UNIVERSITY OF CAPE COAST

LAW JOURNAL

VOLUME 4 | ISSUE 1

UCC LAW JOURNAL

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Published by
Centre for Legal Research
Faculty of Law
University of Cape Coast,
Cape Coast,
Ghana, West Africa

Printed by

UCC Press
University of Cape Coast
Tel: +233(0) 555588164 /
279436603
Email: priniting.press@ucc.edu.gh

University of Cape Coast (UCC)Law Journal

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The UCC Law Journal is a peer-reviewed bi-annual publication that welcomes submissions on interdisciplinary, methodological, and theoretical perspectives of the law. The subject fields include Law and Legal History/philosophy, African History /Studies, Criminology, Women's & Gender History /Studies, Teaching and Learning, Political Science, and other socio-legal studies.

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DOI: 10.47963/ucclj.v4i1.1545

SHIELDING DIRECTING MINDS OF COMPANIES AGAINST LIABILITY: THE BUSINESS JUDGMENT RULE AND THE DUTY OF CARE IN GHANA

Reginald Nii Odoi[1]

ABSTRACT

Corporate Governance involves how companies are controlled and the role directors play in running the affairs of companies. Directors owe a fiduciary duty to the companies they administer and are required to observe the utmost good faith in their dealings. Where a director breaches the duties imposed by law or exceeds the powers so conferred, the director is to be personally liable for the damages caused actionable through fiduciary-duty litigation. This paper argues that though directors owe a duty of care, the *"business judgment rule"* or "*business judgment presumption"* should serve as a basis to shield directors from liability in cases where the directors are reasonably informed and not self-interested in the making of the business decision. The paper discovers that, unlike other jurisdictions, the Companies Act of Ghana does not codify the *business judgment rule*. This paper contends that codifying the *business judgment rule* in Ghana would strike a workable balance between the role of a director in exercising independent and unrestrained judgment on one hand, whilst also exacting accountability on the other hand, to safeguard the interests of the stakeholders of the company. As a way of developing a thesis upon which director conduct and compliance could be measured, this paper recommends that practical guidelines of best practice for directors should be formulated by the courts using the National Corporate Governance Code (National Code) developed by the Institute of Directors of Ghana as a guide. This is significant because, in order to achieve economic efficiency of companies, it is imperative to not hold directors liable for every business decision they make.

Keywords: Business judgment rule, Corporate governance, Liability, Duty of care, Ghana

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.1-20
DOI: 10.47963/ucclj.v4i1.1545

INTRODUCTION

> The business judgment rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.[2]

Directors, who are by statutory design the directing minds of companies, occupy positions peculiar to themselves[3] and are appointed as trustees or managers to administer trading concerns for the benefit of themselves and all other shareholders in the companies they manage.[4] Directors owe a fiduciary duty to the companies they administer and are required to observe the utmost good faith in transactions they enter into with or on behalf of the company.[5] In doing so, directors are said to owe both a duty of care and a duty of loyalty towards the company and the shareholders.[6] As fiduciaries, the Ghanaian Companies Act lays down certain key fundamental principles that apply to the role directors play in corporate governance.

Where a director breaches the duties imposed by law or fails to take reasonable steps to comply with the prohibitions imposed by law on exceeding the powers conferred on the director or the director acts or omits to act in a manner contrary to the power so conferred, the director is to be personally liable to pay to the company or to any other person, the amount of money lost to the company or to the other person or the monetary value of the damages caused as a result of the act or omission of the director.[7]

Shareholders are allowed by statute to hold managers and directors of the company to account through fiduciary-duty litigation, the threat of which is capable of

[2] Aronson v. Lewis, 473 A.2d 805, 1984 Del. LEXIS 305 (Del. Mar. 1, 1984).
[3] Regal Hastings v Gulliver [1942] 1 All ER 378 at pg. 387.
[4] Companies Act, 2019 (Act 992), Section 170(1). See Forest of Dean Coal Mining Co. (10 C.D. 450).
[5] Companies Act, 2019 (Act 992), Section 190(1). See Floyd v Hefner No. H-03-5693, 2006 U.S. Dist. Lexis 70922 at 21 (S.D. Tex. Sept. 29, 2006).
[6] Velasco J., *How many Fiduciary Duties are there in Corporate Law?* 83 S. CAL. L. REV. 1231, 1232-33 (2010).
[7] Companies Act, 2019 (Act 992), Section 191(2).

causing directors to behave loyally towards the shareholders and stakeholders of the companies they administer.[8] Furthermore, any amount of money due and payable by virtue of a breach of the director's duties owed to the company may be recovered as a civil debt by the company.[9] Where a director commits a breach of duty, such director or any other person who knowingly participated in the breach is liable to compensate the company for the loss the company suffers and such director is required to account to the company for a profit made by the director as a result of the breach.[10]

Under Ghanaian law, proceedings may be instituted by the company or by a member of the company to enforce the liabilities arising from a breach of duty, to restrain a threatened breach of duty and to recover from a director of the company a property of the company.[11] In the case of proceedings instituted by the company, the proceedings may be instituted on the authority of the board of directors or of a receiver and manager or liquidator of the company, or of an ordinary resolution of the company which has been agreed to by the members of the company entitled to attend and vote at a general meeting or of an ordinary resolution passed at a general meeting.[12] Where proceedings are instituted by a member, that member may either bring a derivative action or a representative action on behalf of that member and all other members.[13]

Though directors are subject to a duty of care, several jurisdictions have relied on the *"business judgment rule"* or the "*business judgment presumption"* as a basis to shield directors from liability under a duty of care in deserving situations where they are able to meet the precondition of having been reasonably informed and not self-interested in the making of the business decision. The reason is that the quest for economic efficiency in relation to companies of going concern makes it imperative to not hold directors liable for every business decision they make, in

