohibit discrimination on the bases of gender or the circumstance of birth of any Nigerian is apt. In Mrs. *Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje* [3] the Supreme Court had the opportunity to evaluate the provisions of Section 42 (1) and (2) of the 1999 Constitution *vis-a-vis* an Igbo native law and customs which deprive children born out of wedlock from sharing from the benefits of their deceased father's estate. The court per Rhodes - Vivour JSC held as follows: -

> …L.O. Ukeje deceased is subject to Igbo customary law. Agreeing with the High Court the Court of Appeal correctly found that the Igbo native law and custom which disentitles a female from inheriting in her late father's estate is void as it conflicts with section 39(1)(a) and (2) of the 1979 Constitution (as amended). This finding was affirmed by the Court of Appeal…No matter the circumstances of the birth of a female child, such a child, is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking, in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said customary law is void as it conflicts with section 42(1) and (2) of the Constitution.

This judgment reaffirms that issues concerning inheritance are human rights issues that must be enforced in accordance with the provisions of the Constitution. The legal implication of this judgements of the Supreme Court concerning the rights of female children and widows to inheritance, particularly in relation to the estate of their late father and husband is revolutionary in nature. This judgment effectively ended the discriminatory practices against daughters and widows which were hitherto considered as the accepted interpretation of the native law and custom in most communities in Nigeria. Also, of important is that apart of the judgment dealing with the issue of disinheritance of female children under customary law. This case i.e., *Mrs. Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje* [4] also dealt with the status of children born out of lawful wedlock under Igbo native law and custom *vis-à-vis* their right of inheritance in the estate of their deceased father. The Court per Ogunbiyi JSC held that:

> The trial court, I hold did rightly declare as unconstitutional, the law that dis-inherit children from their deceased father's estate. It follows therefore that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The reproduction of that section states thus: 42(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

Thus, this case also established the principle that the mere fact that a child is born out of lawful wedlock should not be a bases for disentitlement for inheritance. This decision being the decision of the apex court, bind all court within the Nigeria Legal system. The position of the law is that any custom that tend to discriminate against female children by depriving them of their rights of inheritance in the estate of their deceased father shall be declared null void and of no effect.

4.0 Succession under Customary Law

The legal framework for succession in Nigeria is divided into two broad classifications. Testate and Intestate succession. Testate succession essentially deals with Wills, while intestate succession on the other hand deals with the distribution of a deceased estate through the instrumentality of customary law. In *Zaidan v. Mohssen*[5] the Supreme Court define the meaning of customary law as follows:

[1] Ogugua v. c. *Gender Dynamics of Inheritance Rights in Nigeria Need for Women Empowerment* (2009) Folmech Printing & Pub.Co. Ltd page 17.
[2] See Article 21 (1)
[3] (2014) LPELR-22724 (SC)
[4] (2014) LPELR-22724 (SC)
[5] (1973) LPELR-3542 (SC)

> We are of the view that, in this context, customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between the parties subject to its sway. We are also of the view that anyone subject to any such law is excluded from the operation of section 49 of the Administration of Estate Law (Cap 1) of Western Nigeria 1959 applicable in the Mid-Western State of Nigeria.

Also, in *Ejike & Anor v. Onuzulike & Ors*[1] Isaiah Olufemi Akeju JAC at Pages 30-31 Para E-C of the record held as follows when defining the meaning of Customary law thus:

> In NWAIGWE V. OKERE (2008) ALL FWLR (PT. 431) 843 at 870. TOBI J.S.C defined Customary Law as follows: - 'And what is Customary Law? Customary Law generally means relating to custom or usage of a given community. Customary Law emerges from the tradition, usage and practice of people in a given community which, by common adoption and acquiescence on their part and by long and unvarying habit, has acquired, to some extent, element of compulsion and force of law with which it has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable. Putting it in a more simplistic form, the customs rules, traditions, ethos and cultures which concern the relationship of members of a community are generally regarded as Customary Law of the people' it follows from the foregoing that for custom, usage, convention or tradition to be binding and enforceable among the people of a particular community it must have either been accepted, adopted or acquiesced to over a long period of time.

Furthermore, according to the learned author Salacuse, Customary law can be defined as "a mirror of acceptable usage, a reflection of the social attitude and habits of various ethnic group and it derives its validity from the consent of the community which it governs, applicable only to the people indigenous to the locality where such customary law holds sway." [2] Also, the court has held that custom must be flexible and changes with time. Therefore, any applicable customary law at any particular time must be an existing customary law and not merely a custom of ancient time[3] Basically, succession under customary law is intestate succession. It is applicable to the estate of a person who is subject to customary law, contracted a statutory or Christian marriage and dies without being survived by a spouse or a child of that marriage[4] and persons who *ad initio* contracted customary marriages.

4.1.0 Succession under Esan Customary Law

The position under Esan customary law concerning succession and inheritance is straightforward. Matters of inheritance and succession are determined by the application of the rule of primogeniture. Under this rule, the eldest surviving son of the deceased inherit the property of his late father exclusively. He alone makes the determination as to what property he intends to share with his other brothers. Okojie aptly described the position of the customary law thus:

> Basically, the first son inherited the father's property and sheared to any of his junior brothers and sisters at his pleasure. It is true that some brothers particularly the second and the third could challenge his unfairness in taking everything to himself and reported the matter to the *Egbele.*[5] In this, the *Egbele* could only advice, they could not force the first son to part with what has come to him by right. [6]

In *Ogiefo v. Isesele1 & Ors*.[7] The Court of Appeal define primogeniture as per Saulawa J.C.A. as follows:

> …the term primogeniture denotes the state of being the firstborn child among siblings. Jurisprudentially, the term primogeniture connotes - 'The common-law right of the first-born son to inherit his ancestor's estate. Usu. to the exclusion of younger siblings. Also termed (in sense 2) primogeniture ship'…however, according to Radhadinod Pal primogeniture embraces all the cases of single inheritance and may indeed be define

[1] (2013) LPELR-21220 (CA).
[2] W. J. Salacuse in *"A Selection Survey of Nigeria Family Law* (1965 Ahmadu Bello University Book shop Zaria) at 2 & 8.
[3] See Bairaiamia CJ in *Owonyin v Omotosho* (1961) ALL NLR 304 at 309
[4] See the case of *Salubi v. Mrs Benedicta Nwariakwu & Ors* [1997] 5 NWLR (Pt. 505) 442. Here the court held that where a person who is subject to native law and custom marries under the Marriage Act, and he dies interstate, the applicable law for the distribution of his estate is the Marriage Act. It should be noted that Sec. 36 of the Old Marriage Act deal with the issue of distribution of the estate of any person who is married under the Marriage Act upon intestacy. However, this provision has been removed from the current Marriage Act Cap M7 law of the Federation of Nigeria 2014. Issues of intestacy are now death with by the provisions of the Administration of Estate Laws of the various states. In Edo State, the relevant law is the Administration of Estate Law Cap 2 Law of Bendel State of Nigeria 1976 applicable to Edo State.
[5] Elderly male members of his extended family.
[6] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 119.
[7] (2014) LPELR-22333 (CA)

as prerogative enjoyed by an eldest son or occasionally an eldest daughter, through law or custom to succeed their ancestor's inheritance in preference to younger children.

However, before the eldest surviving son of the deceased is entitled to inherit his late father's estate, he must comply with the customary rules that govern succession under Esan customary law. Apart from the rule of primogeniture, inheritance and succession is patrilineal among the Esan people. Patrilineal inheritance is a system whereby property is inherited from one's father or another paternal ancestor[1]. This system is also known as patrimony.[2] This system is a very common feature of most communities in Nigeria. The philosophy behind the practice of this system of inheritance is to ensure that property remains within the family from generation to generation. Apart from the above stated reason, this system of inheritance seeks to ensure that family identity and traditions are maintained[3]. Chieftaincy titles, which are hereditary under customary law can only be inherited through patrilineal mode of inheritance. However, in many instances of patrilineal inheritance, male children inherit to the exclusion of the female children.[4] However, there are limited situation where female children are part of patrilineal inheritance. In such instances, a distinction is usually drawn between family property and personal property of the deceased.[5]

4.2.0 Laws governing Inheritance and Succession Rights under Esan Customary law

For many centuries, the laws the regulate and governed issues affecting succession and inheritance in almost all the 35 kingdoms[6] in Esan land have crystalized into seven recognisable laws. These laws, regulate customary succession and inheritance rights under Esan customary law. Amongst these seven laws, two are directly imparting succession to the throne as a traditional ruler called the *Onojie*, (king) in Esan language. while the remaining five laws, i.e., (1), (2), (3), (4) and (6) have dual application under Esan customary law. In other words, these laws regulate inheritance matters that effect both the crown and the ordinary citizens of the community. Unfortunately, these rules are not of universal application throughout all the kingdoms in Esan land. Two kingdoms, and a cosmopolitan clan does not observe these rules particularly as it concerns succession to the throne. These kingdoms are the kingdom of Idoa, Ukhun, and the cosmopolitan clan of Illushi.[7] Although the rule of primogeniture was introduced into Esan land as a result of the introduction and adoption of the Benin Court Tradition in 1463 AD during the reign of Oba Ewuare over the years, the Esan communities have modified the rules in its application and scope, when compared to what is presently obtainable among the Binis.[8] Some Esan historian had opined that these variations are not unconnected with the traditions of the aborigine that had already settled before the conferment of the Benin traditional court practices in Esan land. These two ethnic groups, the Binis and Esan, are among the key ethnic groups in present-day Edo State in Nigeria. Historically, one of the accounts of origin of the Esan people is that the initial settlers / founders of Esan land were said to have migrated from Benin Kingdom.[9] This explains the similarity in the customs and traditions between these two groups. Esan land consists of 35 (Thirty-five) kingdoms with their autonomous traditional rulers known as the *Onojie*[10]. Within these, 35 autonomous communities, it is not difficult to find areas of notable variations in the application of certain aspect of the customary law rules regulating succession and inheritance rights. Despite these differences, these seven basic laws governing the selection, succession, and installation of the traditional ruler, the *Onojie* [11] are of general applicable throughout Esan land. The rule of primogeniture is strictly adhered to in almost all these kingdoms except for the kingdom of Idoa, Ukhun and the cosmopolitan clan of Illushi where the succession to the throne is based on the principles of rotation among the various ruling houses. Apart from the rule of primogeniture, there are other rules that must be observed in conjunction with this rule of primogeniture. These rules are as follows: (1) the title of *Onojie* (traditional ruler) is hereditary, which passes from father to son. The same position applies to succession to a hereditary chieftaincy title. (2) The first

[1] Ogobobine. R.A.I., *Materials and Cases on Benin Land Law* at 190
[2] Oxford Dictionary of English (ODE) Second Edition revised (2005 Oxford University Press). iPhone version.
[3] Ogobobine. R.A.I., *Materials and Cases on Benin Land Law* at 179.
[4] Azinge. E., *Restatement of Customary Law in Nigeria* (1st ed, 2013, Nigerian Institute of Advance Legal Studies Lagos at 110
[5] Ibid at 111.
[6] The kingdoms are as follows: Amahor, Ebelle, Egoro, Ewohimi, Ekekhenlen, Ekpoma, Ekpon, Emu, Ewu, Ewatto, Ewossa, Idoa, Ifeku, Igueben, Ilushi, Inyelen, Irrua, Ogwa, Ohordua, Okalo, Okhuesan, Onogholo, Opji, Oria, Orowa, Uromi, Udo, Ugbengun, Ugboha, Ubiaja, Urhohi, Ugun, Ujiogba, Ukhun and Uzea.
[7] For further reading why these laws are not applicable to these kingdoms, see Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of Culture and History.* Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th August 2021).
[8] For further reading, see Itua. P.O., "Succession under Esan customary law in Nigeria: Grounds for Disinheriting an Heir from inheriting from his Deceased father's Estate under Esan Customary Law" *International Journal of Innovative Research and Development* Vol.7 August 2018 Page 428. Available online at www.ijird.com (last accessed 12th August 2021).
[9] Oseghale. E.B., *Stereotypes in History.* An inaugural lecture series No 81 of Ambrose Alli University Ekpoma, Edo State 2019, 16-17.
[10] See footnote 56 above
[11] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 67

surviving legitimate[1] son success his father estate as of right. This rule is of general application to every family in Esan land. (3) There can be no lawful succession until after the burial ceremonies of the late traditional ruler (*Onojie)* have been completed, in accordance with native law and custom. Also, concerning the ordinary citizen, the eldest surviving son cannot inherit his deceased father's estate until the performance of the final burial ceremonies as stipulate by custom. (4) He who performs these burial ceremonies inherits the family property, which is not shared and succeeds to the title and throne absolutely. Also, with respect to ordinary citizens of the communities, it is the person who performed the burial ceremonies that inherit the deceased estate amongst his children. Okojie, emphasise that these burial ceremonies have the greatest significant under Esan customary law of inheritance, and hence this fourth law is of overriding importance both to the throne and ordinary family. (5) Once an *Onojie,* always an *Onojie.* In other words, once someone has been duly installed as a traditional ruler, (*Onojie)* in accordance with native law and custom, nothing, except death that can remove him from the throne. In relation to this rule, deposition of any Esan Onojie from the throne will amount to an exercise in futility.[2] (6) The title Onojie, being that of a Constitutional Monarch, which is held in trust for the community cannot be willed or voluntarily relinquished in favour of any son, brother, uncle, or a trusted friend. The same law is equally applicable to any testator who intends to make a will. This rule prohibits and foreclose a testator from making a will and disinherit his eldest son of his *Ijiogbe* which he is entitled to under customary law[3]. (7) The official burial place of an *Onojie* is at a special spot or location in *Eguare*.[4]

These rules ensure that a uniform system of succession is maintained throughout Esan land except in kingdoms where they are not applicable. The importance of these laws towards ensuring the stability of traditional institution and private lives in Esan people for centuries cannot be over emphasised. By way of adumbration, the first rule ensures that a son succeeds to the property of his later father, and a single line of succession is maintained. The advantage of this system is that it eliminates all strife and competition for the throne because it is known that the eldest son of the incumbent ruler is alive, or there is an identified next of kin in the line of succession to the throne. The only exception is when the traditional ruler (*Onojie)* dies without an heir. In such a situation, the right to succession passes to the late king's surviving most senior brother. If no brother, the right passes to his eldest uncle.[5] On the other hand, concerning private individual the same law is also applicable. However, the situation would be different if the dead man does not have a male child to succeed him. In such a situation his younger brother will inherit his properties irrespective of the fact that he is survived by daughters. The application of this rule concerning the estate of a man who dies without an heir but survived by daughters who are discriminated against because they are female is an aspect of the Esan custom that confront the fundamental rights provisions of the 1999 Constitution (as amended). This is an outright case of discrimination based on gender, which must not be allowed to continue.

The second rule satisfy the customary law dealing with the rule of primogeniture that provides that every first son inherits his late father's worldly possession. This law is of uniform application across Esan land. With reference to the *Onojie's* stool, if an *Onojie* has several sons and the eldest of them dies, i.e., he pre-deceased his father who is the traditional ruler, and leaving behind male children of his own who could have succeeded him with respect to the throne if he had lived to become the king. Despite his death, nothing precludes his children from inheriting his personal estate. However, his eldest child cannot lay any customary claim to the throne after the death of the current Onojie who his grandfather, although his late father was the late Onojie's first son. The reason being that by the operation of native law and custom, since the first son predeceased his father, the right to succession automatically falls on the late king second son who now become the eldest surviving son of the late Onojie or king at the time of his death. The children of the deceased former first son under customary law have no legal claim whatsoever to the title if their uncle is alive. In other to illustrate the application of this rule, two examples readily come to mind. According to Esan historian sometime around 1905 Ozigue of Okhuesan died, and within nine days of his death, his son Isi, the heir apparent to the throne also died. The traditional right of succession to the throne automatically shifted to the late king second son called Ataimen who then performed the burial ceremonies of their late father Ozigue, and he was thereafter installed as the *Onojie* in accordance with the custom. However, on the 20th of September 1920 he too also died leaving a son called Ehidiamen who was a

[1] The word legitimate is used here to include children born in lawful wedlock both under customary law and statutory law. They also include children born outside lawful wedlock, but who paternity has been acknowledged by their father.

