Curbing Incidencies of Torture through Legislation: Focus on the Nigerian Anti-Torture Act, 2017

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Abstract

Criminal justice administration throughout the world has been tarnished with torture of persons either suspected of having committed an offence or for sundry other reasons. No country is spared the indictment of resorting to torture in one form or the other, Nigeria inclusive. To stem this ugly tide, the United Nations passed the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) obligating State parties to take administrative and legislative steps to prevent torture and inhuman treatment. Nigeria signed and ratified CAT and the Optional Protocol that followed. The Nigerian National Assembly domesticated CAT by promulgating the Anti Torture Act, 2017 partly to stem the geometric rise in cases of torture in the country and as a step in fulfilling her international obligations. This Article adopting doctrinal methodology of research, appraised the Act and found that it is the first instrument in Nigeria to define and criminalize torture by name; that the Act requires domestication by States; and that despite the fine provisions, if not backed by political will and intensive sensitization and training of all actors in the criminal justice sector, the lofty intentions of the legislature may not be realized. It is recommended that States of the federation should quickly domesticate the Act given its importance in the humane administration of justice, and that that intensive sensitization and training of players in the justice sector be carried out for effective implementation of the Act.

Keywords*: torture, punishment, domestication, sensitization*

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Introduction

Torture of persons which constitutes grave violation of human rights is neither alien nor new. History is replete with instances of torture by various countries against citizens, but most often, against non-citizens of the state concerned. The use of torture is so widespread that no country is spared its deployment for assortment of reasons ranging from gathering information, inducing confessions and punishing people considered enemies of the state[2] . The United Nations considering the frequency and general resort to and in an attempt to end the ugly incidences of torture passed the 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments'[3] (CAT). The objective of CAT was to mandate state parties to take effective measures (including legislation) to prevent acts of torture and other cruel, inhuman and degrading treatment within their respective territories.[4] This was followed by the 'Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'[5] with the objective to establish a system of regular visits by independent bodies to places where people are deprived of their liberty to prevent torture and other cruel treatment.

Nigeria signed CAT on the 28 July, 1988 and ratified same on the 28 June, 2007. She further ratified the Optional Protocol on the 27 July, 2009. Despite the signing and ratification of these international instruments, the Nigerian polity continued to be plagued with acts of torture, particularly against her nationals. Worried by this ugly trend of events and in a bid to fulfill her international obligations under CAT, the Anti-Torture Act (Act) was

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2 C J. Einolf, 'The Fall and Rise of Torture: A Comparative and Historical Analysis' www.asanet.org/sites/default/files/savvy/images/journals/docs/ST/june07STFeature.pdf accessed 30/10/18 gives a comparative account of the history, motives of torture and why it has resurfaced in the 20th Century

3 Resolution 39/46 of 10 December, 1984 and it entered into effect on 26 June, 1987.

4 CAT Articles 2 and 16

5 Resolution A/RES/57/199 2002

passed by the National Assembly.[6] The Act comprises of 13 sections, and according to its long title, its main objective is 'to penalize the acts of torture and other inhuman and degrading treatment and prescribe penalties for such acts; and for related matters'.

This Article seeks to scrutinize provisions of the Act to see how it intends to curb torture, the philosophy underpinning the provisions, the perpetrators of torture and the remedies available to victims of torture, and, issues likely impede its implementation. In doing this, the Article is divided into six segments. Part one is the introduction, part two conceptually situates 'torture', 'inhuman' and 'degrading treatment', Part three examines the philosophical underpinnings of the Act, Part four assesses the major provisions of the Act, Part five discuss the implementation bottlenecks, whilst part six draws the conclusion and makes recommendations for reform.

Contextual clarification of 'Torture' 'Inhuman' and 'Degrading Treatment'

The word 'torture' appears to be free of legal polemics. The Act defines torture as:

> An act by which pain or suffering whether physical or mental is intentionally inflicted on a person to (a) obtain information or a confession from him or a third person; (b) punish him for an act he or a third person has committed or is suspected of having committed; or (c) intimidate or coerce him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

[6] The Act was passed by the National Assembly on the 14th November, 2017 and signed into Law on the 20th December, 2017.