[8] Ibid, Section 200(1).
[9] Ibid, Section 191(5).
[10] Ibid, Section 199.
[11] Ibid, Section 200(1).
[12] Ibid, Section 200(2).
[13] Ibid, Section 200(5).

their capacity as directors, which goes wrong so long as certain wrongful behaviours are not present.[14]

The business judgment rule ensures that decisions made by directors in good faith are protected even though those decisions, in hindsight, turn out to be wrong or harmful decisions.[15] The business judgment rule seeks to prevent courts from attempting to criticize or question decisions that were made in good faith[16] since imposing liability on directors for making wrongful decisions would ruin their creativity and risk-laden innovation which in turn brings profit and returns to the company.[17]

This research paper, as a core thesis, suggests that there is a need for the Ghanaian Companies Act to codify the business judgment rule as a doctrine for determining when directors should be responsible to shareholders and the company for their actions. The paper makes a strong case for the introduction of the business judgment rule in the statute books of Ghana as it would help to establish a workable balance between directors' autonomy and the need to exercise authority in running the business enterprise given the current economic climate, on one hand, while allowing some accountability interests on the other hand. The analysis in this paper on the business judgment rule is limited in that it draws experiences only from the United States of America and South Africa. Future research should explore comparative analyses across multiple countries and incorporate more diverse data sources.

By way of structure, this paper outlines the key fiduciary duties that directors and managers of companies owe to their companies. Furthermore, this paper takes a critical look at the contours and policy foundations of the business judgment rule as representing a topic of international and practical relevance. The paper then seeks to outline the requirements of the business judgment rule in a bid to advance a thesis upon which compliance would be measured by the courts, it largely being

[14] Brainbridge, M.S., *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004).
[15] Ibid.
[16] Aronson v Lewis, 473 A.2d 805, 812 (Del. 1984), overruled by Brehm v Eisner, 746 A.2d 244 (Del 2000).
[17] In re Citigroup, 964 A.2d at pg. 126.

an adoption and transplantation of the rule in the United States of America and South Africa where the rule is approached as a type of immunity.

In conclusion, the paper asserts that the business judgment rule which is recommended to be codified in Ghana's laws is not a fortress for directors who act irrationally in breach of their duties owed to the company but rather aligns with the objective of good corporate governance that there should not be over-regulation of company business by granting legal authority to directors to run companies as they deem fit howbeit within the legislative framework. Accordingly, it should be the role directors of companies rather than regulators and judges to run the business of companies since they are best placed to balance the interests of the shareholders and the larger society within the context of running a business.

DUTIES OF DIRECTORS UNDER GHANAIAN LAW

As highlighted above, the Companies Act of Ghana states that a director of a company stands in a fiduciary relationship towards the company and accordingly is required to observe the utmost good faith towards the company. This connotes a fiduciary obligation of loyalty and a duty of care owed by directors to the companies they administer. Generally, a director is required to act in what one believes is in the best interest of the company, as a whole, so as to preserve the assets, further the business and promote the purposes for which the company was formed in the manner that a faithful, diligent, careful and ordinary skillful director would act in the circumstances.[18] In doing so, the director must have regard to the likely consequence of any decision in the long term; the impact of the operations of the company on the community and the environment and the desirability of the company maintaining a reputation for high standards of business conduct.[19]

A director of a company is required to act in accordance with the constitution of the company and must only exercise powers for the purposes for which those powers are so conferred.[20] In considering whether a particular transaction or course of action is in the best interest of the company as a whole, a director is allowed to

[18] Graham v Allis-Chalmers Manufacturing Company 188 A.2d 125, 130 (Del. 1963).
[19] Companies Act, 2019 (Act 992), Section 190(2).
[20] Ibid, Section 190(3).

consider the interests of the employees, as well as the shareholders and members of the company[21] but at all times the director is required to exercise independent judgment[22] though they may rely in good faith upon information provided to them by employees, other directors, shareholders or experts.

Directing minds of companies are not to exceed the powers conferred on them by the Companies Act and the constitution of the company or to exercise those powers for a purpose different from that for which those powers were conferred even if the directors believe the exercise of those powers is in the best interest of the company.[23] A director of a company is prohibited by the Companies Act from placing oneself in a position in which the duties of the director to the company conflict or may conflict with the personal interests or the duties to other persons.[24] There must be no conflict between duty and self-interest.[25] This prohibition is only excused when the director obtains the consent of the company.[26]

A director would be said to have obtained consent if, after full disclosure of the material facts *(including the nature and extent of the interests of the directors)*, the transaction in question has been specifically authorised by an ordinary resolution of the company which has been agreed to by the members of the company entitled to attend and vote at a general meeting or has been passed at a general meeting at which neither the director concerned nor the holders of shares in which the director is beneficially interested have voted as members on the resolution.[27] The consent may be obtained before or after the occurrence of the transaction to which the consent relates[28] only that where the consent is sought to be given after the occurrence of the transaction by means of a resolution of the company passed to

[21] Ibid, Section 190(4).
[22] Ibid, Section 190(5).
[23] Ibid, Section 191(1).
[24] Ibid, Section 192(1).
[25] Cede & Co. v Technicolor, 634 A.2d 361 (Del. 1993) (quoting Guth v Loft, Inc., 5 A.2d 503, 510.
[26] Ibid, Section 193(1).
[27] Ibid.
[28] Ibid, Section 193(2).