[2] See Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of Culture and History.* Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th August 2021).

[3] See Itua. P.O., "Succession under Benin Customary Law in Nigeria; Igiogbe Matters Arising" (2011) Vol. 3(7) *Journal of Law and Conflict Resolution* Page 119 Available online at: < http://www.academicjournals.org> (last accessed 19th August 2021). See also, the following cases. *Mr Victor Ayemwenre Eigbe & Anor v. Mr Benjamin Izibiu Eigbe & Ors* (2013) LPELR – 20292 (CA), *Idehen v. Idehen* [1991] 6 N.W.L.R. (Pt.198) at 382; *Ogiamien v. Ogiamien* [1967] NMLR 247; *Lawal –Osula v. Lawal –Osula* [1993] 2N.W.L.R. (Pt.274) 158

[4] See Okojie. C.G, *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 67-68.

[5] Ibid

minor. Isi's first son called Eigbokhan, who was of age had no right to the title, and so a regent called Oobo was appointed by the kingmaker. Oobo was the minor most senior uncle as a regent to act until Ehidiamen was old enough to be installed as the king. This example helps to illustrate and to point out the fact that even though Eigbokhan who was Isi eldest surviving son was alive, he was not appointed by the kingmaker because they were following the strict application of the rule of primogeniture. The regent administered the kingdom till 1933 when Ehidiamen was installed as the Onojie. Also, the second example is the case of Usiahon 1 of Okolo kingdom. This case is very apt and instructive on the strict application of this rule under consideration. Usiahon succeeded his father Ehirenmen who had reigned from 1892-1956. He performed the burial ceremonies and of his late father in 1957, and he was installed as the king or Onojie in 1957. Unfortunately, he died in 1973 leaving a son called Jonathan Izebhokhae to succeed him. Unfortunately, Jonathan Izebhokhae was a very sick man. He succeeded his father but hoping to fully validate his position by completing all the processes of the final burial ceremonies. Sadly, on the 27th of January 1974 he died without completing the final burial rites of his late father. The Odionwele and Ibhijie of Okalo (the Kingmakers) called on the next surviving son of Usiahon 1, Prince Andrew Ilenbarenemen to perform the burial ceremonies of their late father Usiahon, which he did, and he was installed as the Onojie (traditional ruler) of Okalo on the 9th of February 1974. Thus, according to Esan native law and customs it was immaterial whether later Jonathan Izebhokhae had sons who could have succeeded him or not.[1]

It is important to emphasise that for a male child to benefit under the operation of the rule of primogeniture, such a son must be a legitimate child of the deceased king. Children from a lover or lovers, known as (*Omon Osho)* in *Esan* language or from an *Arebhoa*[2] do not qualify and they are excluded from consideration. Therefore, children that falls under this classification do not have any "customary rights" to lay claim to the title or throne under Esan customary law.[3] The application of this rule restricting succession to the throne by foreclosing children from "*Omon Osho"* who happens to be the late *Onojie's* first surviving son is discriminatory in nature, and such practice offend the fundamental rights provisions of the 1999 Constitution (as amended) when juxtapose against the provisions of section 42 (2) of the Constitution.[4] The reason being that such a child, even though his father might have accepted his paternity, he is still being discriminated against by the custom because of the circumstance of his birth and he is thus considered as not being a "fit and proper" person customarily to succeed to the throne because his mother was never married properly as customs demands. In line with the current judicial attitude towards cases of this nature that clearly violate the human rights of the persons concern, this rule of Esan customary law would be declare void and repugnant to natural justice equity and good conscience. However, the situation could be interpreted differently if the late *Onojie* does not have any other male child to succeed him. Rather than allowing the title to shift to the late *Onojie's* younger brother, the kingmaker would rather prefer the child of an "*Omon Osho"* whom paternity has being acknowledged by the late king than seeing the crown being transfer to the late king younger brother. However, the same cannot be said for a child given birth to by an *Arebhoa* for obvious reasons. Encouraging such a child, will amount to disruption in the line of succession.[5]

The third law ensures that the proper customary burial ceremonies are observed and performed. There is an idiomatic expression in Esan language that goes thus: "*Ei se bhe Eguale abha mien ojie*" meaning the throne is never vacant. Immediately after the death of an incumbent *Onojie,* the kingmakers will immediately install the heir and he must as a matter of urgency commence the burial ceremonies at once. The implication of failure to perform the burial ceremonies or not completing it after stating one is the loss of the throne by the linage of the heir. In such a situation, the next senior brother will be called upon to ascend the throne not withstanding that the deceased heir has children who could have been installed as the next *Onojie* to succeed him. This also epitomise the common saying amongst the Esan people that no man is legally an *Onojie* until he has performed the burial ceremonies of his late father. A good illustrate of the application of this law occurred at Ebelle kingdom[6]. This case concerns the quest of Emovuon of Ebelle (1907-1910) to succeed to the throne of his late father. The custom at Ebelle is to the effect that once the Onojie is dead, his is interred immediately. Then the Royal Family

[1]Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 67-68.
[2] An Arebhoa was usually a man's first daughter (his *Ehale*). She is encouraged not to be married to any man. When she attained puberty, she lives in her father's house where she is permitted to have sexual relationship with any man of her choice. All the children from this association are deemed to be the children of her father. The only reward for the husband is uninhibited companionship at the girl's father compound. Also, the man is not expected to pay any bride price on the girl. This practice is encouraged where a man does not have male children that will inherit his estate when he is dead. This procedure provides an alternative means of having male children.
[3] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 69.
[4] See Cap C23 Laws of the Federation of Nigeria, 2004.
[5] For further reading on the application of this law see Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of Culture and History.* Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th March 2020).
[6] Ebelle, is one of the major Esan Kingdom in Edo State, Nigeria. It is a populated place located in Iguenben Local Government Area of Edo State. For further information see Wikipedia at https:// en.m.wikipedia.org (last accessed 12th March 2020

of Ebelle install his heir at once, and he too is expected to commence the burial ceremonies immediately with the commencement of the *Ihavie* ceremony which is considered as the most important aspect of the burial ceremonies. The custom dictates that the *Ihavie* ceremony should never be postponed for any reason whatsoever. Emovuon commenced the Ihavie ceremony and stopped midway without completing the ceremony with the "*Ema Edion*".[1] Unfortunately, Emovuon died without completing even the first part of the burial ceremonies. The kingmakers called on prince Igbinijie, late Emovuon's younger brother to perform the final burial ceremonies which he did, and he was then installed the *Onojie*. He reigned from 1910-1971. The reason for the immediate installation of the heir after the death of an Onojie is to prevent what is term in Esan language as "*O re Okpu or Uwedia fi Ukhuo don.*" [2] The installation of the heir as the *Onojie* designate is to prevent the throne from being empty. In reality, the heir does not exercise any form of authority, until the burial ceremonies are completed. Thus, during the interval between installation and the completion of the burial ceremonies, the kingdom is being administered by the "*Oniha*" who the traditional Prime Minister.[3]

The fourth rule appears to be the most important having its uniform application to the crown and the ordinary citizens. This rule stipulates thus: "*Onon luogbe ole nab he ogbe"* meaning (he who performs the burial ceremonies owns the house and all therein) this customary law is based on the necessity to bury the dead *Onojie* and bring him in harmony with, and association with the spirits of the departed *Enijie*[4]. It is believed among the Esan people that the spirit of the newly departed *Onojie* merely hangs about in the next world with no abode or respect until he has been buried according to native law and custom.[5] Since succession right to the throne is conferred on the person who performs these burial rites, this in tune places a grave responsibility on shoulders of the kingmakers by not allowing or accepting any person other than the first surviving legitimate son of the departed *Onojie* to perform the burial ceremonies. Furthermore, this rule of customary law is also applicable to ordinary citizen within the community. It is the deceased first surviving son that performs the final burial rites of his late father before he is entitled to inherit his estate. However, where the son is a minor, it is permissible for an older uncle to perform these burial ceremonies on behalf of his nephew, the uncle then inherits the property which he holds in trust until the boy attain majority. but, where the heir to the throne as in the case of an *Onojie*, is a minor, the rules are completely different from the position enumerated above concerning the ordinary citizens. Where an heir is a minor the kingmakers will appoint an *Akheoa* (Regent) to administer the affairs of the kingdom until the minor comes of age and performs the burial rites afterwards, he is then installed as the *Onojie*. Under Esan native law and customs, the Regent must be the minor oldest uncle. He is not allowed under any circumstance to perform the burial ceremonies; and in any case, he cannot perform them on his dead brother because customarily he is forbidden from doing so. This is one of the safeguards introduced by the founding fathers of Esan land to ensure that the rule of primogeniture as it affects the throne is preserved.

Furthermore, it important to discuss what happens if the first surviving son who is legally and customarily entitled to ascend the throne is either incapacitated by mental illness or he is an imbecile. What of a situation where it become impossible to trace the where about of the first son or the heir apparent to the throne? What happens in these circumstances? This kind of scenarios were very common in the olden days. But today with the advancement in technology this kind of situation can rarely happen. However, whenever such a situation does arise, the system has an inbuilt mechanism for resolving these kinds of conflicts. The position under Esan native law and custom is to the effect if any heir is known to be suffering from or affected by any of the condition(s) mentioned above, which will ultimately make it impossible for him to participate and fully understand the essence and the nature of the burial ceremonies; and since the burial ceremonies cannot be shelved, then the kingmakers will have no option than to call on the second son of the deceased king (*Onojie*) to perform the burial ceremonies. Once the second son performs the ceremonies successfully, he will be installed as the *Onojie* (king) in accordance with the fourth rule that provides that he who performs the final burial ceremonies is entitled to inherit the deceased *Onojie's* property and the throne. But, Okojie has warned that before this alternative procedure is adopted particularly in relation to not being able to identify and locate the where about of an heir, due diligence must be the watch word in other not to repeat the mistake of the past, which occurred sometime ago at Ewu kingdom.[6]

The fifth law strongly support and entrench the existence of the *Onojiship*. The rule ensures that once a person has been installed as the *Onojie* after the performance of the second burial ceremonies, he cannot be removed as an *Onojie.* Only death can effectively remove an *Onojie* from the throne under Esan native law and custom.[7] In the event that the *Onojie* become sick and unable to discharge the function of his office, an *Akheo*a

[1] Translated to mean the elders feasting.
[2] Translated to mean missing the throne.
[3] G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 69.
[4] The plural form of *Onojie*.
[5] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 70
[6] Ibid at p.71.
[7] See Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of*

(Regent) will be appointed to perform his duties on his behalf. In most cases, the *Onojie* first son is usually appointed or the *Onojie's* immediate brother. However, Okojie[1] argued that the notion or opinion, which, states that an *Akheoa* can become a substantive *Onojie*, is not correct and not part of Esan customary law. This view is something new among the Esan people, which cannot be supported by any traditional or historical records. Its origin cannot be ascertained, and it is an aberration to Esan Native Law and Customs. It does not represent the correct position of Esan customary law of succession to the throne. The correct position of the law is that an *Akheoa* can never be a substantive *Onojie*[2].

The sixth rule ensure that the succession to the throne follows the age long tradition as provided by Native Law and Customs. Thus, an *Onojie* cannot by a testamentary instrument executed by him bequeath the throne to any other person apart from his first son, who is the customary heir to the throne. Where any of such testamentary bequeath is made, that disposition will be declared void *ab initio*. The reason being that the title (the throne) is not his personal property. It belongs to all the communities constituting the kingdom and he (the king) does not possess the powers to single headedly alter the age long customary law in favour of anyone else apart from the first son who is customarily recognised as the heir to the throne. Although a situation could arise where an heir would refuse ascending to the throne for reasons best known to him. Whenever such a situation does arise, it will be easily resolved because the system had already envisaged the occurrence of such a situation and a solution already provided by the customary law. The implication of such an act of rejecting the throne is an automatic forfeiture of the customary right to the throne and the attendant right to inherit any property of his late father the *Onojie*. Under Esan customary law, the option of who then become the *Onojie* is left for the kingmakers to decide. Also, another senecio could arise where the heir to the throne performs the burial ceremonies of his late father in in accordance with the customary law but refuses to ascend to the throne for reasons best known to him. The position of Esan native law and customs is that whenever such a situation arises, succession to the throne will be shifted to a named person, to be chosen by the kingmakers of that kingdom. The person so chosen by the kingmakers will only occupy the throne legitimately during his lifetime only to serve the period the legitimate heir who refused to occupy the throne. Whenever the "selected" *Onojie* dies, the line of succession to the throne does not continue with his children or his lineage. But because of the operation of the rule of primogeniture and the need to preserve a single linage of succession to the throne in that kingdom, any legitimate claim he might have is automatically extinguish by his death. Succession to the throne automatically reverts to the linage of the heir who performed the final burial rites of his deceased father (the *Onojie*) but refused to ascend to the throne. Thus, by performing the burial ceremonies, the heir has established an irrevocable claim to the throne not only for himself, but also for his own offspring. Therefore, after the death of the prince that renounced the throne and the person so chosen/ selected to replace him by the kingmakers, his own children and not the children of the 'selected' *Onojie* that possess the customary mandate to ascend and be enthrone as the Onojie, thereby enjoying uninterrupted and legitimate right to succeed to the throne.[3]

Finally, the seventh law deal with the final resting place of an *Onojie*. The rule provides that no matter the place and location where an *Onojie* dies, he must be brought to Eguare (the place) and be interred at the official place. This spot is reserved for the interment of the *Onojie*. Under Esan customary law no other person or persons no matter how popular or highly placed he might be in the kingdom; he cannot be buried on these sacred grounds exclusively reserved for the burial of the departed *Enijies*.

4.3.0 Order of inheritance under Esan customary law

Under Esan native law and custom, the children of the deceased are the ultimate beneficiaries to his estate. Reaffirming this customary law position, Okojie stated thus: "let it be understood at the onset that it was a basic Esan law and custom that when a man died his property and all he possessed were inherited by his children in the first instance."[4] His properties are shared in according with the rules already discussed. If the man died without any child or children, then the right to inherit goes to his maternal brothers. If he does not have any maternal brother or brothers, then his paternal brother will be considered for inheritance. But, if the deceased does not have any paternal brother, the right to inheritance passes to the *Ominjogbe* of the *Uelen*.[5]

4.3.1 Property

When Esan man who has properties to be inherited is dead and he is survived by children, ordinarily, the children are entitled to inherit his estate. Under Esan customary law where the rule of primogeniture is fully in operational, the first son of the deceased inherits his father's properties and share to any of his junior brothers

Culture and History. Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th March 2020).

[1] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 71

[2] Ibid at 72.

[3] Id. at 75.

[4] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 119.