> capacity provided that it does not include pain or suffering in compliance with lawful sanctions.[7]

Deducible from this definition is that to constitute torture, four key elements must coexist: the act must inflict physical or mental pain and suffering;[8] must be committed intentionally, it must be committed for the purpose of obtaining confession or punishing someone, and the pain or suffering must be at the instigation or consent of a person in official capacity. There is a proviso to the provision which excludes 'pain or suffering in compliance with lawful sanctions'.

Even though the long title of the Act criminalizes torture and other cruel, inhuman and degrading treatment, it made no attempt to define these other terms preferring to give examples instead[9]. However, borrowing a leaf from the European Court of Human Rights, inhuman treatment or punishment is an act which deliberately causes suffering not amounting to torture such as withholding medical treatment, cramping in overcrowded and squalid prisons[10] or destruction of homes and personal belongings.[11] Degrading treatment or punishment are acts that stimulate in the victim fear, anguish and inferiority thus lowering his dignity or physical integrity such as caning.[12] The phrase *'cruel, inhuman and degrading treatment'* was judicially defined by the Nigerian Court of Appeal in *Uzeuku v Ezeonu* (1991)[13] as 'any barbarous or cruel act or acting without feeling for the suffering of the other". This definition is adopted by this Article.

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7 Section 2 (1) of the Act. This definition is in tandem with article 1 (1) CAT.

8 Note that section 2 of the Act is more liberal than article 1 CAT, whereas, CAT uses the phrase 'severe pain', section 2 of the Act uses the word 'pain'. This wider definition is in tune with article 1(2) CAT.

9 Section 2 of the Act chronicles a long list of these.

10 *Kalashnikov v Russia* 15.7.2002 ECHR 2002-VI

11 *Selcuk v Turkey* 24.4.1998 ECHR 1998-II

12 *Tyrer v United Kingdom* 25.4.1978 Series A 26.

13 (1991) NWLR (pt. 200) 708 CA

Philosophical Basis Underpinning the Promulgation of the Act

Prior to the promulgation of the Act, there existed no law that solely criminalizes and punishes torture, inhuman and degrading treatment in Nigeria, though there subsists torrent of legal regimes touching on it. Leading the pack, is the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN) which provides a bundle of rights aimed at eliminating torture chiefly amongst which are: the right to dignity of the human person[14] the right to remain silent,[15] the right to counsel of choice,[16] the right to be informed about the facts and grounds of arrest,[17] and the right to take an arrested person to court within a reasonable time[18] amongst many others.

Taking a cue from these constitutional safety valves, plethora of legislation on acts aggregating to torture but without calling it expressly by name abound. The Penal Code (applicable to Northern Nigeria) criminalizes acts approximating to torture such as infliction of injury (hurt and grievous bodily hurt)[19], homicide[20], and rape[21]. The punishment ranges from fines, imprisonment or a combination of both, and capital punishment if the acts complained of results in death. The Criminal Code (applicable to Southern Nigeria) criminalizes assault, homicide, offences endangering life, rape and excessive use of force. The punishments for these offences range from fines, imprisonment, or combination of both, and capital punishment if the acts complained of results in death. The Child Rights Act, 2003 criminalizes offences against the Nigerian child such as child battering, mutilations (especially facial marks and female genital mutilation, and rape). The Violence against Persons

14 CFRN section 34
15 Ibid, Section 35 (3)
16 Section 9 of Criminal procedure
17 CFRN section 35 (4)
18 Ibid section 35 (4)
19 Section 247
20 Section 221
21 Section 283

(Prohibition) Act, 2015 criminalizes rape and other physical and psychological violence against the human person.

At the regional level, the African Charter on Human and Peoples' Rights 1981 (ACHPR) which is domesticated in Nigeria clearly provides that 'States should ensure that acts which fall within the definition of torture are offences within their national legal systems. There is also the African Commission's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) which provides detailed guidance of State Parties' obligations under article 5 ACHPR. It is instructive to note that Nigeria not only signed but ratified all these international and regional instruments.