DOI: 10.47963/ucclj.v4i1.1545

ratify the said transaction, that resolution should be passed not later than fifteen (15) months after the date when the transaction took place.[29]

A director is duty bound to avoid using to the advantage of that director any money or property of the company or confidential information obtained by that director in the capacity of director.[30] Furthermore, a director must not be interested whether directly or indirectly in a business which competes with that of the company[31] and such a director must not be personally interested in a contract or transaction entered into by the company unless that director declares the nature and extent of the interest at a meeting of directors.[32] Overall, a director must unselfishly and in an undivided loyal manner refrain from doing anything that works injury to the company or deprives the company of gain or profit.

THE BUSINESS JUDGMENT RULE & CORPORATE GOVERNANCE: WORTHY COMPANIONS

The business judgment rule and good corporate governance are seen in contemporary corporate and commercial law and practice as inseparable bedfellows. Corporate governance deals with the role of companies in society and the organization of affairs within companies.[33] It relates to the way companies are directed and controlled with emphasis placed on the role directing minds play in running the affairs of companies aimed at achieving laid down objectives.[34] The theory and idea of Good corporate governance, in this context, is to the effect that companies that are well managed will undoubtedly produce benefits for all stakeholders of the company. It encourages high standards of corporate administration with directing minds being viewed as pivotal in achieving these objectives. Good corporate governance is fundamental to the business judgment rule since it is asserted that the concept of good corporate governance presumes a

[29] Ibid, Section 193(2).
[30] Ibid, Section 192(1)(a).
[31] Ibid, Section 192(1)(b).
[32] Ibid, Sections 192(1)(c) and 194(2).
[33] Muswaka, L., *Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance* [2013] SPECJU 2.
[34] Ibid.

degree of freedom for making mistakes and only when that is exceeded should liability be imputed onto the offender.[35]

Business decisions form an integral part of the duties of directors and managers of companies to act in the best interest of the company as well as to act with care, skill, diligence, and loyalty. Accordingly, the business judgment rule although uncodified in Ghanaian corporate law jurisprudence was developed as a response to the need to ensure good corporate governance whilst enforcing compliance of directors to the legal duties and obligations owed to the company and stakeholders of the company. The business judgment rule creates a presumption of good faith business judgments of corporate management and by so doing shifts the burden to someone who faults the directors, for decisions they have made, to show that the decision was made recklessly, irrationally, and without good faith for which reason action should be taken against the directors involved.[36] The rule acknowledges that the daily operation of a business requires making complex and controversial decisions that have the propensity to put the company at huge risk but highly guarantee huge profits to the company.[37]

The business judgment rule serves as a protection for the business decisions of corporate directing minds who are sued by members of the companies they manage on the basis that they have breached their duties and fiduciary obligations owed to the companies as directors.[38] The rule ensures that if the actions of the directors in question are supported by an appropriate degree of due diligence, are in good faith and do not create a conflict of interest, such directors should be protected from liability even if their decisions are wrong and bring loss to their companies.[39] This means that in the absence of an abuse of direction, the business judgment of a director ought to be respected by the courts.[40] Thus in practice, the rule operates

[35] Mongalo, *Corporate Law and Governance: A Global Picture of Business Undertakings in South Africa* (2003) 159 and Mongalo et al Forms of Business Enterprise: Theory, Structure and Operation (2004) 217.
[36] Aronson v Lewis, 473 A.2d 805, 1984 Del. LEXIS 305 (Del. Mar. 1, 1984).
[37] Triem, F., *Judicial Schizophrenia in Corporate Law: Confusing the Standard of Care with the Business Judgment Rule*, 24 Alaska L. Rev. 23 (2007).
[38] Ibid.
[39] Ibid.
[40] Peeples A. Ralph, *Use and Misuse of the Business Judgment Rule in Close Corporation*, 60 Notre Dame L. Rev. 456 (1958).

as both a restraint on judicial behaviour and a standard of managerial conduct[41] and is designed to protect corporate directing minds from civil liability for the decisions they make on behalf of the company[42] concluded in good faith and upon an informed basis for the best interest of the company in circumstances where the decision-maker had no personal interest in the outcome.[43]

Policy Foundations of the Business Judgment Rule

The business judgment rule is justified due to the policy of information imbalance. This asserts that the courts are *"ill-equipped to make business decisions and should not second-guess directors or substitute its judgment for that of the directors."*[44] Since directors are involved in the day-to-day running of the company, it is argued that they are best placed, skilled and informed about the internal management of the company rather than the courts and accordingly directing minds of companies have more information for which reason it should be presumed that their decisions are better than the decision taken by the courts.[45] Since directing minds of companies are not prophets who are able to foretell future occurrences, they should not be crucified for wrongful decisions unless it can be shown that their decisions are irrational, fraudulent and illegal and those decisions in turn adversely affect the fortunes of the company. Informed decisions by the directors should not be penalized.[46]

Also, the need to protect corporate directing minds from the risk of recollection bias also known as hindsight bias is one of the justifications for the business judgment rule. This bias relates to the instance where one better understands a situation only after it has occurred or happened.[47] Thus, it is argued that the courts and other stakeholders who are called upon to judge events involving decisions made by directors only after the event took place are placed in a better situation different from what the directors were in at the time of making the decision and

[41] Ibid.
[42] Brainbridge, supra at note 15.
[43] Ibid.
[44] Giraldo, *Factors affecting the application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU*, pg. 121, Vicepresidencia Juridicia (2006).
[45] Ibid.
[46] Brainbridge, supra at note 15; Aronson v Lewis 473 A 2d. 805 812 (Del 1984).
[47] Muswaka, L., *Shielding Directors against Liability Imputations: at note 34.*

would obviously make a conclusion which would be biased against the directors.[48] Accordingly, it would be unfair to allow the courts and other stakeholders to fault the business decisions of directors as being unreasonable and careless, in such circumstances. Rather, a mechanism should be put in place to protect directors from being penalized as a result of hindsight bias.[49]