[5] Means the first born (son) among the first born (sons) of members of the same family who traces their origin to the same person on the family genealogical tree under Esan native law and customs. Sometimes, an Ominijiogbe of the Uelen could be the deceased's uncle or a cousin.

and sisters at his pleasure[1]. Technically, he cannot be compelled to share if he desires not to. It is not uncommon to see the younger brothers or other children challenging the rationale for the eldest son to inherit all their deceased father's property. Instances abound when the matter have been reported to the elders or the *Egbele.* Customarily, the Egbele cannot compel the eldest son to change his mind. At best, "the Egbele could only advise, they could not force the first son to part with what has come to him by right."[2] Thus, no junior can inherit any property of his late father unless with the full consent of his senior brother. It is interesting to note that "every property such as a house, coconut tree etc, a father gave to the younger children in his lifetime, could be successfully demanded by the first son, unless the deposition was made at the ancestral shrine before the *Egbele.*"[3] Before the eldest son can inherit the property of his deceased, he must fully comply with rule four governing inheritance and succession rights under Esan customary law which provided that: "*Onon luogbe ole nab he ogbe"* meaning (he who performs the burial ceremonies owns the house and all therein). It is on this basis; the eldest child can inherit the *Ijiogbe.* This right of the eldest son to inherit his deceased father *Ijiogbe* under Esan customary law has been judicially recognised and enforced. in *Mr Victor Ayemwenre Eigbe & Anor v. Mr Benjamin Izibiu Eigbe & Ors.*[4] The Court of Appeal Per Ogunwumiju JCA held as follows:

> I have made a thorough consideration of this court's decision in *Egharevba v. Oruonghae* supra. The facts are almost on all fours with the facts of this case. The court held unanimously that a Bini man can have only one *Igiogbe* which must be located in Benin Kingdom. I think what was of most consideration in that case as in this case was the fact the testator gave the house in his hometown to his eldest son and being regarded as his ancestral home, was thus regarded as his *Igiogbe* as opposed to another house in another city where he had at once lived. In the case under review, I am convinced that the testator categorically identified his *Igiogbe* by clause 3 of his will. Having held that the Will was duly executed, the testator having stipulated the house he considered to be his Igiogbe, situate in his ancestral home, I have to arrive at the conclusion that the house in Irrua is the *Igiogbe* of the testator.

Furthermore, a situation could arise where the eldest son of the deceased could be a minor. His age does not preclude the applicable of the customary law. What the custom prescribed in such circumstances is for the minor's customary next of kin to step into his shoes and perform the burial ceremonies on his behalf. Suitable persons are "the minor's maternal brother, ordinary brother, or *Ominijiogbe.* The minor paternal uncles are precluded because under native law and custom they cannot be performing the burial ceremony of their younger brother which is taboo under Esan customs. Once the next of kin performs the ceremonies, he inherits the deceased estate on behalf of the minor. The role goes with the responsible. It some worth akin to standing in *locus parentis.* But the different is that he holds the estate in trust for the minor and he must return the estate to the minor when he attains majority with the duty to account.

In recent times, some Human Rights activist have questioned the rationale for the continue adherent and practise of this custom that prescribe that the eldest son succeeds to all the property of the deceased father to the exclusion of other children as discrimatory in nature and that it practices should not be accommodated or encourage in the in the 21st century. They further argued that this custom is discriminatory in nature, and that it ought to have been abandon. One the other hand, supporters of the custom are quick to defend the custom as being not discriminatory. They find judicial backing in the case of *Ogiamien v. Ogiamien*[5] where the Supreme Court in interpreting a similar custom under Bini native law and custom held that the repugnancy doctrine had no place in Bini custom.

Also, in *Lawal-Osula v. Lawal Osula* [6] Adio J.C.A who read the judgment of the court held while considering the meaning of the phrase "subject to customary law relating thereto" in section 3(1) of the Wills Law of Bendel State applicable to Edo and Delta State that:

> A native law and custom to the effect that the eldest son succeeds to all the property of the deceased father to the exclusion of the other children is not repugnant to natural justice, equity, and good conscience…

Thus, by extension there is nothing repugnant to natural justice equity and good conscience in the Esan customary law that also entitled the eldest son to inherit all the property of his deceased father. Historically, the Esan people and the Bini share certain aspect of custom because of their link, and historical connection that date back to centuries. It is therefore not surprising That the operation of this custom has been largely responsible for the smooth customary transition from one head of the family to the other after death the founder and the former

[1] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 119.
[2] Ibid.
[3] Id.
[4] (2013) LPELR – 20292 (CA).
[5] [1967] NMLR 245.
[6] [1993] 2N.W.L.R. (Pt. 274) 158.

head of the family. Even though this custom on the face of it may appear discriminatory against the other children, it is noteworthy to point out that the custom has its own inbuilt mechanism that ensures that the rest children of the deceased are provided for. Although, the custom provides that the first son should inherit all his father's properties, in practise he is enjoined to share these inherited properties with all his brothers and sisters. The reason for encouraging inclusiveness in sharing is simple. If he wants to live in peace and harmony with his brothers and sisters; he is bound to share with them. If his siblings are of the opinion that he might not share the property with them, they too could refuse to assist him financially during the burial ceremonies. In such a situation, he has no choice, other than to single handily performed the burial ceremony without any assistance from them. Sometimes the whole ceremony might be too expensive for him alone to bear.

4.3.2 Wives

Generally, under Esan native law and custom, wives of a deceased man except a princess are legible to be "inherited" in accordance with custom. This procedure is what is referred to in Esan language as "*Uhanmin.*"[1] During this second marriage, bride price is not collected because under Esan native law custom, bride price is only paid once on a woman marrying into a family. It must be emphasised that these women are not under any customary compulsion to agree to be inherited. The eldest son of the deceased can inherits the wives of his late father with the exception of his own mother who is normally inherited by the son's uncle or the *Ominjiogb*e of the *Uelen*.[2] Sometime when there is no person i.e., among the children and the uncles who are interested in inheriting these women, the right to inherit moves to any old man in the *Uelen.*[3] This procedure of *Uhanmin* dealing with inheritance of wives or widows under Esan native law and customs is not applicable to a princess (the daughters of an *Onojie* or traditional ruler). When the husband of a princess dies rather than the princess being inherited as applicable to ordinary citizen, the princess goes home free. However, if the princess decided to stay behind and take care of her children, then she must be "remarried" again before her father the king. Even though the princess is "remarried" again for the second time, no bride price is paid for the "second" marriage. It important to clarify that although bride price is usually paid as an incident of customary marriage, but where it concerns customary marriages contracted by princesses in Esan land, no bride price is paid on any princess[4]. This example is the only situation where a widow is "remarried' again for the second time in all the 35 (Thirty - five) kingdoms that constituted Esan land.

Also, a woman who has been inherited once, cannot be the subject of another inheritance. In other words, once a woman has been inherited before, she can no longer be subjected to another form of inheritance for the second time by the heir of the person that inherited her, when that person eventually dies. For example, if a man inherits the wife of his brother or of an *Ominjiogbe* or the wife of any member of their kindred, when he dies, such an inherited woman is not inheritable by the dead man's heir. In such a situation, the right to inherit passes to the dead man's senior brother. As mentioned earlier, in all situations of widow inheritance, under Esan native law and customs the widow has the option to choose whether she consented to being inherited by her late husband's first son or any other member of his family or not. The woman fundamental rights are respected. In a situation where the first son is the widow's child, she has the right either to agreed or to refused to being remarried by her late husband's brother because she cannot marry her own son. The widow has the right to determine whether she want to be married to any member of her late husband's family or whether she chooses to exercise her right to remain unmarried and remain in her late husband's house in other to take care of her children until her death. Where the widow decides to return to her family after the death of her husband, her former- in- law has not choice than to respect her opinion. From the foregoing, this article has established the fact that it is not automatic that once a man dies, his wife or wives are immediately subjected to being inherited under Esan native law and customs. From either of the options opened to the widow under Esan customary law; either to remain unmarried and stay in late husband's house to take care of his children, or she decided to be "inherited" according to custom, the woman does not have any right to inheritance in her deceased husband's estate. This unfortunate situation is not peculiar to Esan native law and custom. In fact, most customs in other part of Nigeria see women as part of the estate to be inherited. In Chief *Meburami Akinnubi & Anor v. Grace Olanike Akinnubi (Mrs) & Ors*.[5] The Supreme Court held as per Onu J.S.C as follows:

[1] The procedure where the wife or wives of the deceased man is "inherited" by either the eldest son, his uncle or Ominijiogbe of the Uelen.

[2] An *Ominjiogbe* is the head, not necessary by age of the family or Uelen. It is a hereditary position in as much as each successor duly performed the burial ceremonies of his father, and within Uromi kingdom, he must also perform the Ogbe ceremony as well. Thus, the easiest definition of Ominjiogbe is the first son of the first sons traced from the progenitor of the family. On the death of the head of a family, his first son performs the burial ceremonies and customarily assumed the position of headship of that family. All his other brothers, sisters, whether married or not, uncles, are automatically under his control. Yearly, they pay homage to him as the keeper of the family ancestral shrine during the "*Iluobo Ukpe.*" Thus, it is not uncommon in some part of Esan land for the term "Akheoa" to be used synonymously with *Ominjiogbe.*

[3] Means family.

[4] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 121.

[5] (1997) LPELR -352 (SC). The position of the law is different when compare with the status of a widow of a statutory marriage whose husband died intestate. For further reading see the case of *Obusez v. Obusez* (2001) 5NWLR (Pt. 736) 377. Where the court held that the widow was the appropriate person to be granted letters of administration to administer the estate of her late husband and not the deceased

> …Under Yoruba customary law, a widow under an intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased's family; she could neither be entitled to apply for a grant of letters of administration nor to be appointed as co-administratrix of her deceased husband's estate

Generally, the rule of succession under most customary law in Nigeria is that a widow or widows of a deceased man are not entitled to inherit in his intestate estate. The reason being that wife or wives are generally not included in the definition of the family. In *Fakoya v. Ilori* [1] the court held that the widow of a deceased owner is not competent, under Yoruba customary law to effect a valid sale of a property of the deceased because upon intestacy, devolution of the property follows the blood and a wife or widow not being of the blood has no claim to any share of the inheritance. In *Akinubi v. Akunubi* [2] the court held as that:

> A widow under an intestacy is regard as part of the deceased husband's estate to be administered or inherit by the deceased's family. It is for this reason that under customary law a widow cannot be an administrator of the estate of her deceased husband.

However, a widow of a statutory marriage does not suffer from the aforementioned legal disabilities even when her husband dies interstate.[3]

4.3.4 Daughters

The eldest son of the deceased is expected in accordance with custom to inherit all the assets and liabilities of his father. Thus, the responsible of taken care of his sisters falls squally on his shoulders. Therefore, he has the responsible of marrying out his sisters who are not married and collect the bride price. In addition, he also has the responsibility of collecting all the items brought by his sisters' husband during the yearly homage usually paid to in-law customarily. Apart from those already married, the responsibility of taken care of his unmarried sisters rest on him as well because daughters are customarily not taken into consideration when inheritance issues are been considered. The reason being that a woman does not possess the customary right to inherit in her late father's estate under Esan customary law. This is encapsulated in two Esan language idiomatic expressions depicting this age long custom. They are as follows: "*Okhuo ile Aghada bhe Uku*" meaning a woman never inherit the sword and "*El bie Omokhuo he ole Iriogbe*" meaning no one give birth to a girl child and named her the family keeper.[4] By the principles of Esan native law and customs, the rights of a female child to inheritance, reside in her husband house. But this expression is ironic in nature. A woman that is deprived of the right of inheritance in her father's estate would soon or later discover that such rights she is supposed to enjoy in her husband's estate is an illusion. This makes women right to inheritance precarious. But to every general rule, there is an exception. To the general rule stated above, an exception exists. In most of the kingdoms where the system of *Arebhoa* is accepted and practised, a woman assumes the role of a man for the benefit of her heirless father by performed the burial ceremonies according to Esan native law and customs which will automatically entitle her to inherits her late father's estate. This situation must not be confused with the privileges that the *Ehale non odion* (the first daughter) enjoys during her father's lifetime. All those privileges cease once the father is dead. Okojie provided the philosophy and the rationale behind this reasoning by the foundering fathers of Esan land[5]. He posited that "it was this attempt to keep property in the family that led to the custom that a woman, however wealthy, she may be is not allowed to bury her father". Okojie further explain as follows:

> It was this attempt to keep property in the family that led to the custom of a woman, however wealthy, not being allowed to bury her father, since he who perform the ceremonies inherit the property. If she was very influential and her brothers are minors, she could prevail on the Egbele to allow her to perform these ceremonies, strictly on the understanding that she was only doing this because she did not want their father to remain unburied and that she did everything on behalf of her brothers.[6]

The rationale behind this custom is based on the rule governing inheritance and succession that stipulate that "he who performed the burial ceremonies inherits the property," it will be inequitable to denial the woman the right to inherit after performing the final burial ceremonies. Therefore, if a man decides to share his properties amongst his children, irrespective of gender, during his lifetime before his death, whatever he shares to his daughter or daughters remain their inheritance for life. The eldest son or any member of the family cannot

younger brother in accordance with Agbor native law.

[1] (1983) 2 FNC 602. See also Sogunro-Davies v. Sogunro-Davies (1928) 8NLR 79.

[2] [1997] 2 NWLR (Pt. 486) 144 at 159.

[3] For further reading see Itua P.O., "Disinheritance of Women under Esan Customary law in Nigeria: The Need for Paradigm Shift Towards Gender Equality" *Advances in Social Sciences Research Journal,* 8(2), 668-723. Available online at www.https://doi.org/10.14738/assrj.82.9788.

[4] Ibid at 124.

[5] Ibid.

[6] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 125.

deprive them of such inheritance after the death of their father. In so acting, the man must be mindful not to give out his *Ijiogbe* to his daughter or any other child because of the customary implication of such a gift.

Closely associated with the above is the Esan custom that prohibit a woman from handling the "*Ukhure*".[1] The traditional implication is that since a woman cannot handle the *Ukhure,* she cannot customarily take possession of the family shrine, thereby being incapable of performing the burial ceremonies which, would have entitled her to inherit the family property. The discriminating aspect of this custom becomes obvious when the deceased is survived by only one child who happens to be a woman. In such situation, the custom will prevent the daughter from performing the burial ceremonies. The only customary remedy is to allow a male member of the family to perform the burial and inherit the property. Okojie further explained the custom as follows that

> the next male in line of succession stood to perform the burial ceremonies, the woman and her wealth fading away behind, so that after the ceremonies, she had no clam to the property. This type of burial is only allowed to prevent property in the family passing outside the family and village as would otherwise happen if the daughter had been permitted by the Egbele to perform the burial ceremonies of her father[2]

On the other hand, different rules apply to the property of a woman. When a married woman dies, customarily, her property is inherited by her children. If the deceased is only survived by a daughter who is already married, the custom permit her to perform the burial ceremonies of her late mother. She must come from her husband's house to her parent house to perform the ceremonies. Once these ceremonies are completed, she then inherits her late mother's estate. But the situation is different if the woman died without any child. In such situation, the husband inherits all her properties.

Furthermore, in the past, where a man dies without an heir, but he is survived by a daughter or daughters, the next male in line of succession in his family steps in to perform the burial ceremonies. The daughters are prevented from performing the burial ceremonies which by implication means denial of the right to inherit. At the completion of the burial ceremonies, the male member of the deceased family most times, his younger brother inherits the deceased properties to the detriment of his biological daughters. This discriminatory custom is not peculiar to Esan native law and customs alone, its application is found in some other part of the country. For example, in the south-eastern part of the country. The court has held in plethora of cases that this custom apart from being discriminatory against female children; is also in conflict with the provisions of the Nigerian Constitution.[3] Such conflict and other discriminatory aspect of the Esan customs have been discussed extensively by Itua and other academic on the right of female children to inheritance under Esan customary.[4] Although Esan native law and custom expressly encourages the rule of primogeniture, the modern trend arising from judicial activism is that certain customary law principles that tend to discriminate against female children from inheriting any property from their late father's estate will no longer be encourage and given validity by our courts. Once a man dies without an heir, the court will not hesitate in allowing the daughter or daughters to inherit their father's estate at the expense of their paternal uncles. Consequently, the courts in recent times have always ruled that the children of the deceased no matter their gender are entitled to inherit his estate.