At the international domain, the Universal Declaration of Human Rights 1948 (UDHR) was the first international instrument to outlaw torture, cruel, inhuman and degrading treatment[22]. This was followed by Geneva Convention 1949 and the Additional protocols which contain a number of provisions that absolutely prohibit torture and other forms of ill treatment in armed conflicts; the International Covenant on Civil and Political Rights (ICCPR) 1966; and CAT and its Optional Protocol which mandates State Parties to take measures (legislative and administrative) to prevent acts of torture within their jurisdictions;[23] and further provides that no exceptional circumstances, whether war or threat of war, internal political instability or public emergency may be invoked to justify torture.[24]

Yet in the face of superfluity of municipal legislation, regional and international instruments, torture of Nigerians by those entrusted and clothed with state power to protect them, incidences of torture are despondently on the increase. There is superfluity of

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22 Article 5 UDHR provides: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

23 Article 2 (1)

24 Article 2 (2)

examples such that the problem becomes which incidence to choose. A few are selected to nail home the point.

1. In November 2016, the African Commission on Human Rights after undertaking a promotional mission in Nigeria, expressed concern about the allegations of violations of human rights including excessive use of force by security forces and civilian militia groups and lack of independent investigation into these allegations.[25]
2. The United States of America State Department found in 2015 that in fighting *Boko Haram* and crime and security in general, 'security forces perpetrated extra judicial killings, and engaged in rape, arbitrary arrests, mistreatment of detainees and destruction of property.[26]
3. The United Nations Special Rapporteur on Torture in 2007 concluded that 'torture and ill-treatment are wide spread in police custody and particularly systematic at Criminal Investigative Department (CID). It concluded that torture is an intrinsic part of how Police operates in the country[27].
4. In 2016 Amnesty international asserted that officers of Special Anti- Robbery Squad (SARS) subjected detainees' to horrific methods of torture, including hanging, starvation, beating, shootings and mock executions, most times for the purpose of extorting money.[28]
5. Locally, the Network of Police Reform in Nigeria (NOPRIN) reported that the practice of torture is formally

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25 African Commission, Press Statement at the conclusion of the Promotion Mission of the African Commission on Human and People's Rights to the Federal Republic of Nigeria 2nd December, 2016 at http://www.achpr.org/press/2016/12/d335 accessed on 29th April, 2018

26 United States of America State Department, Nigeria 2015 Human Rights Report p.1 at https://www.state.gov/documents/organization/252927.pdf

27 UN special Rapporteur on Torture 2007 Mission Report paragraph 40.

28 Amnesty International, 'Nigeria: Special Squad get rich in torturing detainees and demanding bribe in exchange for freedom (Amnesty International, SARS Report) 21 September,2016 at https://www.amnesty.org/en/latest/news/2016/09/nigeria-special -police-squad-get rich-torturing detainees accessed on 29th April, 2018.

> institutionalized in Police detention center's with torture facilities referred to as 'torture chambers' and officers designated to torture suspects as 'O/C Torture' (officer in charge of torture). The report concluded that notable torture techniques include: clubbing of soles and ankles, banging of victim head against the wall, burning of victims with cigarette, hot irons or flames, squeezing or crushing of fingers and ripping out of fingers or toe nails amongst others.[29]
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> The examples are legion. Suffice to say that what is reported of the Police is not different from what obtains in other forces or Para-military agencies like the prisons, civil defence, and customs and even vigilante groups.

As for corporal punishment, it is legally authorized in many criminal statutes in Nigeria.[30] Elsewhere, it has been contended that corporal punishment is unconstitutional and an affront to the dignity of the human person[31]. The Administration of Criminal Justice Act 2015 (ACJA) has omitted it in her provisions and it does appear that corporal punishment is no longer part of the Nigeria law (at least to States that have domesticated ACJA).