Finally, the business judgment rule is justified on the grounds that penalizing directors for every wrongful business decision they make albeit in an informed manner poses the risk of stifling innovation in the corporate business.[50] This stifling of innovation and creativity in turn affects the ability of the directors to implement changes by introducing new techniques and products into the business.[51] Innovation should be encouraged at all costs since it is impossible to ensure perfection in all aspects of the corporate business lest discouraging people from taking up the task of managing companies. Once directors of companies are assured of some protection for their honest mistakes arising from informed business decisions, many brilliant and daring individuals would aspire to become company directors.[52]

The Business Judgment Rule as a Principle of Immunity

The business judgment rule has been formulated as an immunity doctrine in the sense that it operates as a privilege which exempts and insulates directing minds of companies from any liability or penalty arising from a breach of duty in relation to a business decision made in good faith. With the same policy underpinnings applicable to the principle immunity, the business judgment rule can be equated to immunities that are accorded to other classes of persons under the laws of Ghana.

A typical example is the judicial immunity that the 1992 Constitution gives to judges as a means of protecting them from personal lawsuits arising from wrongful

[48] Ibid.
[49] Aronson v Lewis, 473 A.2d 805.
[50] Olson Brothers v Engelehart 42 Del Ch 348, 211 A.2d 610 (CH 1965); John Hancock Capital Growth Management Inc v Aris Corporation No. 9920 (Del Ch 1990).
[51] Ibid.
[52] Ibid.

decisions and judgments given in the course of duty. [53] The 1992 Constitution, specifically Article 127(3) states that *"a Justice of the Superior Court, or any person exercising judicial power, shall not be liable to any action or suit for any act or omission by him in the exercise of the judicial power."* Thus, a judge should not be deprived of immunity because the action he or she took was error-laden or was in excess of the power granted such judge.[54] Sir Edwards Coke justified it to the extent that judges administer justice in a way that *"concerns the honour and conscience of the King"* and the judges who represent the King *"are only to make an account to God and the King."*[55] Accordingly, it is in the interest of the public to allow judges to freely exercise their independent judgment about the merits of a case without fear of punishment,[56] the only caveat being that the immunity would not extend to corrupt judges.[57] The reverse of this situation would be that judges would be intimidated and influenced out of fear to make decisions that do not sit well with their conscience and the oath that they swore.[58]

Another example of an immunity that the business judgment rule mimics is the legislative immunity conferred on legislators under the 1992 Constitution. Article 116(1) of the 1992 Constitution provides that *"civil or criminal proceedings shall not be instituted against a member of Parliament in any court or place out of Parliament for any matter or thing brought by him in any court or place out of Parliament for any matter or thing brought by him in or before Parliament by petition, bill, motion or otherwise."* This provides absolute immunity to Members of Parliament and legislators in Ghana when discharging their duties in their legislative capacity. The 1992 Constitution extends this immunity to cover service of legal processes and arrests as long as the legislator is on his way to, attending at or returning from any proceedings of Parliament.[59] Accordingly, legislators are made immune from elements that have the capacity to contribute to inhibiting the

[53] J. Randolph Block, Stump v Sparkman and the History of Judicial Immunity, 1980, Duke L.J. 879, 879 (1980).
[54] Ibid at pg. 356 – 357.
[55] K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 Howard L.J. 95, 104 (1995) (quoting Floyd v Barker, 77 Eng. Rep. 1305, 1307 (K.B. 1607).
[56] Dennis v Sparks, 449 U.S. 24, 31 (1980).
[57] Long v Cross Reporting Service Inc., 103 S.W. 3d 249, 253 (Mo. Ct. App. W.D. 2003).
[58] Tenney v Brandhove, 341 U.S. 267, 372 (1951), reh'g denied 342 U.S. 843 (1951).
[59] 1992 Constitution of Ghana, Article 117.

discharge of their legislative duties.[60] So just like the legislative immunity, the business judgment rule protects directors from liability for business decisions that are made in the capacity as directors of companies on the condition that the honesty of the decisions taken are not negatived by certain fraudulent and grossly negligent elements.[61]

Codification of the Business Judgment Rule in other Jurisdictions

The business judgment rule remains uncodified in Ghana however in South Africa, for example, it has been codified in the Companies Act[62] specifically section 76(4) which relates to the director's duty to act in the best interest of the company and to work with care, skill and diligence. The law in South Africa is to the effect that a director would receive protection from allegations of breach of duty to act in the best interest of the company as well as the fiduciary duties of care and loyalty where it is proven that the director took reasonable diligent steps so as to become informed about the matter and furthermore the director in question had no conflict of interest in relation to the matter and also complied with the rules on conflict of interests. In respect of conflict of interest, the director involved should not have had any material personal financial interest in the subject matter of the decision or had no reasonable basis to know that any related person had a financial interest in the matter.[63] More so, the protection in the Act extends to a Director who had a rational basis for believing and actually believed that one's decision as a director was taken in the best interest of the company.[64]

In the South African case of *Coronation Brick (Pty) Ltd v Strachan Construction Co. (Pty) Ltd*[65] the Court stated that the basis upon which a determination is made as to whether the director in question took reasonable steps to become informed about the matter is the objective standard namely the legal convictions of the community. The court stated thus *"in any given situation the question is asked whether the defendant's conduct was reasonable according to the legal*

[60] Tenney v Brandhove, 367, 372 (1951), reh'g denied, 342 U.S 843 (1951).
[61] Ibid.
[62] 2008 (Act 71 of 2008).
[63] Companies Act, 2008 (Act 71 of 2008), Section 76(4)(ii)(a).
[64] Ibid, Section 76(4)(iii).
[65] 1982 4 SA 371 (D) 380.

convictions of the community."[66] Regarding, the issue of conflict of interest and financial interest in the subject matter, the South African Act does not define what *"material"* means as used to qualify the personal financial interest in the subject matter of the decision. It presupposes that not every personal financial interest in the subject matter of the decision would suffice with some interests being immaterial. In the same way, the Act does not define what the requirements are for one to be properly said to have rationally believed in one's decision as having been taken in the best interest of the company. In practice, however, a reasonable standard is applied in order to determine what a reasonable person in the position of the said director would have believed.