4.3.5. Inheritance of domestic animals

Usually, under Esan native law and custom, domestic animals like cows, goats, sheep, fowls belong to the children of the deceased as inheritable property. The first son has absolute rights over these domestic animals. However, in the interest of peace, the first son ensure that he share some to his other brothers where the livestock is large. The sharing is usually done according to the numbers of wives the deceased had when he was a life. Where the deceased was married to more than one wife, then the sharing is conducted among the first son from each woman represent each door, in the other of inheritance. This practise is to ensure that at least a child from each wife is taken into consideration. Where the first child, the heir is a minor, then his uncle will inherit the livestock and take care of them till the heir attained majority.

4.3.6. Inheritance of debts

As mentioned earlier in this research, assets and liabilities are inheritable under Esan native law and custom.[5] Therefore a dead man's unpaid debt passes squarely unto his heir after his death. The custom expects the heir to inherit both the assets and the liabilities of his dead father. While he has the benefit of enjoying the assets, he must also liquidate the debt. The remaining children of the deceased are not under any obligation to assist the

[1] The *Ukhure* is the family ancestral staff keep at the family shrine used for ancestral worship by the Head of the family.
[2] C.G. Okojie. *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 125
[3] See *Salami v. Salami* [1957] WRNLR 10; *Adeseye v. Taiwo* 1 FSC 84; *Taiwo v. Taiwo* 3 FSC 80*; Lopez v. Lopez* 5 NCR 43. See also the provision of Sec. 42(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Cap.C23 Laws of the Federation of Nigeria 2004.
[4] See Itua P.O., "Disinheritance of Women under Esan Customary law in Nigeria: The Need for Paradigm Shift Towards Gender Equality" *Advances in Social Sciences Research Journal,* 8(2), 668-723. Available online at www.https://doi.org/10.14738/assrj.82.9788 accessed on the 24th of August 2021.
[5] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted1994, Ilupeju Press Ltd) at123.

heir with the payment of the debts. In fact, their intervention is done at their own pleasure. The only way the heir can escape the payment of the debts is to renounce his claim to the inheritance of his father's estate. In such a situation the "*Egbonughale"* age group then takes the responsibility for the burial of his deceased father. Since technically the deceased died without an heir, his properties, both assets and liabilities are inherited by the *Onojie* (the traditional ruler) that has jurisdiction over the community. In recent times, is it very difficult for the application of this rule concerning inheritance of the deceased man's properties by the traditional ruler as a result of the inability of the heir to offset his late father's indebtedness, and also renouncing his customary rights to inheritance thereby allowing the *Egbonughale* age group the authority to then perform the burial rites. Such a situation could be highly embarrassing for the deceased family within the community, and they would everything possible to avoid it.

5.0 Problems confronting applicability of Esan customs dealing with succession rights

This research has so far discussed succession and inheritance rights under Esan customary law, laws governing inheritance and succession rights, and the order of inheritance among the children of the deceased who are the ultimate beneficiaries under Esan native law and custom. Over the years, it has become increasing difficult to apply some rules of Esan native law and customs concerning succession and inheritance rights without confronting or running into difficulties with fundamental rights provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended). the various problems bedevilling succession rights under Esan Customary shall be examine, and an attempt shall be made to proffer solutions to these identified problems, discuss them against the current position of the law, with a view to find a part way that will make the applicability of these customary laws, particularly those governing inheritance and succession rights from being declared as repugnant to natural justice equity and good consciences by the courts, because of the significant role they play in regulating the lives every Esan person.. The need to preserve these customary laws cannot be over emphasised. This position underscores the urgent need for reforms in these aspects of our native law and customs by making them more gender friendly and compactable with the fundamental rights of citizens and in conformity with international Human Rights standard.

5.1.0 Gender discrimination against female children

Under Esan customary law, the children of the deceased are the ultimate beneficiaries to the estate of their deceased parents. However, because of the application of the rule of primogeniture, the customs tend to encourage gender discrimination against female children, and further ensure that even amongst male children, the first son of the deceased is placed at an advantage position over the other children. The customs further encourage the first son to inherit all the properties of his late father and subject to his conviction, he can decide to share part of the estate with his other brothers and sisters. This custom does appear to offend section 42 (1) (2) of the 1999 Constitution (as amended). Although the apex court has held that there is nothing repugnant with this custom which is common amongst the Bini and Esan tribe.[1] As it concern the discrimination against female children and widows, there are plethora of judicial authorities where the Supreme Court has criticised and declared similar customs in other communities within the country that tend to encourage discriminatory customary practises against female children and widows as void, contrary to section 42(2) of the 1999 Constitution (as amended), and repugnant to natural justice, equity, and good conscience. In Mrs. *Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje* [2] the Supreme while considering the effect an Igbo customary law that disinherit a female child from inheriting from her deceased father's estate held per Rhodes - Vivour JSC as follows:

> …L.O. Ukeje deceased is subject to Igbo customary law. Agreeing with the High Court the Court of Appeal correctly found that the Igbo native law and custom which disentitles a female from inheriting in her late father's estate is void as it conflicts with section 39(1)(a) and (2) of the 1979 Constitution (as amended). This finding was affirmed by the Court of Appeal…No matter the circumstances of the birth of a female child, such a child, is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking, in the sharing of her deceased father's estate is in breach of section 42(1) and (2) of

[1] see *Ogiamien v. Ogiamien* [1967] NMLR 245 and *Lawal-Osula v. Lawal Osula* [1993] 2N.W.L.R. (Pt. 274) 158.

[2] (2014) LPELR-22724 (SC). See also *Onyibor Anekwe v. Maria Nweke* (2014) 4 All FWLR (Pt. 739) 1154 where the court through Ngwuta JSC., held as follows: "…My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes, in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, the hand that rocks the cradle. The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realties of today's world. Children, male or female are gift from the creator for which the parent should be grateful. The custom of Awka people of Anambra State pleaded and relied on by the appellant is barbaric and take the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished"

> the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said customary law is void as it conflicts with section 42(1) and (2) of the Constitution.

similarly, in *Onyibor Anekwe v. Maria Nweke*[1] Ngwuta JSC, while considering the discriminatory customary law practice that deprived a widow of the proprietary rights to her deceased husband estate under Igbo customary law held that

> …My noble Lords, the custom pleaded herein, and is a similar custom in some communities wherein a widow is reduced to chattel and part of the husband's estate, constitutes, in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, the hand that rocks the cradle. The respondent is not responsible for having only female children. The craze for male children for which a woman could be denied her rights to her deceased husband or father's property is not justified by practical realties of today's world. Children, male or female are gift from the creator for which the parent should be grateful. The custom of Awka people of Anambra State pleaded and relied on by the appellant is barbaric and take the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished.

Thus, in line with the current position of the law, an application of Esan customary law that discriminate against female children from inheritance in their deceased father's estate will be declared null and void by the courts. Similarly, any Esan custom that deprived a widow of the proprietary rights to her deceased husband estate will suffer the same faith according to law. In *NMCN v. Adesina*[2] Ugochukwu Anthony Ogakwu JCA define "discrimination" as follows: The Black's Law Dictionary, Ninth Edition defines discrimination on page 534, inter alia, as "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured". Apart from the discriminatory effect resulting from the application and practise of the rule of primogeniture concerning inheritance in Esan land, the practise of denying children born by "*Omo Osho*" i.e., children born by mistresses of the king or *Onojie* from succession to the throne as a traditional ruler after the death of the *Onojie* because their mothers were not properly married in accordance with customary law present another challenge that brings the custom into direct conflict with Section 42(2) of the 1999 Constitution (as amended).[3] The customary law position is that before an heir can inherit the throne after the death of his father, he must be a product of legitimate customary law marriage between his father and his mother. Where an heir to the throne is born by an "*Omo osho",* such child is automatically disqualified because of the defect in the marital status of his mother, irrespective of the fact that the paternity of the child was acknowledged by the deceased king. This is the true interpretation of the custom. Applying the custom strictly, present a classic example of one been discriminated against because of the circumstance of one's birth a situation that the 1999 Constitution (as amended) clearly forbid. Section 42 (2) of the 1999 Constitution (as amended) clearly prohibits this kind practises. The section provides that "No citizen of Nigeria shall be subject to any disability or deprivation merely by reason of the circumstance of his birth". Concerning children born outside wedlock, the law is settled that under customary law, once a father acknowledges the paternity of his child, for all intent and purposes, the child become legitimate. In *Obasohan v. Obasohan.* [4] Moore Aseimo Abraham Adumein JCA., held as follows:

> In the case of Lawal & Ors. v. Messrs A Younan & Sons (1961) All NLR 254 at 250, Per Sir Adetokunbo CJ; the former Federal Supreme Court distinguished between illegitimate and legitimate children in England and Nigeria by stating elaborately as follows: 'Now to what extent have these laws been applied to illegitimate children, or how far can illegitimate children claim under the Act? In England prior to 1934 when the Law Reform Act was passed, an illegitimate child could not claim under the Act: Dickson v. The North Eastern Railway Co. Lt. vol. 9 New Series 1863. This latter Act certainly does not apply to Nigeria as it is a statute, though of general application, passed after 1900. When considering the present action therefore, it is not possible to go beyond English Law in 1900. This raises the question; who are illegitimate children in Nigeria? Unlike in England, legitimate children in Nigeria are not confined to children born in wedlock or children legitimate by subsequent marriage of their parents. In Nigeria, a child is legitimate if bone in wedlock according to the

[1] (2014) 4 All FWLR (Pt. 739) 1154
[2] (2016) LPELR-40610(CA)
[3] See Itua. P.O., "Legitimacy, legitimation and succession in Nigeria: An appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the right of inheritance" Journal of Law and Conflict Resolution Vol.4(3), pp31-44 March 2012. Available online at http://www.academicjournals.org/JLCR Access on 28th August 2021.
[4] (2019) LPELR – 47187 (CA). See also, *Aderinola Adeyemi & 6 Ors v. Alhaji Shittu Bamidele & Anor* (1968) NSSC 26 at 30.

> Marriage Ordinance. There are also legitimate children born in marriage under native law and custom. Children not born in wedlock (Marriage Ordinance) or who are not the issue of a marriage under Native Law and Custom, but are issues born without marriage can also be regarded as legitimate children for certain purposes. If paternity has been acknowledged by the putative father'… therefore in Nigeria, irrespective of the circumstance of his birth, a child 'would be legitimate if his paternity is acknowledged by the putative father.

Therefore, once a child's paternity has been acknowledged by the father, irrespective of gender, such child is entitled to inherit in the estate of his deceased father. In *Mrs. Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje*[1] Ogunbiyi JSC held that:

> …I hold did rightly declare as unconstitutional, the law that dis-inherit children from their deceased father's estate. It follows therefore that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The reproduction of that section states thus: - '42(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

5.2.0. The concept of Abieke

The custom of "*Abieke"* which has been abandon in most communities in Esan land, but still being practice in some, is another example of an Esan custom which is in direct conflict with certain constitutional provisions. Under this system,[2] a wealthy man will marry a woman for his son when is still a child or a teenager, or in some extreme circumstances immediately the child is born. In most case, the wife, is usually a baby or a young child. The girl child is then "married" to the little boy based on the arrangement between their parents. Naturally, the baby girl will grow to maturity before the boy. When the girl is matured, she starts having sexual relationship with other men and when children result from such relationship, these children are regarded as the children of her infant husband under customary law irrespective of their paternity. By the time the boy 'husband' eventually comes of age, he then starts to have sexual relationship with his wife, who before now would have been given birth for other men because of her earlier sexual relationship with them, although they are chosen by her freely. The children from the previous relationships with other men are regarded as the husband children, and they assume position of seniority to his biological children born by his wife, the same woman. This system is obviously defective, and unfair for two reasons. Firstly, this custom denies the children from the earlier sexual relationship of their paternity with their biological parents. Also, their biological fathers cannot lay any legitimate claim to their paternity as well. Secondly, the children who are the product of earlier sexual relationship rank in terms of seniority to the biological children of her husband. The application of this custom is totally unfair when applied to issues concerning succession and inheritance. This *Abiekhe* system is obviously discriminatory and repugnant to natural justice equity and good conscience. Historically, the application of the repugnancy doctrine in Nigeria emerged from the decision in the case of *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* [3] where Lord Arkin held that "the court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character, it must be rejected as repugnant to natural justice, equity, and good conscience."[4] Therefore, it is expected that a good custom or law must be able to conform to that which has be universally acceptable as being good and just. This doctrine of repugnancy was applied in the case of *Mariyama v. Sadiku Ejo,*[5] where the court was invited to consider whether the customary law of the area that provided that a child born within 10 months after divorce belongs to the former husband of the mother of the child. The court held affirming the custom. On appeal to the High Court, the decision of the low court was reversed on the ground that the custom was repugnant, and that the child should be returned to its natural father. On the strength of this authority and other similar discissions' of the apex court, denying the children from *Abiekhe* system the right of paternity to their natural father is surly repugnant to natural justice, equity, and good conscience.

5.3.0 Children from customarily legalised adulterous relationships

Furthermore, under Esan customary law, it is an acceptable practise for a man who for some reasons is unable to

[1] (2014) LPELR-22724 (SC).
[2] For full appreciation of the operation of this concept, see Okojie. C.G, *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted1994, Ilupeju Press Ltd) p118.
[3] (1931) AC 262 at 273.
[4]For further reading on the repugnancy test see Uweru. B.C., "Repugnancy Doctrine and Customary law in Nigeria: A positive Aspect of British Colonialism. *African Research Review* Vol.2 (2) 2008. Available @ https://www. ajol.info last accessed 20th June 2021.
[5] 1961 N.R.N.L.R. 81.

father a child, to grant his wife or wives permission by allowing them after the performance of the necessary traditional rites at the ancestorial shrine before his *Egbele* freedom to have unlimited sexual relationship with any man or men of their choice save for members of her husband *Egbele.* This practise is what Okojie referred to as "children from legal harlots" in his book.[1] Although this practise is acceptable and approved by Esan customs, its application run the risk of coming into direct confrontation with certain sections of the 1999 Constitution (as amended) because of its overall goals and objectives. One of the objectives of this custom is to ensure that the heirless husband can have children that will succeed to his estate after his death. The essence of the scarifies before the ancestral shine is to remove any element of adultery called "*Oghęlę"* in Esan language on the part of the wives because adultery, is a taboo in Esan customs and it attracts severe customary sanction under Esan customary law. Any child born by the wife or wives under this arrangement is regard as the child or children of the husband under customary law, and they are automatically entitled to inherit in their husband estate after his death. The legal question that is begging for answers with this customary practise is, can the application of this customary recognised custom deprive or prevent the natural/biological fathers of these children from making legitimate paternity claims for their children under the law? Legally speaking, the answer is certainly in the negative. The reason being that this kind of practise is certainly repugnant to natural justice equity and good conscience. But it must be appreciated that the Judicial Committee of the privy Council in the case of *Dawodu v Danmole* [2] opine and state "that the principles of natural justice equity and conscience applicable in country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy[3]. Despite the quotation above, any customs that is clearly below any civilised standard of behaviour would be held to be repugnant to natural justice equity and good conscience.[4] One of the earliest cases to be decided by the Nigerian court on this principle of law is the case of *Edet v. Essien.*[5] Here, the appellant had paid dowry in respect of a certain woman, when she was a child. Later, the respondent also paid dowry on the same woman to the woman's parents and married her. The appellant claimed custody of the children of the marriage on the ground that under customary law, he was the husband of the woman, and that she lacks the capacity to contract another legal marriage until the dowry he paid on her has been refunded to him and that until the dowry is refunded, he is entitled to the children born by her. The court found that although the alleged customary law was not established, it further held even if the custom was established, the custom is certainly repugnant to natural justice equity and good consciences.[6] In *Messrs A. Younan & Sons v. Lawal & Ors*[7] the Supreme Court, considering under what circumstance would the law make a presumption regarding the paternity of a child held as follows:

> …this raises the question; who are illegitimate children in Nigeria? Unlike in England, legitimate children in Nigeria are not confined to children born in wedlock or children legitimated by subsequent marriage of the parents. In Nigeria, a child is legitimate if born in wedlock according to marriage Ordinance. There are also legitimate children born in marriage under Native Law and Custom. Children not born in wedlock (Marriage Ordinance) or who are not the issues of a marriage under Native Law and Custom, but are issues born without marriages can also regarded as legitimate children for certain purposes, if paternity has been acknowledged by the putative father.