It is submitted that torture, cruel, inhuman and degrading treatment has become systemic in Nigeria requiring a special statute for diverse reasons. First, the absence of the crime of torture simpliciter in Nigeria's criminal statutes watered down its weightiness, when torture is subsumed under another offence such as

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29 Network of Police reform in Nigeria, NOPRIN: Criminal Force: Torture, Abuse and Extra-judicial Killings by Nigeria Police Force 2010 athttps://www.noprin.org/criminal-force-20100519.pdf.p68 accessed on 29th April, 2018.

30 Sections 55, 68, 78 of the Penal Code (applicable to Northern States); section 18 of the Criminal Code (applicable to Southern States); Sections 308 – 310 Criminal Procedure Code (applicable to Northern States) and sections 384 -388 of the Criminal Procedure Act (applicable to the Southern States).

31 Vearumun Tarhule, 'Is Corporal Punishment Constitutional?' 2010 University of Jos Law Journal Vol 1.64-73; Vearumun Tarhule Corrections Under Nigerian Law (Innovative Communications, 2014) 322-337

assault, battery, grievous hurt and so on, it does not convey or carry the same stigma or weight as torture; secondly, since it was not criminalized as torture *per se*, authorities are not likely to consider it as a legitimate tool to combat its perpetration; thirdly, in the absence of a separate crime of torture, it is difficult to raise awareness about it or train authorities in its absolute prohibition; fourthly, it is difficult to track instances of torture and to ensure that those responsible are adequately held responsible or punished; fifthly, it also prevents victims of torture from obtaining adequate response for harm suffered; sixthly, the international instruments signed and ratified were not domesticated as mandated by CFRN[32] and consequently inapplicable to Nigeria. In order to combat the prevalence of torture, it became necessary to legislate on it, hence the Act.

Salient Provisions of the Act.

This Article has established that the Act gave an elastic definition of torture even beyond that given by CAT, and proceeded to give instances of physical torture[33] and of psychological or mental torture[34]. It identified perpetrators of torture as mainly: persons in

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32 CFRN section 13

33 Section 2 (2) of the Act gave these to include: cruel, inhuman or degrading treatment which causes pain, exhaustion, disability or dysfunction of one or more parts of the body, such as: systematic beating, head-banging, punching. kicking, striking with rifle butts and jumping on the stomach (frog jumping); food deprivation or forceful feeding with soiled food, animal or human excreta or other food not normally eaten; electric shocks; cigarette burning, burning by electrically heated rods, hot oil, acid, by the rubbing of paper or other chemical substances on mucous membranes or acids or spices directly on the wound; the submersion of the head in water (cold or hot), or water polluted with excrement, urine, vomit or blood; being tied or forced to assume fixed or stressful bodily position (including mechanical restraint as done in prisons); rape and sexual abuse, including the assertion of foreign bodies into the sex organs or rectum or electrical torture of the genitals, (or mouth); and so on.

34 Section 2 (2) of the Act. These include blindfolding; threatening a person or such persons' related or known to him with bodily harm, execution or other wrongful acts; confinement in solitary cells put up in public places (as frequently adopted by Prison officials on inmates); confinement in public places against their will or without prejudice to their security; prolong interrogation to deny normal length of sleep or rest, (adopted by Police, DSS, SSS, Military and other security agencies); causing an unscheduled movement of a person from one place to another, creating the belief that she be summarily executed; maltreating a member of the person's family (mostly adopted by Police via hostage arrests of family members in lieu of the suspect); causing the torture sessions to be witnessed by the person's family relatives or any third party; inducing generalized fear among certain sections of the population; denial of sleep or rest; inflicting shame by stripping a person naked, parading him in public place, shaving his head, or putting marks on his body against his will; and confinement in jails and prisons under intolerable and inhuman conditions or degrading mental treatment or punishment. The section terms these as 'psychological torture'.

authorities as the coercive instruments and the garment of authority (uniforms, ammunitions and detention facilities) which they abuse by causing pain and suffering to those deprived of their personal liberty. These include: any person who actually participates in the infliction of torture or is present during the commission of the act; a superior military, police or law enforcement officer or senior government official who issues an order to a lower ranking personnel to torture a victim for whatever reason is liable as principal; an order from a superior officer or from a superior officer or public authority shall not be justification for torture; the immediate commanding officer of the unit concerned or the security or law enforcement agency is held liable as an accessory to the crime for any act or omission or negligence on his part that may have led to the commission of torture by his subordinates.