In the United States of America, the American Law Institute Corporate Governance Project has formulated a standard model business judgment rule clause aimed at helping different states draft their laws. This has been codified in Delaware law, for example, in section 141(a).[67] The ALI's rendition of the business judgment rule provides that *"a director or officer who makes a business judgment in good faith fulfils the duty of care if the director or officer is not interested in the subject of his business judgment; is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances and rationally believes that the business judgment is in the best interests of the corporation."*[68]

Thus, once the above conditions are met, a director of a company is not liable for any negative consequences that arise from a business judgment decision. This provision places a duty on directing minds of companies to act prudently and reasonably. That notwithstanding, a director is also not liable merely because as a director one failed to act prudently or reasonably as long as the director is shown to have no interest in the subject matter; was reasonably informed and believed that one was acting in the best interests of the company. A director is thus not liable

[66] Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 4 SA 371 (D) 380.
[67] 8 Del. C. section 141(a).
[68] ALI Corporate Governance Project, Section 4.01(c).

for a breach of duty owed to the company unless that breach can be regarded as conduct which implies gross negligence.[69]

In the United States case of *Kamin v Amex American Express Co*.[70] Greenfield J. on the above rules relating to the applicability of the business judgment rule stated that *"directors' room rather than the courtroom is the appropriate forum for thrashing out purely business questions which will have an impact on profits, market prices, competitive situations or tax advantages… it is not enough to allege that the directors made an imprudent decision which did not capitalize on the possibility of using a potential capital loss to offset capital gains. More than imprudence or mistaken judgment must be shown…The directors are entitled to exercise their honest business judgment on the information before them and to act within their corporate powers."* The US courts have stated that a failure to act in good faith may be inferred from instances like *"where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law or where the fiduciary intentionally fails to act in the face of a known duty to act thus demonstrating a conscious disregard for his duties."*[71]

CODIFYING THE BUSINESS JUDGMENT RULE IN GHANA: DEVELOPING A THESIS FOR MEASURING DIRECTOR CONDUCT

The Companies Act of Ghana currently does not codify the business judgment rule in Ghana. Thus, there is no presumption in favour of directors that in making business decisions, directors are deemed to have acted on an informed basis, in good faith and in the honest belief that the action taken is in the best interest of the company. The Companies Act only seeks to establish the duties of directors of companies in Ghana and the limits of their powers. It is imperative to set the bar below which directors are allowed to exercise business risks in their capacity as directors without having to be responsible to the shareholders for their actions. A codification of the business judgment rule would strike a workable balance

[69] Kamin v Amex American Express Co. 54 A.D. 2d 654 (N.Y. 1976), Smith v Van Gorkom 488 A.2d 858 (Del. 1985).
[70] 54 A.D. 2d 654 (N.Y. 1976) and Walt Disney Company Derivative Litigation (Del. 2006, 906 A.2d 27).
[71] Walt Disney Company Derivative Litigation (Del. 2006, 906 A.2d 27) per Justice Jacobs.

between the role of the director in exercising independent and unrestrained judgment on one hand, whilst also exacting accountability on the other hand so as to safeguard the interests of the stakeholders of the company. Overall, an honest and informed board of directors should not be held liable for decisions that go wrong and that were not made in a grossly negligent manner.

Post codification of the business judgment rule in Ghana, there needs to be the development of a thesis upon which director conduct and compliance would be measured by the courts. It is recommended that practical guidelines of best practice for directing minds of companies be formulated by the courts using the National Corporate Governance Code (National Code) developed by the Institute of Directors of Ghana as the basis for measuring compliance. The National Code provides corporate governance guidelines and principles that are specific to the nature of the various types of organizations that operate in Ghana. The National Code reflects the Companies Act and the SEC Code of Ghana. It serves as a basis upon which accountability and responsibility towards the stakeholders of companies should be measured as it mirrors the current global trends similar to the King Code of Corporate Governance of South Africa.

Like the King Code of South Africa, the National Code is not a legal document but it reflects the national standards of good corporate governance set out in the Companies Act of Ghana. It serves as a tool which prescribes conduct and maximizes corporate performance and accountability in the broader scheme of things. Accordingly, it may be used as a good benchmark for measuring the conduct of directors in order to justify the exemption of directors from liability for wrongful business decisions and breach of duty. Courts should thus use the guidelines and standards set down in the National Code in determining whether a director in question has met the conditions of the business judgment rule.

The National Code, as part of the three (3) core values highlights the concept of accountability. It stresses that directors should be generally answerable for their actions through independent oversight mechanisms. The Code requires directors to be committed to corporate discipline and by so doing, adhere to behaviour that is universally recognized and accepted to be correct and proper. The principle of accountability under the Code also requires directors to be honest and truthful to the shareholders and other stakeholders of the company in the performance of their

duties by observing the high standards of ethical behaviour. The National Code requires directors to similarly uphold the core value of responsibility. This means that directors of companies must act responsively to and with responsibility towards all the stakeholders of the company.