Also, in *Ekong & Anor v. Akpan*[8] the Court of Appeal per Muhammed Lawal Shuaibu JCA in deciding whether proof of paternity must necessarily imply marriage between the parties involved held that:

> Before embarking on the task of discovering whether the trial Court had abdicated its duty of properly evaluating the evidence in this case, let me say straight away that paternity and marriage are not so interwoven that proof of paternity must necessarily imply marriage between the parents involved.

From the above judicial authorities, it very clear that if the putative father of any of the children born by the wife or wives that have been given the customary permission to have extra-marital affairs with other men with a bid of raising children for their heirless husband that will eventually be regard as the legitimate children of their husband for purposes of succession and inheritance, make any legitimate claim to their paternity, their husband customary claim to these children cannot withstand the superior and legal rights of the children biological fathers. Thus, under the current position of our laws, this custom is no longer effective, and stand the risk of being

[1] Okojie. C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted1994, Ilupeju Press Ltd) p118.
[2] (1908) 1 N.L.R. 81 at pp. 99-102.
[3] [1962]1 W.L.R. 1053 at p. 1060. See also *Rufai v. Igbirra N.A.* 1957 N.R.N.L.R. 178.
[4] See Park. A.E.W., *The Sources of Nigeria Law* (1963) p.72
[5] (1932) 11 N.L.R. 47.
[6] See also *Mariyama v. Sadiku Ejo* 1961 N.R.N.L.R. 81.
[7] (1961) LPELR -25073(SC). See the case of Bamgbose v. Daniel 14 WACA 111 at page 115. See also the case of Alake v. Pratt 15 WACA 20.
[8] (2020) LPELR-4957(CA). See the case of Anwadike & Anor v. Anwadike (2019) LPELR-469.

adjudge as being repugnant to natural justice equity and good conscience.

5.4.0 Children from Woman-to-Woman marriage

Under Esan customary law of inheritance, it is not uncommon to find a custom or practise commonly referred to as "woman to woman" marriage. It must be noted that this custom is not peculiar to Esan tribe alone and must be distinguished from same-sex-marriage. According to Nwogugu[1] "under some customary laws in Nigeria, certain marriages are contracted which may superficially be described as the union of two women. On the surface, such arrangement may be said to contravene the basic precept of marriage as a union between a man and a woman." Two types of arrangement can be deduced from this concept. One of such arrangement is a situation where a barren married woman in other to ensure that her position in the marriage is secured even though she has no children, will provide her husband with the necessary resources including, but not limiting to fund for the bride-price in respect of a new wife who is expected to bear children in her place. This practice is common amongst the Ibo of the South-Eastern part of Nigeria. Under this arrangement, it is the husband that marries the new wife as opposed to the barren woman marrying the new wife for herself. On the other hand, the second method which is common among some communities within Edo and Delta States, usually involves an unmarried but prosperous woman who desires to have a family of her own may if she cannot bear children 'marry' another woman to do so on her behalf. She basically provides the bride-price for the new wife who is expected to live with her while she bears children for her. In some cases, the new wife can bear children from a particular member of the family or through paramour.[2] In *Meribe v. Egwu*[3] the Supreme Court was invited to pronounce on the validity of the first type of woman-to-woman marriage considered above. The court after conclusion of hearing held that:

> In every system of jurisprudence know to us, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing, and decent society should abhor and express its indignation of a 'woman to woman' marriage; and where there is proof that a custom permit such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and ought not to be upheld by the court.

The method and the mode of contracting this form of marriage under Esan customary law was aptly captured by Okojie[4] as follows. "If a childless, but very rich woman not wanting her property to pass to her husband and desiring a befitting burial ceremony 'married' a girl by paying her bride-price in full and bring her to live with her. The girl was permitted to have sexual relationship with any man chosen by the childless woman." All the off springs of this relationship are regarded as the children of the rich but childless woman i.e., she was the legal though not the natural father of this children. Thus, the man involved "was merely a donor and for this privilege he gave the rich woman the services of a dutiful son-in-law"[5]

It is obvious that in contemporary Nigeria the validity of this customary law that permit the application of this kind of custom cannot go unchallenged. In *Emmanuel Nwodo & Anor v. Nwodo*[6] the Court of Appeal while considering the validity of an Igbo native law and custom which allows a woman to bring another woman into the marital home of her husband who dies without a surviving son for the sole purpose of continuing the line of succession of her late husband was held to be repugnant to natural justice, equity, and good consciences. According to George Mbaba JCA,

> In my view, Appellant's claim to be the Nwodo family land founded on the alleged woman to woman marriage and claim to a father, who died 15 years before the 1st Appellant was born, revolts against public policy as the alleged custom is repugnant to natural justice, equity, and good conscience. The fact that 1st Appellant's mother was married by another woman (Kesiah) who was an adopted wife of Ubaegbulem (having been inherited by Ubaegbulem at the death of his father, Nwodo) made the whole story of the 1st Appellant's right to alienate the property of Nwodo Njoku to the 2nd Appellant, laughable, ridiculous, and also offensive to sound logic and morality. To allow a married woman such leverage/ power to 'marry' or bring another woman into the marital home of her late husband, many years after the death of the said husband, and arrange for the strange relationship between that woman with the other woman/men to produce a child (son), in the name of the late husband for the

[1] *Family law in Nigeria* (Revised Edition) 2006 Heinemann Educational Books Ltd 63.
[2] See *Iweze v. Okocha* (1967/68) M.S.N.L.R. 64.
[3] (1976) 1 ALL.NLR 266
[4] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 118.
[5] Ibid.
[6] (2018) LPELR-43948 (CA)

> alleged purpose of continuity of the family line of the late husband, is to me, absurd; immoral and an unnatural/strange mode of procreation, especially where the motive of the strange arrangement, is to corner and possess the family property of the deceased! It is even more so, where the deceased had female children who by our modern law are entitled to their father's property…of course, the lower court had appropriately relied on the case of MERIBE VS EGWU (1976) LPELR 1861 SC, and Okonkwo vs Okagbue (1994) NWLR (Pt.308) 301 to reach its conclusion on the fact that woman to woman marriage is an aberration, repugnant to natural laws, and a revulsion to public policy.

From the current position of the law, any customary law that seek to encourage or give effect to the practice of woman-to-woman marriage will be declared repugnant to natural justice, equity, and good conscience by the courts. Although Okojie suggested that his practice or the application of this custom appears to have disappeared in some part of Esan land because of the "psychological harm any suggestion of bastardy could inflict on innocent children, and so these arrangements forced upon men afraid to die without heirs' laps without any formal annulment."[1] The legal implication of the current state of the law is that those who would have intended to ensure succession to their estate through this customary method can no longer take advantage of this custom. In any event, the law and custom also provide other alternative method of achieving the same result.

5.5.0 Adultery with the Onojie' Wife

Also, in the past, under Esan native law and customs any person that has been found guilty of committing adultery with the Onojie's (king) wife is liable to be sentence to death or face banishment from the kingdom. Depending on the terms of conviction, by the "*inotu"* In certain circumstances, the woman and the man could be sentence to death. This used to be the position in the past before constitutionalism became entrenched. Today this kind of punishments, i.e., death and banishment being punishments resulting from committing adultery with the wife of an Onojie, which could deprive a beneficiary from inheritance does long exist under Esan customary.

5.6.0. Banishment (*Anolen Ubi Kua)*

Closely related to the above is the punishment of banishment which is called "*Anolen Ubi Kua*" in Esan language. In Esan custom, banishment is further divided in two forms known as I*kpotoa* and *Isunfia*. Ultimately, the aim despite the form, is to ensure the victim is banish from the community.[2] Customarily, ones a person has been banish from the community, depending on his status, his right to inheritance is seriously affected if he is a beneficiary. Having been banished, he automatically losses his right to return to the community, and his right to inheritance is extinguished. However, the result would be different if it was the father that was banished. Banishment in any form raises serious legal questions. The constitutionality of banishment under Esan customary law shall be examine against the backdrop of the clear provisions of the 1999 Constitution (as amended), dealing with fundamental right. In *AG & Commissioner of Justice, Kebbi State v. Jokolo & Ors*[3] the Court of Appeal Per Moore Aseimo Abraham Adumein JCA held as follows:

> The Governor of Kebbi State has no right to act outside the clear and unambiguous provisions of the Constitution of the Federal Republic of Nigeria, 1999 (applicable to this case). Section 35 (1) of the said Constitution provides that every citizen of Nigeria is 'entitled to his personal liberty and no person shall be deprived of such liberty' except in the circumstances set out in Subsection (a) to (f) thereof. Section 40 of the same Constitution provides that 'every person is entitled to assemble freely and associate with other persons.' On the issue at hand, Section 41(1) of the Constitution is germane and it provide thus: "41-(1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof , and no citizen of Nigeria shall be expelled from Nigeria or refuse entry thereto or exist therefrom…the appellant has not been able to show that the banishment of the 1st respondent from Gwandu Emirate in Kebbi State and his deportation to Obi in Nasarawa State were in accordance with the clear provision of Section 41 of the Constitution of the Federal Republic of Nigeria, 1999. The banishment and the deportation from Kebbi State, on or about the 3rd of June, 2005 of the 1st respondent to Lafia in Nasarawa State, and later to Obi, also in Nasarawa State is most unconstitutional, and illegal. By the said banishment and deportation, the 1st respondent has been, unduly and wrongfully denied his Constitutional rights "to respect for dignity of his person"; to assemble freely and associate with other persons"- including the people of Gwandu Emirate of

[1] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 119.
[2] Ibid at 103.
[3] (2013) LPELR- 22349 (CA)

> Kebbi State; and to reside in any part thereof" as respectively provided in the Constitution of the Federal Republic of Nigeria 1999.

From the above judicial authority, the position of the law is unambiguous. Therefore, in any Esan community that tend to enforce the customary punishment of banishment which is known as "*Anolen Ubi Kua*" in Esan language will be contriving the clear constitutional provisions. Once the matter is brought before a court of competent jurisdiction, that customary order of banishment will be set aside, and the constitutional rights of the citizen restored. Once his rights are restored, his rights to inheritance are also restored automatically as well.

5.7.0 The concept of Arebhoa or Omogbe

The concept of "*Arebhoa"* also known in other part of Esan land as "*Omogbe"* under Esan native law and customs was designed by the founding fathers to solve the problem associated with inability of any man to produce an heir for the sole purpose of succession and inheritance. Surprising, this custom is forbidden in Ugboha[1] Basically, there exist two types of *Arebhoa* system. Most time, the social status of the heirless man often determine the type to adopt. Under the first type, a man that has only female children would encourage his "*Ehale"*[2] to remain unmarried, i.e., not married traditionally to any man. Under Esan custom, she is seen as and treated a 'man' though a woman, she traditionally has all the rights and privileges of a first son in the family. She lives in her father's compound where she keeps a particular man as her paramour. This relationship would produce children who would in turn by regarded as the children of her father for the sole purpose of inheritance. Under this arrangement, the natural father of these children only reward is his uninhibited companionship at the girl's father compound.[3] One of the characteristics of this arrangement is that bride-price is excluded. The customary implication of the non-payment of bride-price is that the man cannot under custom claimed to have been married to the girl. This therefore rub him of his ability to claim paternity over these children customarily.

The second type of *Arebhoa* is not as straightforward as the first example. Under this arrangement, there is a significant modification. "It consisted of the acceptance of half pride-price, by the father from the suitor. First, an arrangement was made that the marriage was going to be part-*Arebhoa*, and on this understanding the father accepted the half dowry"[4] secondly, the woman after the payment of the half bride-price moved to live with her husband. Thirdly, unlike the first type of Arebhoa system, the children from the marriage are shared between the husband and his father-in-law. Whereas, unlike what is obtainable under the former system, the husband does not have any claim to the paternity of the children of the relationship. This order of sharing these children is so complex that it goes beyond the first generation.[5] The rational for the adoption of this system was fully examined by Okojie thus:

> The reasons are to be found in Esan anxiety over ensuring perpetuity in a family, an attempt to curb extinction of an *Ijogbe* or *Uelen*- the family unit. This could easily happen within two or three generations: Mr 'A' inherited the property and wives of his father; now 'A' dies leaving only a daughter who was already fully married, i.e., the bride price had been accepted. According to Esan custom, a woman is never allowed to come from her husband's place to inherit her father's property, so the male next-of-kin inherit the property and the door of 'A's father's house was shut for ever.[6]

Justifying the necessity for the *Arebhoa* or *Omogbe* custom, Okojie further posited that where this custom is practice, it is very rare for a man to die without an heir. He asked a rhetorical question thus:

> Now suppose 'A' had made his daughter an Arebhoa, all the children of this woman, male, or female, could have been his own children, so that on his death he could have sons to bury and inherit his property instead of its passing to another door. Still more important was the fact that an Arebhoa had the same rights as a son; she could 'marry' wives who would be having issues for her and she could perform the burial ceremonies on her father's death, exactly as if she had been a male.