Toeing the line of CAT, the Act made torture a strict liability offence and made it a non derogable right. Section 3 (1) of the Act provides that no exceptional circumstances whatever exist from derogating from the offence and this is irrespective of whether there is war or threat of war, internal political instability or any other public emergency may be invoked as justification for torture. The Act further outlaws secret detention facilities, solitary confinement, incommunicado or similar forms of detention facilities where torture may be carried out[35].The Act finally renders inadmissible any statement obtained as a result of torture in evidence against the victim except for proving the torture itself[36]. This is in conformity with s.29 of the Evidence Act, 2011 which provides that the court shall render inadmissible a confession obtained by oppression (defined to include torture). The injunction not to receive such evidence in court is to discourage the perpetration of torture on victims.

Despite these provisions, investigators, prosecutors and judges continue to rely on the so called confessional evidence to

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35 Ibid section 3 (2)

36 In *pari-material* with article 15 CAT

prosecute and convict offenders in most cases stressing that confessions are the best form of evidence. This has made inducement of confessions from suspect to appear as a major incentive for police and other investigatory agencies to commit torture and ill- treatment. Amnesty International found in 2014 that in Nigeria 'many people are being convicted largely based on 'confessions' made to the police under torture'.[37]

The Act imposes an obligation on government to ensure that all persons especially those derived of their liberty are respected at all times and that no person under investigation or held in custody is subjected to any form of physical or mental abuse or torture (section 1). The Act gives to victims of torture the right to complain to the police, National Human Rights Commission (NHRC) or any other relevant institution or body having jurisdiction over the offence and also makes provision for the protection of the victim or complainant (section 4). There are also the important provisions that allows the filling of complaint on behalf of any person who suffers torture or by any interested person to seek legal redress (Section 5) and the constitution of the Attorney General and other law enforcement agencies into a regulatory agency for the implementation of the Act (sections 9, 10 & 11).

Remedies Available to Victims of Torture

Where and when a person alleges that he has been subjected to or is a victim of torture, such a person has the right to complain to and have his case promptly and impartially examined by a competent authority.[38] Sadly, 'competent authority' is not defined by the Act. From the wording of sections 10 and 11 it appears that the Attorney General of the Federation or any other law enforcement and investigative agencies is the competent authority.

Upon filing the complaint, the competent authority shall take steps to ensure that the complainant is protected from further ill-

37 Amnesty International 'Welcome to Hell Fire' p. 30
38 Anti-Torture Act section 5 (1)

treatment or intimidation as a consequence of his complaint. The complainant may seek legal assistance from the National Human Rights Commission or non-governmental organization or private persons for the actualization of his complaint, and may demand for medical examination from a physician of his own choice conducted outside the influence of Police or other security forces;

Where the crime of torture has been established under the Act: the offender shall be liable on conviction to imprisonment tor a term not exceeding 25 years without option of a fine, and shall be tried for homicide where the torture results to death of the victim. The victim additionally, has the right to compensation. The right to monetary compensation provided by the Act is a very important remedy as it has been found to be very effective, at least in Nepal[39].

Issues likely to Impede the Implementation of the Act

There appears to be legal and social bottlenecks against the successful implantation of the Act. First, the Act is a direct domestication of the CAT and its Optional Protocol. It is a step taken by Nigeria in fulfillment of her legal obligation pursuant to article 2 of CAT. Recommendable as this is, it raises the question of which legislative body in Nigeria (National or State) that has the power to legislate over human rights issues. Legislative powers in Nigeria are constitutionally conferred by the use of 'Lists' contained in Schedule 1 to the Constitution. These are the Exclusive Legislative List (reserved for the National Assembly) and the Concurrent Legislative List (for both the National and State legislatures). Any matter not falling within these two Lists becomes the residuary power of the State legislatures. Consequently, any law made by the National Assembly outside the two Lists requires domestication by the State Legislature.