Regarding the compliance regime, the National Code adopts the *"apply or explain"* basis which mandates that directors must consider how the principles of good corporate governance can be applied. In doing so, directors have the legal duty to act in the best interests of the company they manage and in following the *"apply or explain"* approach, a director in making a business decision may conclude that to follow a recommendation from a stakeholder of the company would not be in the best interest of the company. Thus, the director could then decide to apply the recommendation differently or apply another practice and still achieve the overarching objective of the company. Thus, as long as the director is able to explain how the recommendations or principles of corporate governance were applied or the reasons for not applying them, such an act would be regarded as compliance for which liability would not arise. Furthermore, the National Code requires directors to exude professional independence in that they are to discharge their duties without fear or favour. Directors must not be under the influence of any individual, interest group or political authority when making business decisions. Directors are required to act with a degree of professional scepticism and keeping inquiring minds.[72] Directors must not allow their decision making to be influenced by gifts, donations or anything that compromises their professional independence and judgment.[73]

CONCLUSION

This paper effectively considers the contours and policy foundations of the business judgment rule as representing a concept of international and practical relevance. By way of conclusion, this paper suggests that there is a need for the Ghanaian Companies Act to codify the business judgment rule as a doctrine for determining when directors should be responsible to shareholders and the company for their actions. The national courts should also be empowered and encouraged to

[72] National Code, Principle 4 at pg. 48.
[73] Ibid at pg. 49.

give meaning to it. The business judgment rule, as it has been shown, has the capacity to protect directors against liability for every business decision they take that leads to undesirable consequences. It would help to establish a workable balance between directors' autonomy and the need to exercise authority in running the business enterprise given the current economic climate on one hand while allowing some accountability interests on the other hand.

This is significant because, in order to achieve the economic efficiency of companies, it is imperative that directors and managers of companies are not held liable for every business decision they make.

The courts in determining whether or not a director meets the requirements of the business judgment rule are encouraged to resort to the National Code as a guide for measuring compliance with good corporate governance principles. With these above listed guidelines and principles of the National Code in mind, the courts would be well placed to apply the rules in the Companies Act viz-a-viz the business judgment rule which is being suggested to be codified in Ghana, against real fact situations to properly assess the conduct of directors who have taken business decisions on behalf of companies they administer. The suggested criteria of good governance would be important to determine what is the appropriate standard of conduct for directors such that failure to meet the recognized standard of governance would lead to the erring director being liable for breach of duty under the law.

On the other hand, a director who takes a decision which that director honestly and reasonably believes will benefit the company should receive absolute protection from liability under the business judgment rule. This standard would encourage directors to take the necessary risks associated with directing and controlling a company without fear of hindsight bias and the consequences that come with it. Indeed, directors should be encouraged to make reasonable decisions and not perfect decisions.[74] As long as a business decision of a director was made in good faith and falls within the reasonableness sphere, it is suggested that a court has no business substituting its opinion for that of the director even though the benefit of

[74] Maple Leaf Foods Inc v Schneider Corporation 42 OR (3d) 177 (1998) OJ No. 4142.

hindsight may cast doubt on the intelligence associated with the director's decision.

Admittedly, the experiences of other jurisdictions like the United States of America and South Africa as considered in this paper may only serve as a persuasive guide towards curating a rendition of the business judgment rule which perfectly suits our peculiar situation as a country. However, the rendition of the business judgment rule which should be developed and codified in Ghana should manifest as a type of immunity afforded to directors who act in good faith and are not grossly reckless when making decisions on behalf of the company. It is not intended to serve as a fortress for directors who act irrationally in breach of their duties owed to the company but rather aligns with the objective of good corporate governance that there should not be over-regulation of company business by granting legal authority to directors to run companies as they deem fit.

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.21-41
DOI: 10.47963/ucclj.v4i1.1546

MICROFINANCE REGULATION IN GHANA: LESSONS LEARNT

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ABSTRACT

A well-functioning and regulated financial system is vital for businesses, consumers and the economy. Therefore, regulating microfinance activities is crucial to ensure institutional sustainability and customer protection. We explore the consequences of microfinance regulation in Ghana using the desk review approach to document lessons that could be learnt. Our preliminary findings suggest that there are some learning opportunities. These are regulatory methodology mismatch, mission drift tension, and the collapse of potentially rescuable institutions. Additional lessons include a need for better governance, implementation of complementary laws and inadequate regulatory capacity. The paper offers policy recommendations for future regulatory architecture and design.

Keywords: Microfinance regulation, Ghana, Financial services, Bank of Ghana, Microfinance institutions

INTRODUCTION

Financial sector regulation originates from microeconomic concerns over financial institutions' capacity to monitor lending risks and ensure effective governance to promote financial sustainability. Therefore, financial laws and rules exist to minimise the risks. In the banking sector, laws are provided to safeguard depositors' monies and bank assets. For example, historical antecedents suggest that financial regulation was dramatically overhauled during the Great Depression in the 1930s. Consequently, the chaos associated with bank runs, and the numerous bank failures spurred numerous policy actions to prevent a recurrence.

Around the world, financial regulators strengthened the laws that govern banking institutions in response to the financial crisis. Like traditional banking institutions, non-bank financial institutions (NBFIs) play a significant role in the

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financial sector and also need to be regulated. At the Managed Funds Association (MFA) Global Summit held in May 2023, the Chair emphasised the need for NBFI regulators to have information that facilitates risk detection and robust intervention.[4] In Ghana, there are risk variations within non-bank financial activities, particularly those involving capital market transactions and services that target the informal economy such as microfinance institutions (MFIs). These inherent variations also require appropriate regulatory mechanisms.

Globally, MFIs have been subjected to regulation with rules, guidelines, and laws because they are a segment of the financial system. They collect deposits; therefore, their risks could cascade to the traditional banking sector, and their failure may be contagious. Any disruption could affect the livelihoods of most of their clients, who have small-scale businesses in the informal sector. As depicted by the global financial crisis, the assumption that markets are self-correcting might not always hold; hence, the need for government intervention to reduce risks and instability.