Thus, apart from ensuring that an heirless man has someone to inherit his estate and perform his final burial ceremonies, the custom of *Arebhoa* or *Omogbe* further ensure that in kingdoms where the Onojie was empowered by the custom to inherit the property of any heirless man after death was practically eliminated, because once the *Arebhoa* has children, it will be difficult and customarily impossible to classify his estate as

[1] Ugboha is a kingdom in the present-day Esan North East Local Government Area of Edo State. See also Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 115
[2] Ehale is usually the first daughter of an Esan man.
[3] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 115
[4] Ibid.
[5] For further reading see Itua P.O., "Succession Under Esan Customary Law in Nigeria: Grounds for Disinheriting an Heir from Inheriting His Deceased Father's Estate under Esan Customary Law" *International Journal of Innovative Research and Development* Vol.7, issue 8. Available online at http://w.w.w. ijird.com last accessed on 25th July 2021; Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 116.
[6] Ibid.

such. On the other hand, concerning succession to the throne as a traditional ruler (*Onojie*), Esan native law and custom prohibits succession to the throne by any person that is not a legitimate first son of the deceased king. Okojie, restating the custom further posted that "…this recognised first son must be legitimate and must not be an issue from a lover or an *Arebhoa*. His position is daily confirmed as the recognised son and heir, by the custom of his eating all the heart of the animals slaughter at the ancestral shrine in the palace."[1]

As convincing as the philosophy behind the adoption of this *Arebhoa* or *Omogbe* custom is, its operation under the current 1999 Constitution (as amended) is doubtful. The reasons being that the custom seems to encourage the denial of paternity rights of the biological father of the children born under the *Arebhoa* relationship. Under the first type of the *Arebhoa* system, the biological father of the children from the relationship is completely denied his paternity rights to his children on the basis that he did not pay the bride-price on their mother,[2] which is an essential ingredient to establish the existence of valid customary law marriage under Esan customary law. In *Obi & Obi v. Bosah & Ors* [3] the court held that "it is the law that there are two essentials of a valid customary marriage. These are (1) payment of bride-price and the handing over of the bride to the groom." Apart from the first essential ingredient, the second element identified in Obi's case above which is the handing over of the bride to the groom is also missing under the *Arebhoa* system. However, the same cannot be said for the second form of Arebhoa system. Under the second of *Arebhoa* system, the two elements are complete despite the payment of half bride-price. Irrespective of the method adopted, the custom still faces the constitutional compatibility test and the repugnancy test. Unfortunately, in line with the current judicial authorities on repugnancy, it is impossible for this custom of *Arebhoa* to pass the validity test because it sought do deny the natural father of the paternity of his children.[4]

5.8.0 Posthumous Parentage

Esan native law and custom make provision for and recognised the practice of posthumous parentage. In other words, a death man can father a child posthumous. It must be stressed that this custom is almost extinct in most kingdoms in Esan land because of civilisation. However, where it is still being practised, the sole aim is accessing the estate of the death person for the purposes of inheritance. In certain circumstances, the deceased sister could "marry" a woman for his dead brother, and the woman is given liberty to have sexual relationship with any man of her choice and the children from that relationship are regarded as the children of the dead man. This practise denies the natural father of these children their paternity. This custom is also common amongst the Ibo tribe in the South-Eastern part of Nigeria. In some part of Ibo land, their custom allows a woman to have posthumous children for her dead husband. In *Okeke v. Okeke*[5] the Court of Appeal was invited to consider whether a custom which allows a woman to have posthumous children for her deceased husband is repugnant to natural justice, equity, and good conscience. After a careful consideration of the records, the Court held as follows:

> Now, let us examine the vexed issue of whether or not the learned trial judge was right when he came to the decision to the effect that since the appellant was born in 1952, five years after the demise of Simon Okeke in 1947, the appellant was a stranger to the family of late Simon Okeke. That the appellant could not have been a posthumous son of the late Simon Okeke, hence the former cannot inherit anything from the late Simon Okeke. A similar situation with respect to Nnewi native law and custom pertaining to inheritance of a dead man's property by four children borne by his widow after his demise had arisen in the unreported appeal No. CA/E/115/2000 between Benedict Ojukwu v. Gregory Agupusi and Anor, decided by this court on the 22nd January, 2014…My Lord I.I. Agube, JCA in his lead judgement at pages 22-28 thereof held thus: 'In Nwachinemelu Okonkwo vs. Mrs Lucy Udegbunam Okagbue and 2 Ors (1994) 9 NWLR (Pt. 308) 301, the Supreme Court in an appeal that emanated from this Honourable Court in a case from the High Court of Anambra State, Onitsha judicial division where the custom of the Onitsha people that enable a woman to marry another woman for the purpose of raising children for her deceased brother fell for consideration. Ogundare, JSC at page 343 paragraph H to page 344 paragraph A-B of his contribution to the lead judgment of Uwais JSC wherein Wali, Ogundare, Mohammed and Adio JSC concurred, reasoned thus- 'The institution of marriage is between two living persons. Okonkwo died 30 years before the purported marriage of

[1] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 76.
[2] See *Edet v. Essien.* (1932) 11 N.L.R. 47.
[3] (2019) LPELR-47243(CA). See also *Agbeja v. Agbeja* (1985) 3NWLR (Pt. 11) page 11., *Okolonwamu v. Okolonwamu* (2014) LPELR-22631 (CA) at 44-45 (E-B)
[4] See *Edet v. Essien* (1932) 11N.L.R. 47 and *Mariyama v. Sadiku Ejo*, 1961 N.R.N.L.R. 81
[5] (2017) LPELR-42582(CA)

> the 3rd defendant to him. To claim further that the children 3rd defendant had by other man or men are the children of Okonkwo deceased is nothing but an encouragement to promiscuity. It cannot be contested that Okonkwo (deceased) could not be the natural father of these children. Yet 1st and 2nd defendants would want you to integrate them into the family. A custom that permits of such a situation gives licence to immorality and cannot be said to be in consonance with public policy and good conscience. I have no hesitation in finding that anything that offends against morality is contrary to public policy and repugnant to good conscience. It is in the interest of the children to let them know who their true father are (were) and not to allow them live for the rest of their lives under the myth that they are the children of a man who had died many decades before they were born' I hold the view that the observation of the learned justice of the Apex Court apply to this case where a man who died in 1987 could still father children long after his death…I am in complete agreement with the decision of the learned trial judge at page 175 of the record of appeal to the effect that since the appellant was born five years after the demise of Simon Okeke, he cannot lay claim to a right of inheritance to the estate of late Simon Okeke nor can the appellant contend successfully that he was denied his right of inheritance to the estate of the late Simon Okeke because of the circumstance of his birth. It is up to the appellant and his siblings to demand from their mother, who their real and biological fathers are because their inheritance lay only in the estate of their real and biological fathers and not to the estate of their make-belief father- Simon Okeke who predeceased their conception and birth.

From the extensive quotation above from the decision of the Court of Appeal Per Tom Shaibu Yakubu JCA in the case of *Okeke v. Okeke*, it is now settled law that any claim of paternity based on any form of posthumous conception gear towards achieving a desire goal, particularly as it concerns inheritance will be declared repugnant to natural justice equity and good conscience.

5.9.0 Conviction by Inotu

Esan customary law also make adequate arrangement, albeit customarily on how the estate of a person who has been convicted by the "*Inotu"* [1] for murder can be administer. Before the advent of the British colonial administration in Esan land, when the Onojie was an autocratic ruler, a murderer not only forfeit his/her right to live, but also forfeit the object with which the crime was committed, he too automatically become the property of the Onojie.[2] The murderer's right to live, is dependent on many factors such as the circumstances that led to commission of the crime in first instance. If the murder was not intentional, then the life of the murderer would be spared, and he become a slave to the Onojie. Also, the custom does not spare anyone convicted of attempted suicide.[3] If a man commit suicide, the customs also treat him as a murderer and his properties are automatically taken over by the Onojie thereby depriving his beneficiaries of their right to inherit their father's estate. It has been argued that the rationale behind this custom was to prevent and discourage suicide. However, under the current Constitution, and extant laws in the country, the power to investigate and prosecute any offender for any crime including murder reside in the Nigeria Police. Section 4(a) and (b) of the Police Act[4] is very explicit. Thus, all the powers that used to be exercised by the "*Inotu"* and the Onojie in the pre-colonial era Esan now reside with the Nigerian Police. The implication is that once an Esan person is found guilty of murder and sentences to a term of imprisonment or death as the case maybe, his properties are now longer liable to be inherited by the Onojie, but his beneficiaries. Same goes for anyone that commit suicide.

5.10.0 An heir causing his father's death to facilitate his inheritance

Having discuss the position of Esan native law and custom concerning person who commit murder, and those that either attempted to commit suicide, and those that succussed in committing suicide, the next issue for consideration is the position of Esan native law and custom on the right of inheritance of the eldest son who killed his father in other to facilitate his rights to inheritance. The position of the custom is very clear and unequivocal to the effect that such a child cannot benefit from his own crime. Once the crime is reported, and the accused is convicted and sentenced to prison he loses his right to inherit. Under Esan customary law, such a

[1] "Inotu". This consisted of all the strong able-bodied and courageous elements of the town or village. They are called upon when there was murder, or fatal accidents like a wall falling on people, the lintels of the wall being 'arrested' by Inotu and carried to the Onojie as the would do to a murderer. For a proper understanding of the various age groups in Esan land and their respective duties as determine by customs see Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) pages 50-51.
[2] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 126.
[3] Ibid.
[4] Nigeria Police Force (Establishment) Act, 2020.

person is also seen as a murderer, and he loses his right of inheritance to his immediate younger brother in other of seniority.[1] The question now is, can a testator make a Will and disinherit his eldest surviving son of the property he is customarily entitled to under native law and custom, when such a child has attempted to kill him, or he is in fact convicted of the killing of his father. To effectively answer this question, it is appropriate to examine the provisions of the Wills Law of Bendel State. Surprisingly, the Wills Law of Bendel State[2] seem not to have envisage such a situation, thereby failing to make adequate provisions to address this kind of problems. The only solution is to have recourse to the Court under the maxim *Commodum Ex Injuria Sua Nemo Habere Debet.*[3] Section 3(1) of the aforesaid Wills Law, which provides as follows:

> Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in a manner hereinafter required, all real and all personal estate which he shall be entitled to, either in Law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled b descent, of his ancestor, or upon his executor or administrator.

By the provisions of Section 3(1) of the Wills Law of Bendel State, a testator is Edo cannot disinherit his eldest surviving son of any property which customary law has made express provision for concerning such a child. Amongst the Bins and Esan tribe, the principal house which is regarded as the family seat called the *Igiogbe* in Bini language and *Ijiogbe* in Esan language, customarily belongs to the eldest surviving son of the testator and he the testator cannot make a will to disinherit his eldest surviving son of it. Thus, this section of the Wills law placed a restriction on the freedom of testamentary power of a testator in Edo State, regarding the nature of property he can bequeath in his will.[4] The court have in a plethora of case[5] held that the *Igiogbe* [6] which is one of such property is automatically inherited by the eldest surviving son of a Benin man and that the testator cannot make a will and bequeath the said *Igiogbe* to someone else. In *Idehen v Idehen*[7] Belgore JSC, stated as that:

> By Benin customary law, the Family Seat called the 'Igiogbe' automatically goes to the eldest son on the death of his father. Thus, the law for the first time in Nigeria takes into consideration the local situation in testamentary capacity. Hitherto, by virtue of the English Wills Act 1837 seemed every Nigerian could make a will on virtually all property he has and could avoid providing for his eldest male child or any child. See Adebusokan v Yinsua (1971) 1 A N.L.R. 225.

The same principle of law discussed above, is also applicable under Esan Native law and Custom. The right of the first son to inherit his deceased father's "*Ijiogbe"* came up for determination in *Mr Victor Ayemwenre Eigbe & Anor v. Mr Benjamin Izibiu Eigbe & Ors.*[8] The Testator Mr Peter Kadiri Eigbe was an Esan man from Irrua. The children of the Testator instituted a suit against their father's brother seeking among other reliefs, an order setting aside the device in respect of the Bungalow at No. 20 Esan Street, Equare, Irrua Esan Central Local Government Area Edo State as contained in clause 4 of the Testator's Will for being inconsistence with Esan Native Laws and custom on inheritance. The appellant the Testator's children contended the Will violates section 3(1) of the Will Law of Bendel state because the Testator did not devise his *Ijiogbe* to the first appellant in accordance with native law and custom. They contended that both the house No 43, Muritala Mohammed way Benin city and No 20 Esan Street, Equare, Irrua constitute their late father's Ijiogbe under Esan native law and custom. The Court of Appeal Per Ogunwumiju JCA, after evaluation of the evidence came to the following conclusion

> I have made a thorough consideration of this court's decision in *Egharevba v. Oruonghae* supra. The facts are almost on all fours with the facts of this case. The court held unanimously that a Bini man can have only one *Igiogbe* which must be located in Benin Kingdom. I think what was of most consideration in that case as in this case was the fact the testator gave the house in his hometown to his eldest son and being regarded as his ancestral home, was thus regarded as his *Igiogbe* as opposed to another house in another city where he had at once lived. In the case under review, I

[1] This is the position under Esan customary law as expressed by High Chief Umolu Abhulimen, the Otota of Irrua Kingdom in Edo Central Senatorial District of Edo State.
[2] Cap 172, Laws of Bendel State of Nigeria 1976 applicable to Edo State.
[3] This Latin maxim means a wrongdoer should not be enabled by the law to take any advantage from his actions.
[4] See Sagay. I E., "Customary law and freedom of testamentary power" (1995) *Journal of African Law* Vol. 39 (2). For further reading, see Sagay I.E., *Nigeria Law of Succession Principle, cases, statutes, and Commentaries* 1st Ed. 2006 Malthouse Press Limited.
[5] See *Idehen v Idehen* [1991] 6 NWLR (Pt.198) 382, *Agidigbi v. Agidigbi* [1992] 2 NWLR (Pt. 221) 98.
[6] Also known as Ijiogbe under Esan Customary is the principal house of the family seat where the deceased lived in his lifetime, but not necessary where he died. This house, under customary law belongs to the eldest surviving son of the deceased after performing the final burial rites.
[7] [1991] 6 NWLR (Pt.198) 382.
[8] (2013) LPELR – 20292 (CA).

> am convinced that the testator categorically identified his *Igiogbe* by clause 3 of his will. Having held that the Will was duly executed, the testator having stipulated the house he considered to be his Igiogbe, situate in his ancestral home, I have to arrive at the conclusion that the house in Irrua is the *Igiogbe* of the testator.

Therefore, like in Benin Kingdom, the eldest surviving male child of the deceased Esan man automatically inherit his late father *Ijiogbe* after the performance of the final burial ceremonies.

Some legal jurists have questioned this automatic right of inheritance by the eldest son of the deceased. The need to review the automatic application of the Bini customary law that devolve the *Igiogbe* on the eldest surviving son of the deceased was muted by Kolawole JCA., in the case of *Agidigbi v. Agidigbi*[1] according to the learned Justice, he had experienced great anxiety in the application by the courts of the opening phrase, "subject to customary law relating thereto" in section 3(1) of the Wills Law of Bendel State which take away the power of the testator to dispose of his property by Will the way he wishes after his death, without the court finding out why a particular son as the eldest surviving son of the deceased testator was disinherited. Similarly, Kabiri-Whyte JSC also had dropped a hint in *Idehen's* case where he suggested that if there is credible evidence why the eldest son was disinherited by his deceased father, the Supreme Court might be persuaded to reconsider the matter.[2] Kolawole JCA, in *Agidigbi v. Agidigbi* further provided circumstance in which the rule of automatic succession by the eldest son should be disregarded as follows:

> If the eldest son attempted to exterminate his father in order to succeed to the *igiogbe* and the testator decided to disinherit the eldest surviving son for that purpose, would section 3(1) of the Wills Law ensure for the benefit of the eldest surviving son in the face of such criminal act? If the eldest surviving son is an imbecile, an idiot, a mentally incompetent son who was to be looked after, what does the Court do? What is the position when the eldest surviving son has been imprisoned to a long term of imprisonment for crime against his father? Would such eldest son be able to undertake and discharge the responsibilities of the status of the head of the family? Is the testator not entitled to disinherit such a son? Is the testator not entitled to disinherit such a man? I am of the view that it is contrary to public policy that a man should be allowed to claim a benefit resulting from his own crime…it seems clear to me therefor that a son who is proved to be guilty of the murder or manslaughter of the testator ought not to take any benefit under his will notwithstanding the provisions of section 3(1) of the Wills Law[3]

It is hereby recommended, that in line with the sound judicial reasoning quoted above as enunciated by Kolawole JCA, and by the operation of the maxim "*Commodum Ex Injuria Sua Nemo Habere Debet"* which means that a wrongdoer should not be enabled by the law to take any advantage from his actions, there is need from the standpoint of public policy for the Court to interrogate the automatic application of the provision of section 3(1) of the Wills Law of Bendel State, applicable to Edo State as it relate to the inheritance of the *Igiogbe* and the *Ijiogbe* both in Benin Kingdom and in Esan land respectively.

6.0 Esan Native Law and Customs on Paternity

In other to be able to effectively discuss the various challenges confronting Esan custom concerning succession, it is imperative to discuss the laws on paternity under Esan native law and custom. These laws are as follows. The general rule of Esan native law and custom concerning paternity is that a man is recognised as the father of his children once he acknowledges their paternity. Before the advent of the British colonial administration in Esan land, there were little or no dispute at all over the paternity of a child. Paternity dispute was almost non-existence. A man first son is his first male child by his lawful wife, or if born before marriage, provided the child is acknowledged, he become legitimate. An *Omo-Osho* could only aspire to this unique position in the family when all the conditions concerning his recognition as such have been fulfilled by his father. One of such condition is that the man make a public testament of his first son by given him the hearts of all animals slaughtered in his compound.[4] The implication of this practise is to inform his *Egbele* who his heir is.