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[39] Jeevan Raj Sharma and Tobias Kelly 'Monetary Compensation for Survivors of Torture: Some Lessons from Nepal' *Journal of Human Rights Practice*, 10, 2018 307 - 326

An examination of the two Lists reveals that Human Rights are not on any of them. It follows that for the Act to be applicable in the States, it must be domesticated by the state concerned. However, experience has shown that the States have not been in a hurry to domesticate any similar Acts passed by the National legislature. The Child Rights Act, 2003 and Violence against Persons Prohibition Act 2015, and the ACJA are examples in point. It follows that the law has limited application to the Federal Capital Territory and Federal High Courts in the States thereby gravely losing its potency and efficacy.

Another thorny issue is that the class of persons to whom the complaint is to be lodged are themselves, the perpetrators of the torture. Apart from the office of the Attorney General of the Federation, it is doubtful if the law enforcing officer would agree to investigate the act of torture committed by one of their own or a fellow law enforcement agency. Even with filing of complaints to the office of the Attorney General of the Federation presents some difficulties as the victims of torture are mostly illiterate and poor in the society, how are they to approach the exalted office of the Attorney General located in faraway Abuja? Finally, the absence of a special fund from which victims of torture would draw from to actualize the therapeutic balm of torture further reduces the Act to an idealist enactment. Without change of orientation these may act as stumbling blocks towards its successful implementation.

Besides, while appreciating the importance of legislation to reducing instances of torture, it has been observed by the Global Governance Institute in her 2017[40] report that good laws alone are not enough. The report notes that legislation must be backed by political will (presently lacking in Nigeria) shaped by public attitudes to treatment of detainees and whether or not there is an active civil society campaigning to eliminate the use of torture.

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[40] Global Governance Institute Report, December, 2017, 17

There is also the perennial problem of finances which have grounded almost every sector in Nigeria. Lack of resources coupled with corruption can explain persistence of torture in some instances. Where Police are poorly paid, ill-disciplined, poorly trained and semi illiterates, implementing a law against torture may be difficult if not altogether impossible. Perhaps this explains why almost a year after enactment, no prosecution has been made under the Act.

A lot of sensitization and training is required to have optimal performance of the Act. Carver and Hadley 2016[41] provides statistical evidence of the importance of training for all relevant stakeholders, the Police, Judiciary, Prison Staff as well as those involved in monitoring places of detention and handling complaints. So far little or no effort has been made to sensitize the citizenry of the existence of the Act, let alone train the corrupt and poorly educated actors in the criminal justice sector, particularly, the police and the Prisons.

Conclusion/Recommendations

This Article has examined the Act to explore its potential for curbing incidences of torture in Nigeria. It finds the Act to be in substantial compliance with CAT and has provisions which if implemented would reduce torture incidences such as: defining torture by name, making it a non derogable offence, stipulation of stiff punishment for the offence and making it easy for victims and non-governmental organizations to prosecute the offence in the courts. The Article notes likely difficulties to be encountered in efforts at accomplishment to include, the tricky issue of domestication of the enactment by the States, making the perpetrators part of the regulatory agency to oversee performance of the Act, illiteracy and lack of sensitization and training of criminal justice actors.

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41 Carver and Handley, *Does Torture Prevention Work?* Liverpool University Press 2016

It is recommended that States should as a matter of requirement domestic the Act to make it enforceable in their respective jurisdictions given its humane approach to handling of persons deprived of personal liberty by the security agencies. Furthermore, sensitization and training of persons engaged in the criminal justice sectors is a must if the Act is to succeed. The task of effective implementation must also be backed by political will without which the Act may be consigned to dusty shelves.