Regulation improves efficiency, reduces costs, creates innovation, and promotes development. Like other financial institutions, MFIs are generally subject to two forms of regulation: prudential regulation reinforces financial soundness, and non-prudential regulation serves other purposes, such as consumer protection—governments have a duty to protect innocent customers from losing their hard-earned deposits. Regulation is also a public policy requirement, which the government must address to avoid political instability. Therefore, if well executed, regulating microfinance activities could produce more gains than losses.

In most African countries, MFIs are regulated by different bodies. In this section, we draw on a few examples of the various modus operandi from selected African countries. These countries were selected based on the unique nature of their regulatory system. In South Africa, MFIs are regulated by the Microfinance Regulatory Council (MFRC),[5] which was established in 1999 under an Exemption Notice. The initial attempt at the reformation was implemented by the 1992 Usury Act Exemption (1992 to 1999 covers the 1st Exemption Notice).

Since 1999, the MFRC has been mandated to formalise micro-lending, ensure consumer protection, improve information delivery and educate the people about microfinance business. In 2003, the Usury Act was amended (Usury Amendment Act 10 of 2003). The amendment significantly enhanced the MFRC's authority

[4] https://www.fca.org.uk/news/speeches/drive-data-non-bank-financial-intermediation-nbfi.
[5] The MFRC was mandated to inspect unregistered and registered lenders using external inspectors and submit questions to the High Court for declaratory order.

DOI: 10.47963/ucclj.v4i1.1546

and empowered it to act on behalf of the government.[6] The MFRC's wider regulatory powers, effectively backed by law, have supported the smooth functioning of microfinance activities.

The Kenyan government passed an Act of Parliament (the Microfinance Act, 2006[7]) to ensure the licensing, regulation, and supervision of microfinance businesses and related activities. The Act covers supervision by the Central Bank, licensing, governance and deposit protection. The Microfinance (Amendment) Act of 2013 augments the initial instrument. The interesting aspect of the Kenyan case is that parliament has taken steps to enact laws to enforce microfinance regulation. As an Act of Parliament, it gives the regulators *teeth* to bite and the *cane* to whip. Unfortunately, this is not the case in Ghana and most African countries.

Morocco's Central Bank is primarily responsible for regulating the microfinance industry. However, the bank has a dedicated division that has a direct supervisory responsibility. The 'Office of Bank Supervision' is a subsidiary of the Department of Oversight of Financial Institutions. A law enacted in 1999 (No. 18-97) brought MFIs under a legal operational framework. Subsequently, the sector experienced rapid and significant growth until 2006, when problems began to unfold. The historic low rates of non-performing loans (NPLs) rose significantly over an extended period. It was observed that a lack of effective and efficient governance contributed to the MFI challenges. This prompted the Central Bank, the *Bank Al-Maghrib*, to actively intervene in an industry that had been lightly regulated. Consequently, new regulations were issued through the *'Directive on the Governance of Microfinance Associations'*, enacted in September 2009. The directive was to enforce effective corporate governance in the industry.

In Central Africa, microfinance is regulated by an apex body called the Central African Banking Commission (COBAC). The commission regulates microfinance in Cameroon, Central African Republic, Gabon, Chad, Congo and Equatorial Guinea. Gabon was the first country to regulate its microfinance activities in 2003 with an oversight unit within the Ministry of Finance. In the Congo-Brazzaville, the government created the first microfinance network, while some member countries, such as Cameroon, had embryos of legislation that

[6] Patrick Meagher, 'Microfinance regulation and supervision in South Africa' (2005) CGAP and IRIS Centre

[7] See The Microfinance Act, 2006 No. 19 of 2006 as evidence of a devoted microfinance regulatory instrument.

sought to regulate microfinance.

Microfinance was placed under the tutorship of the Ministries of both Agriculture and Finance because it was initially identified as essentially suited for promoting rural and agricultural development.[8] One unique aspect of microfinance regulation in Central Africa is that individual central banks are not responsible for general oversight. The regional centralised supervision could be problematic because of the differences in economic and cultural characteristics that regulation must consider.

The country-specific cases highlighted suggest that microfinance regulation is distinct from banking regulation. Having dedicated supervisory entities propped by legal instruments can significantly engender the smooth functioning of the microfinance sector and the financial system. These entities can either be a specialised agency with ample regulatory powers or a fully resourced and dedicated unit of a Central Bank that can effectively execute its mandate. However, the problems experienced in Morocco suggest that supervisory presence and legal reinforcement may be inadequate. Without sufficient rigour, regulation may still be superficial with attendant consequences; hence, more robust intervention would be required to strengthen supervisory oversight.

In 2011, the Central Bank implemented microfinance regulation in Ghana. Among other initiatives, the regulator categorised providers based on their functions and services. The regulation formalised microfinance operations to improve accountability and ensure financial stability. Despite the positive outcomes, several issues have occurred, including licence revocations, reported customer defrauding, difficulty paying deposits, and the collapse of MFIs. Therefore, there is an urgent need to examine and document some lessons from the regulation activities to inform policy.

So far, the literature lacks a policy-oriented study that critically examines the post-regulatory environment to offer lessons to regulators, policymakers, and all stakeholders. Apart from the paper by Gallardo and others[9] on lessons from microfinance regulation in Benin, Ghana, and Tanzania, we are not aware of any study that has taken stock of lessons from microfinance regulation in Ghana. This review is especially pertinent given the recent banking crisis, which has

[8] Anne Claude Creusot, 'L'état des lieux de la microfinance au Cameroun' (2006) BIM n° - 09 mai 2006, http://www.lamicrofinance.org/resource_centers/profilcameroun/

[9] Joselito Gallardo and Korotoumou Ouattara and Bikki Randhawa and William Steel, 'Microfinance regulation: Lessons from Benin, Ghana and Tanzania' (2005) 85-96 Savings and Development.

implications for the conduct of both banking and NBFIs.