Secondly, if a woman was an "*Arebhoa",* then the children from that relationship will be regard as her father's children. The children grandfather will now be their natural father. The children biological father is displaced. However, if the woman has an intended husband, then the children belong to her intended husband who might not be their natural father.[5]

Thirdly, the law on paternity is different when it concerns children born by a woman who is separated from

[1] (1992) NWLR. (Pt.221) 98
[2] Sagay I.E., *Nigeria Law of Succession Principle, cases, statutes, and Commentaries* 1st Ed. 2006 Malthouse Press Limited. P.151.
[3] (1992) NWLR. (Pt.221) 125.
[4] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 167
[5] Ibid at 165.

her husband. If the bride price has not been returned to the former husband, any child or children given birth to by the woman, belongs to her first husband irrespective of who impregnated her[1]. But if the dowry had been fully refunded by the woman's father, then the children will be regarded as her father's children. But if the woman refunded the bride-price herself, then the children belong the man that impregnated her if the man later married her. But if he does not marry her, then the practice was for the suitor who would later marry her to make arrangement to cover both the mother and her child who then become his child, in other words the woman's father had an extra-large bride-price. [2]

Fourthly, any child or children born from an adulterous union, belongs to the lawful husband of the woman. The rationale behind this customary claim of paternity is because the woman is still married to her husband, and the bride-price paid by the husband has not been returned. [3]

Fifthly, this law concern children born from "I*bhalen"* association. "*Ibhalen"* in Esan language simply mean "I am not aware." This cover person who are within the prohibited degree of consanguinity and affinity under customary law. Thus, where two members of the same kindred (*Egbele*) have sexual relationship and pregnancy resulted from such association, when the child is eventually given birth to, the child will be regard as the son of the prospective husband of the woman. But if the woman does not have any prospective husband, then the child will be regarded as her father's child, or better still for an extra-large dowry, to the man who will eventually marry the woman.[4]

In Esan land, it used to be the practice for a man to marry a wife for his son who is a minor. The wife too also must be a minor. This is what is refer to as "*Abiekhe*" under Esan native law and custom. However, once the girl attained maturity, which is usually the case, she starts to have children from other men while waiting for the boy to grow into a man. By the time the boy attain majority, they are then united in marriage. Under this kind of arrangement, all the children given birth to by the woman are regarded as the lawful children of the minor and they took precedence over the natural children the man would later have when he had overcome his minority.[5] It is important to re-instate the custom as it concern the stool. For any child to be recognised as an heir to the throne, such a child must be legitimate.

Finally, if a woman was known to be pregnant before the death of her husband, on delivery, such a child is regard as the child of the deceased husband, and the child is entitled to inherit from her father's estate. This circumstance explains the origin of names such as "*Umoera*"[6] in Esan language. In certain part of Esan land, the practise is that before the woman delivery the child, she is inherited so that the child would belong to the man that inherited the mother. Explaining the custom further Okojie said "sometimes if the pregnancy was very early, when the husband died, and by the third month it was still not known generally, the man who inherited her successfully claimed the child. It was immaterial if she gave birth to a child six months after the last husband's death" Okojie further opine that "this should cause no surprise because in certain parts of Esan 'B' a man could adopt his father's youngest son from another mother, as his own first son particularly if it is vital for him to perform certain ceremonies like "*OGBE*" before he had his own son." These are the various part ways to succession and inheritance under Esan customary law. Having discussed these various customary methods of seeking to achieve succession and inheritance, this research shall now focus on the challenges posed by the application of the principles of Fundamental Rights as enshrine under the 1999 Constitution (as amended).

7.0 Challenges of Fundamental Rights

The major challenge confronting the application of some Esan customs governing succession and inheritance is the applicability of these customs *vis-à-vis* the application, enforcement, and protection of fundamental rights as guaranteed by the 1999 Constitution (as amended). In *Ransome-Kuti v. A.G. Federation*[7] the Supreme Court define fundamental rights as follows:

> What is the nature of a fundamental right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is the primary condition to a civilised existence and what has been done by our constitution, since independence, starting with the Independence Constitution, that is, the Nigeria (Constitution) Order in Council 1960 up to the present Constitution, that is , the Constitution of the Federal Republic of Nigeria, 1979…is to have these rights

[1] See *Edet v. Essien* (1932) 11N.L.R. 47 and *Mariyama v. Sadiku Ejo*, 1961 N.R.N.L.R. 81
[2] Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 166
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Meaning "you have a father" in Esan language. According to Okojie, this name should not be confused with "*Omoera"* which means "he has a father" in Esan language. This name is usually given to child who father was seriously ill when the mother was pregnant, but he lives to see his child. For further reading, see Okojie, C.G., *Esan Native and Custom with Ethnographic Studies of the Esan People*, (1st ed, Reprinted 1994 Ilupeju Press Ltd) at 166.
[7] (1985) NWLR (Pt.6) 211. See also *Ibanga & Ors v. Akpan & Ors* (2018) LPELR-46167(CA).

> enshrined in Constitution so that the right could be "immutable" to the extent of the of the non-immutability" of the Constitution itself. It is not in all countries that the Fundamental Rights guaranteed to the citizen are written into the Constitution. For instance, in England, where there is not written constitution, it stands to reason that a written code of fundamental rights could not be expected. But not with standing, there are fundamental rights. They guarantee against inhuman treatment, as specified in section of the 1963 Constitution, would, for instance, appear to be the same as of the fundamental rights guaranteed in England, contained in the Magna Carter 1215-Article 19 and 40 which provide-"no freeman may be taken or imprisoned, or disused of his freehold or liabilities in free customs or be outlawed or exiled or in any way molested nor judged or condemned except by lawful judgment or in accordance with the law of the land and the crown or its ministers may not imprison or coerce the subject is an arbitrary manner. In the United States, the Eighth Amendment to the United Constitution provides- "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted"[1]

Also, in *Chief Francis Igwe & Ors. v. Mr. Goddy Ezeanochie & Ors*[2] the Court of Appeal define fundamental rights as follows:

> What is a fundamental right? It is a right derived from natural or fundamental, or Constitutional law. See; Black Law Dictionary, 8th Edition, page 692. In this country, the fundamental rights of the citizen though acquired naturally, are constitutionally guaranteed. Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria clearly provides for the Fundamental Rights.

It is a trite principle of law that a court has a duty to protect the fundamental rights of citizens. In *Chief Francis Igwe & Ors. v. Mr. Goddy Ezeanochie & Ors*,[3] the Court of Appeal also held that "it is indeed the duty of the court to protect the constitutionally guaranteed rights of citizens."[4] Therefore, in any instance where it appears that the fundamental rights of any Nigerian that is constitutionally guaranteed is about to, or has been breached as a result of the application of rule of customary law is brought before court, the court has no choice than to protect the rights so guaranteed as against the application of the custom. In *Attorney- General & Commissioner of Justice, Kebbi State v. Jokolo*.[5] The Court of Appeal Per Akomolafe-Wilson. JCA held as follows:

> It is the duty of courts in this country to safeguard the fundamental rights of each individual. Human rights are usually described as inalienable and constitute birth right. The important of these rights in this country is obvious by the entrenchment of such rights in our constitution. In *F.R.N. v. Ifegwu* (2003) (supra) Uwaifo JSC at p.1844 stated thus- "If I may say so, as for the Court is concerned whenever an aspect of personal liberty is properly raised in any proceeding the focus on the constitutional question is intense and intensive, and a solution which projects the essence of the constitutional guarantee is preferred

Thus, the law is settled that once there is a breach of any the constitutional guaranteed fundamentals rights of citizens, the Court has a duty to protect and defends these rights. As have been observed, majority of the Esan native law and customs dealing with how a man acquires paternity in relation to some children appears not only to be repugnant to natural justice equity and good conscience, but totally offend the fundamental rights provisions of the 1999 Constitution (as amended). As discuss earlier, apart from circumstances where a man claims paternity of his children born by his wife, other mode of acquiring paternity appears to be repugnant to natural justice. For example, it is totally repugnant to natural justice to deny a man the paternity of this child merely because he has not returned the bride-price paid on the child's mother paid by her former husband to him. Same applies to children born under '*Arebhoa*' system. Concerning the throne, it is the custom that before a child can be recognised as an heir or crown prince, he must be "legitimate" in the eye of the custom. To be legitimate, his mother must be properly married in accordance with native law and custom, and he must not be the child of an '*Omo-Osho.'* It is immaterial whether his father acknowledged him before his *Egeble*. This custom, if applied strictly is discriminatory against the child. His refusal for consideration as a crown prince is purely based on the circumstances of his birth. This is a direct affront to the provision of section 42 (2) of the 1999 Constitution (as mended). In *Chiduluo & Ors v. Attansey & Anor*.[6] The Court of Appeal was invited to

[1] Per ESO JSC (Pp. 33-34, paras. A-C).
[2] (2009) LPELR-11885(CA). See also *Chief (Dr) O. Fajemirokun v. Commercial Bank Nig. Ltd. Anor.* (2009) 2 SCM 55 at 71.
[3] See footnote 801
[4] See *Federal Republic of Nigeria v. Ifegwu* (2003) 13 NWLR (Pt. 237) 382.
[5] (2013) LPELR-22349(CA)
[6] (2019) LPELR-48243 (CA)

consider whether any law or custom which deprives children born out of wedlock from sharing the benefit of the estate of their father conflicts with Section 42(2) of the Constitution of the Federal Republic of Nigeria ,1999 (as amended). The court Per Oludotun Adebola Adefope-Okojie held that:

> It is also settled that the children born out of wedlock can also no be deprived from sharing from the estate of their deceased father. Any law that seeks to do this is in violent conflict with Section 42(2) of the Constitution of the Federal Republic of Nigeria Supra. See Ukeje v. Ukeje Supra at page 410 Para D-E Per Ogunbiyi JSC.

The consequences for any custom being declared repugnant to natural justice equity and good consciences or in conflict with fundamental rights guaranteed by the Constitution of the Federal Republic of Nigeria 1999 (as amended) is a declaration of nullity. In *Nurses and Midwifery Council of Nigeria (NMCN) v. Adesina*[1] the Court of Appeal while considering the effect of a breach of the fundamental right provision in the 1999 Constitution (as amended) held that:

> The Courts guard fundamental rights provisions very jealously. Therefore, any law or action that perpetrated against the provision of the fundamental rights of any individual which is against the spirit of the Constitution would not be allowed to stand. The spirit of the Constitution must be upheld at all times, the fundamental rights of the citizen which are immutable and inalienable cannot be subsumed or swept aside by a side wind such as the Appellant's policies and procedures on change of name. Any breach of the provisions of the fundamental rights provision renders any act subsequent to the breach a nullity…[2]

In *Oyeniyi & Ors v. Bukoye* & Ors[3] the Court of Appeal held that "A customary law, which is repugnant to Natural justice equity and good conscience is not recognizable as law and cannot be applied. For a customary law to be recognized and applied in our Courts, it must pass the repugnancy test."[4] The conditions that must be fulfilled for a custom to be valid and enforceable by the Courts were considered in *Ogbuli* & Anor v. *Ogbuli* & Anor.[5] The Court of Appeal Per Amiru Sansui JCA held as follows:

> In Nigeria today, for a custom to be valid and therefore be enforceable by the Courts as a customary law, the custom must satisfy three main test which are: 1. The repugnancy test which is made up of Natural Justice Equity and Good Conscience. 2 The incompatibility test and 3. The public policy test. The above three (3) test presupposes that for custom under consideration to be valid in Nigeria; it (a) Must not be contrary to natural justice (b) Must not be contrary to equity (c) Must not be contrary to good conscience (d) Must not be incompatible with any law for the time being in force and it (e) Must not be contrary to public policy in the case of Mojekwu v. Mojekwu (1997) 7 NWLR (Pt.512) page 283, NIKI TOBI JCA (as he then was) frowned at the custom that discriminate and degrade our people thus: "We need not travel all the way to Beijing to know that some of our customs are not consistent with our civilized world in which we all live today, including the Appellants. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God the creator of human beings is also the final authority of who should be made male or female. Accordingly, for a custom or customary law to discriminate against a particular sex is, to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the custom is repugnant to natural justice, equity, and good conscience.

Furthermore, the provisions of the 1999 Constitution (as amended) are very clear regarding the supreme nature of the Constitution vis-à-vis any other law or custom in Nigeria. In *Ogbuli* & Anor v. *Ogbuli* & Anor[6] the court further held that:

> Section 1 of the Constitution provides that the Constitution is Supreme, and its provisions shall have binding force on all authorities and persons throughout this Nation. Thus, any customary practice, Native Law and Custom which is contrary to or conflict with the provisions of the Constitution must give way to the supremacy of the Constitution. It is no longer acceptable to exclude female children from benefitting

[1] (2016) LPELR-40610 (CA)
[2] Per Ugochukwu Anthony Ogakwu, JCA (Pp 27-27 Paras A-E). See also *Onyemeh v. Egbuchulam* (1996) LPELR (2739) 1 at 21, *Okafor v. A-G Anambra* (1991) LPELR (2414) 1 at 28 and *Tolani v. Kwara State Judicial Service Commission* (2009) LPELR (8375) 1 at 52-53.
[3] (2013) LPELR-22087(CA)
[4] Per Hussein Mukhtar, JCA (Pp 46-46 Paras E-F)
[5] (2015) LPELR-24488(CA)
[6] See foot note 840 above.

from the estate of their late parents solely on the basis of their gender. I am in full agreement with my learned brother that this appeal has merit and should be allowed.

In the light of the above, it is self-evident that any Esan Native Law and Custom that fails the repugnancy test or in conflicts with the fundamental rights of citizens as guaranteed by the Constitution of the Federal Republic of Nigeria 1999 (as amended) will be declared a nullity. The way forward is for the practitioners and the custodian of Esan Native Law and Customs i.e., the traditional institutions to adapt and modify the custom to face of current challenges pose by the enforcement of fundamental rights even though, the same Constitution in Section 21 provides that "the State shall: (a) protect, preserve and promote the culture which enhance human dignity and are consistent with the fundamental objective as provided in this Chapter."[1] Thus the Constitution is in total support of any preservation of cultural rights so long they do not offend against fundamental rights provisions, and they are not repugnant to natural justice equity and good conscience.

8.0 Recommendations

8.1.0 The role of Traditional Rulers

In *Ogolo & Ors v. Ogolo & Ors*[2] the Supreme Court define the meaning and nature of customary law as follows: "Customary law is the organic or living law of indigenous people of Nigeria regulating their lives and transaction. It is a mirror of the culture of the people." Thus, there is no gainsaying that the traditional rulers and other traditional institution who are the custodian of Esan culture owe it as a duty to ensure that some of their customs that are discriminatory to female children and widows are modified in other to being them into conformity with fundamental rights provisions of the 1999 Constitution (as amended). According to Izibili "The word traditional rulers are commonly heard in our day to day language; yet its conceptual configuration may not be seen by all in the same way."[3] But "contextually however, it refers to the indigenous arrangement deliberately made either by nature or nurture; this is the situation whereby leaders or person by virtue of heredity or people with proven track record are nominated, appointed when they are found credible, and eventually installed in line with the permissible provisions of their native laws and customs.[4] Thus, "it is an institution that is saddled with enormous responsibilities amongst others, these: to preserve the custom and traditions, cultural heritage of the people and to manage, settle and resolve dispute or conflict that may arise within and between members of the community or society."[5] It is in the discharge of these duties that they are enjoined to change the narrative concern inheritance rights of female children and widows in their respective kingdoms in Esan land.

8.2.0 Adoption of modified Bini Customary Law rules

Secondly, since the rule of primogeniture mainly govern the distribution of the estate of a deceased Esan man, it is suggested for equity's sake amongst the deceased children who are his beneficiaries, the modified position now prescribed for the sharing a deceased Bini man property as adopted few years ago by the Bini Traditional Council is hereby recommended. The position is reproduced below as follows.

a) The Igiogbe[6] i.e., the house in which the deceased lived and died and usually, though not where he was buried automatically devolves on the eldest son.
b) Custom enjoins the eldest son to accommodate all his brothers and sisters (subject to good behaviour) until they are able to build their own house and move out or (if women) until they get married.
c) Where the deceased has other landed properties, these are distributed to other children according to "*urho*" in other of seniority, i.e., according to the number of wives, the male child taken precedence in each "*urho*". The eldest son is still entitled to a share of the remaining properties.
d) All the other properties are similarly distributed among all the children starting with the eldest son.
e) It may happen that the most senior of the deceased person's children is a female. In such a case, while custom places all responsibility on the eldest son, and give him all the precedence, it is permissible, and expected, by mutual agreement between the family eldest and the children, for something reasonable to be given to the woman being the most senior of all the children.[7]

[1] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[2] (2003) LPELR-2309(SC)
[3] Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021. Page 8
[4] Abanyan N.L. and Otikwe. S "The role of traditional rulers in community development in Nigeria: A theoretical Discourse", *in International Journal of Social Sciences.* 13(2), 2019.pp177-178.
[5] Izibili M.A "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021. Page 8
[6] Which in Esan language is called *Ijiogbe*.
[7] For further reading see Itua P.O., "Disinheritance of Women under Esan Customary law in Nigeria: The Need for Paradigm Shift Towards Gender Equality" *Advances in Social Sciences Research Journal,* 8(2), 668-723. Available online at

Once these positions are adopted, it will elimination any form of discrimination against the female children of the deceased, and the other male children of the deceased will equally be accommodated in the sharing of the properties of the deceased.

8.3.0 Legislative initiative

Also, it is recommended that the Edo State of Assembly should as a matter of urgency enact a law in the state that will be gender friendly, that would guarantee equal rights for both male and female children in matters involving inheritance and succession. The proposed law should also address the rights of widows to inheritance in the state. Since there are provisions in the 1999 Constitution as (amended) dealing with equality based on sex or gender, for example section 1(1), 16(1)(a) and 17(1)(2)(a) of the constitution. With the existence of these provision, one would have expected nationwide application of this sections. However, the problem with these sections is that the provisions are not justiciable *per se*. Despite these inadequacies, the Edo State House Assembly can enact a law that clearly prohibit any customs that discriminate on the bases of gender, the efficacy of the proposed law will be strengthen by the provision of section 42(1)(a)(b) 2 and section 43 of the 1999 constitution that deals with right to freedom from discrimination. The need for this law cannot be over emphasised since the provision of the Administration of Estate Law of Bendel State[1] does not apply to the administration of estate of any person under the authority of any customary court.[2]

8.4.0 The role of the Civil Societies (The NGOs)

The role of the civil societies (NGOs) in the sensitisation, mobilisation, and creation of awareness on issues concerning the populace have been commended.[3] However, it is suggested that they should as a matter of urgency intensified their efforts to ensure that Bills for domestication of treaties that will enhance women's' position in the society. For example, the Convention on Elimination of All forms of Discrimination Against Women. CEDAW. Also, these NGO are encouraged to provide legal assistance to women especially the indigent one and maintain records (data) for the purposes of referencing especially segregated data base. They should be encouraged to sponsor publication of judgments both positive and negative for assessment and evaluation.[4] This kind of action will spur positive obedience to the Rule of law.

8.5.0 Paternity claim litigation

It is recommended that putative fathers should be encouraged to seek legal redress in court through paternity claims litigations in situation where biological fathers are denied or deprived of their paternity rights to their children, because of the operation of Esan native law and customs on paternity. They such approach a court of competent jurisdiction for the enforcement of their fundamental rights. Based on the current position of the law, the court will definitely enforce the fundamental rights of the biological father without hesitating to declare the custom as contrary to public policy, repugnant to natural justice, equity, and good conscience.

9.0. Conclusion

This research discussed the various succession rights under Esan customary law, and the various problems associated with its applicability *vis-à-vis* the challenges posed by the enforcement of fundamental rights as guarantee by the 1999 Constitution (as amended). It is hope that once these recommendations are implemented, those aspect of Esan customary law governing succession and inheritance will be modified as it was done by his Royal Majesty the Oba of Benin, Omo N'Oba Erediauwa so that they shall continue to be the organic or living laws of Esan people of Edo Central Senatorial District, which said customary law have continue to regulating their lives and transactions for centuries because it has always been a mirror of acceptable usage for Esan people.

References

Cases

Aderinola Adeyemi & 6 Ors v. Alhaji Shittu Bamidele & Anor (1968) NSSC 26 at 30.
Adeseye v. Taiwo 1 FSC 84
AG & Commissioner of Justice, Kebbi State v. Jokolo & Ors (2013) LPELR-22349 (CA).
Agbeja v. Agbeja (1985) 3 NWLR (Pt. 11) at 11.
Agidigbi v. Agidigbi (1992) NWLR (Pt. 221) 98.
Akinubi v. Akinubi [1997] 2NWLR (Pt.486) 144 at 159.

www.https://doi.org/10.14738/assrj.82.9788
[1] Cap 2, Laws of Bendel State applicable to Edo State.
[2] See Section 1(3) of the Administration of Estate Law Cap2 of Bendel State of Nigeria 1976 applicable to Edo State.
[3] Ogugua V.C., *Gender Dynamics of Inheritance Rights in Nigeria. Need for Woman Empowerment* (2009 Folmech Printing & Pub. Co ltd) p 239.
[4] Ibid.

Alake v. Pratt 15 WACA 20.
Anwadike & Anor v. Anwadike (2019) LPELR-469.
Bamgbose v. Daniel 14 WACA 111 at 115.
Chiduluo & Ors v. Attansey & Anor (2009) LPELR – 48243 (CA)
Chief (Dr) O. Fajemirokun v. Commercial Bank Nig. Ltd & Anor (2009) 2 SCM 55 at 71
Chief Francis Igwe & Ors v. Mr Goddy Ezeanochi & Ors (2009) LPELR -11885 (CA).
Chief Meburami Akinnubi & Anor v. Grace Olanike Akinnubi (Mrs) & Ors (1997) LPELR-352 (SC).
Dawodu v. Danmole (1908) 1 N.L.R.81 at 99-102.
Edet v. Essien (1932) 11N.LR. 47.
Ejike & Anor v. Onuzulike & Ors (2013) LPELR-21220 (CA).
Ekong & Anor v. Akpan (2020) LPELR – 4957 (CA).
Emmanuel Nwodo & Anor v. Nwodo (2018) LPELR -43948 (CA).
Eshugbayi Eleko v. Officer Administering the Government of Nigeria (1931) AC 262 at 273.
Fakoya v. Ilori (1983) 2 FNC 602.
Federal Republic of Nigeria v. Ifegwu (2003) 13 NWLR (Pt. 237) 382.
Ibanga & Ors v. Akpan & Ors (2018) LPELR - 46167 (CA).
Idehen v. Idehen [1991] 6 NWLR (Pt. 198) p.382.
Iweze v. Okocha (1967/68) M.S.N.L.R. 64.
Lawal- Osula v. Lawal- Osula [1993] 2NWLR (P274) at 158.
Lopez v. Lopez 5 NCR 43.
Mariyama v. Sadiku Ejo (1961) N.R.N.L.R. 81.
Meribe v. Egwu (1976) 1 All NLR 266.
Messrs A. Younan & Son v. Lawal & Ors (1961) LPELR -25073 (SC).
Mr Victor Ayemwenre Eigbe & Anor v. Mr Benjamin Izibiu Eigbe & Ors (2013) LPELR-20292 (CA).
Mrs Lois Chituru Ukeje & Anor v. Mrs Gladys Ada Ukeje (2014) LPELR-22724 (SC).
NMCN v. Adesina (2016) LPELR-40610 (CA).
Nurses & Midwifery Council of Nigeria (NMCN) v. Adesina (2016) LPELR - 40610 (CA).
Obasohan v. Obasohan (2019) LPELR -47187.
Obi & Obi v. Bosah & Ors (2019) LPELR -47243 (CA).
Obusez v. Obusez (2001) 5NWLR (Pt. 736) 377.
Ogbuli & Anor v. Ogbuli & Anor (2015) LPELR -224488 (CA).
Ogiamien v. Ogiamein [1967] NWLR at. 247.
Ogiefo v. Iseselei & Ors (2013) LPELR-22333 (CA).
Ogolo & Ors v. Ogolo & Ors (2003) LPELR -2309 (SC).
Okafor v. AG Anambra State (1991) LPELR – 2414 1 at 28.
Okeke v. Okeke (2017) LPELR -42582 (CA).
Okolonwamu v. Okolonwamu (2014) LPELR – 22631 (CA) at 44.
Onyemeh v. Egbuchulam (1996) LPELR – 2739 1at 21
Onyibor Anekwe v. Maria Nweke (2014) 4 All FWLR (Pt.739) 115.
Osondu & Anor v. A-G Enugu State & Ors (2017) LPELR -43096 (CA).
Oyeniyi & Ors v. Bukoye & Ors (2013) LPELR – 22087 (CA).
Owonyin v Omotosho (1961) ALL NLR 304 at 309
Ramson – Kuti v. A.G. Federation (1985) NWLR (Pt.6) 211.
Rufai v. Igbirra N.A. 1957 N.R.N.L.R. 178
Salami v. Salami [1957] WRNLR 10.
Salubi v. Mrs Benedicta Nwariakwu & Ors [1997] 5 NWLR (Pt. 505) 442.
Sogunro-Davies v. Sogunro-Davies (1928) 8NLR 79.
Taiwo v. Taiwo 3 FSC 80.
Tolani v. Kwara State Judicial Service Commission (2009) LPELR – 8375 1 at 52-53.
Zaidan v. Mohssen (1973) LPELR-3542(SC).

Books

Azinge. E., *Restatement of Customary Law in Nigeria* (1st ed, 2013, Nigerian Institute of Advance Legal Studies Lagos.
Black Law Dictionary with Pronunciations. 6th Edition, P 1431.
Bradbury R.E., The *Benin Kingdom and the Edo-Speaking People of South-Western Nigeria.* (1957 International African Institute London) 63.
Egharevba. J.U. *A Short History of Benin*. (1968 University of Ibadan Press Ibadan).
Iregbeyen. X., *Iruekpen History, People & Culture* (2012 Anointed Publishing Company Benin) page 2.
Izibili., M.A. *Esanology Essays and Reflection on Esan worldview: Yesterday, Today and the Future*. (2020

Mauritius: Ks Omniscriptum Publishing) pp-2-3.
Ogobobine. R.A.I., *Materials and Cases on Benin Land Law* at 190.
Ogugua v. c. *Gender Dynamics of Inheritance Rights in Nigeria Need for Women Empowerment* (2009) Folmech Printing & Pub.Co. Ltd page 17.
Ojiefo. A.P. *Uromi Chronicles 1025-2002* (2002 Aregbeyeguale Publisher Uromi) page 2.
Okojie. C.G., *Esan Native Laws and Customs with Ethnographic Studies of the Esan People* (1994 Ilupeju Press Ltd. Benin.) p 17.
Omokhodion. O.J., The Sociology of Esan, (1998 Pearl Publication Chicago-Illinois)
Oseghale. B.E., "On ideological development pre-colonial Esan; the role of Benin", A.I. Okoduwa (ed) Studies in Esan History and Culture: Evolution of Esan Polities. Vol.1 pp-23-36.
Oseghale. B.E., *Issues in Ishan History and Relation, 1500-1800* (2003 Rasjel Publisher) p1,
Oseghale. E.B., *Stereotypes in History.* An inaugural lecture series No 81 of Ambrose Alli University Ekpoma, Edo State 2019, 16-17.
Oxford Dictionary of English (ODE) Second Edition revised (2005 Oxford University Press). iPhone version.
Park. A.E.W., *The Sources of Nigeria Law* (1963).
Sagay I.E., *Nigeria Law of Succession Principle, cases, statutes, and Commentaries* 1st Ed. 2006 Malthouse Press Limited.
Salacuse. W. J., *A Selection Survey of Nigeria Family Law* (1965 Ahmadu Bello University Book shop Zaria).
Yusuf, A. and Sheriff, E. E. Okoh *Succession under Islamic law* (2011) Malthouse Press Limited.

Journals /Articles

Abanyan N.L. and Otikwe. S., "The role of traditional rulers in community development in Nigeria: A theoretical Discourse", *in International Journal of Social Sciences.* 13(2), 2019.pp177-178.
Esan people on Wikipedia, the free encyclopaedia" available at: http://en.wikipedia.org/wiki/Esan_people
Itua P.O., "Disinheritance of Women under Esan Customary law in Nigeria: The Need for Paradigm Shift Towards Gender Equality" *Advances in Social Sciences Research Journal,* 8(2), 668-723. Available online at www.https://doi.org/10.14738/assrj.82.9788.
Itua. P.O., "Succession Under Customary Law in Nigeria. The Rule of Primogeniture versus the Deposition of a Traditional Ruler (Onojie) in Edo State: A critique of the Provisions of the Traditional Rulers and Chiefs Edicts No 16 of 1979." *International Journal of Culture and History.* Vol. 6 No 2 September 2019. Available online at www.ijch@macrothink.org (last accessed 12th August 2021).
Itua. P.O., "Succession under Esan Customary law in Nigeria: Grounds for Disinheriting an Heir from inheriting from his Deceased father's Estate under Esan Customary Law" *International Journal of Innovative Research and Development* Vol.7 August 2018 Page 428. Available online at www.ijird.com
Itua. P.O., "Legitimacy, legitimation and succession in Nigeria: An appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the right of inheritance" Journal of Law and Conflict Resolution Vol.4(3), pp31-44 March 2012. Available online at http://www.academicjournals.org/JLCR.
Itua. P.O., "Succession under Benin Customary Law in Nigeria; Igiogbe Matters Arising" (2011) Vol. 3(7) *Journal of Law and Conflict Resolution* Page 119 Available online at: < http://www.academicjournals.org>
Izibili M.A. "The role of Traditional Rulers in Promoting Peace, Development and Ensuring Security in Esan Land." Being a text of lecture delivered at the instance of His Royal Highness, Ogirrua of Irrua and the Okaijesan of Esanland on his 50th coronation anniversary to the throne of his fathers on 22nd June 2021.
Oseghale. B.E., "Esan -Benin Relations 1500-1800 AD; A study in inter-group relations", M.A. Dissertation submitted to the Department of History, University of Ibadan, Ibadan, September 1990.
Oseghale. B.E., "The Benin Factor in Esan origin Traditions" *Journal of Teacher Education and Teaching,* Vol.7 Nos 1 and 2, 2004 pp.130-139.
Oseghale. B.E., "Warfare and Diplomacy in Pre- Colonial Esanland (1463-1900)" Long Essay submitted to the Department of History, Bendel State University, Ekpoma, June 1987.
Oseghale. E.B., "*Stereotypes in History.*" An inaugural lecture series No 81 of Ambrose Alli University Ekpoma, Edo State 2019.
Sagay. I E., "Customary law and freedom of testamentary power" (1995) *Journal of African Law* Vol. 39 (2).
Uweru. B.C., "Repugnancy Doctrine and Customary law in Nigeria: A positive Aspect of British Colonialism. *African Research Review* Vol.2 (2) 2008. Available @ https://www. ajol.info.