This paper examines the effectiveness of microfinance regulation in Ghana to offer lessons that can inform policy. First, it reviews the genesis and post-regulatory environment of microfinance operations in Ghana. Second, it gathers the lessons to be learnt and proposes recommendations for policy actions. The paper contributes to the literature on Ghanaian microfinance regulation with insights on effectiveness and delivery. It fills the gap between microfinance regulation and its outcomes by highlighting lessons and implications that can inform the regulatory agenda. Additionally, it contributes to the design and architecture of future regulation of microfinance activities in Ghana.

The paper is organised as follows: the next section presents the methodology followed by the economics and law of microfinance regulation. Section 4 presents the inception and post-regulation environment of microfinance activities in Ghana. Section 5 documents the lessons learnt and Section 6 provides the conclusions, policy implications and recommendations.

METHODOLOGY

This paper adopted the desk review approach to examine secondary documents on microfinance regulation in Ghana. These documents include microfinance acts, operational rules, guidelines and notices issued by the Bank of Ghana, and laws and guidelines on microfinance regulation in some selected African countries. We also accessed academic publications on microfinance delivery in Ghana and related documents. In addition, we retrieved a notice published by the Bank of Ghana to collate data on the reasons for the revocation of licences of insolvent Savings and Loans and Finance Houses in 2019. The data was analysed using simple percentages.

THE ECONOMICS AND LAW OF MICROFINANCE REGULATION

The primary purpose of prudential regulation is to ensure that MFIs (especially deposit-taking institutions) retain sufficient liquidity to meet any reduction in redeposits and to discourage such a reduction in the first place. This critical oversight is to avoid the risk of failure. When financial institutions focus on ensuring a healthy balance sheet, depositors can also be assured of the safety of their deposits. This win-win situation should ensure the overall health of the financial system. Uncertainty is, therefore, the key economic justification for regulation.[10] Alternatively, when depositors lose trust in the financial system, it

[10] David Aikman and Mirta Galesic and Gerd Gigerenzer and Kapadia Sujit and Konstantinos

could spark a withdrawal that can collapse the financial entity. Any contagion can also ripple through the entire financial sector.

Another theoretical argument for microfinance regulation lies in its ability to increase the wealth of low-income clients through capital mobilised for entrepreneurial and investment opportunities.[11] This individual wealth creation is critical for institutional sustainability and its subsequent impact on economic development. In case of failure, the risks can be very high for depositors and the wider integrity of the financial system. Therefore, there is a need to establish a well-structured contractual architecture which should safeguard benefits for both parties.

Uncertainty and risk set into motion the idea of contract law, which has several implications for regulation and supervision. Contract law may be assessed economically and culturally. In *An Economic Analysis of Law*, Judge Richard A. Posner (a former University of Chicago law professor) suggests that contract law performs three significant economic functions. First, it incentivises individuals to exchange goods and services efficiently. Second, it reduces transaction costs because its very existence implies that the parties can avoid the trouble of negotiating a variety of rules and terms already spelt out (for instance, as in a loan agreement). Third, the contract law alerts parties to troubles that have arisen in the past, thus making it easier to plan the transactions more intelligently to avoid potential crises. Regulation, therefore, supports contracts to be sufficient, ceteris paribus.

Regulation ensures the principal party to a contract does not harm the *minor*. In this case, the MFI and the depositor. Regulation exists to provide an avenue for the poor depositor to survive the unforeseen behaviour of the MFIs that might dissipate any accrued wealth. Rules and laws in the regulatory document may prevent any potential breach. Therefore, the legal system supports contracts, which are vital to ensure effective interaction between the principal and the minor. According to the law of tort, if a party owes a duty of care to another and breaches, then the party (that breached the contract) will be liable for any losses.

Katsikopoulos and Amit Kothiyal and Emma Murphy and Tobias Neumann, 'Taking Uncertainty Seriously: Simplicity Versus Complexity in Financial Regulation' (2021) 317-345 Industrial and Corporate Change.
Maurizio Trapanese, 'Regulatory Complexity, Uncertainty, and Systemic Risk' (2022) 689 Bank of Italy Occasional Paper.

[11] Emilio Marti and Georg Scherer Andreas, 'Financial regulation and social welfare: The critical contribution of management theory' (2016) 298-323 Academy of Management Review 41(2).

In a contract, a party is required to deliver the service to the extent of the agreed scope, with reasonable skill and care. When providing financial services to their customers, MFIs owe their clients a duty of care, especially regarding their savings and deposits. Due to competing interests, the Bank of Ghana is tasked by law to superintend over all financial institutions' operations, including MFIs. The reason is that any breach of contract between customers and the MFIs will constitute economic loss and further legal implications. Thus, on economic and legal grounds, regulation is essential as it caters for uncertainty and minimises potential breaches that could result in court cases.

MICROFINANCE REGULATION IN GHANA

The Genesis

The Bank of Ghana legally draws its mandate from the Constitution of Ghana[12] and the Bank of Ghana Act, 2002 (Act 612) as amended. It has overall supervisory and regulatory authority in all matters relating to deposit-taking, non-depositing business, payments, as well as clearing and settlement systems. Arun and Murunde[13] contend that microfinance provides social protection for the vulnerable by enabling them to access finance, create assets and avoid slipping into poverty traps. There was, therefore, an imperative for the Central Bank to regulate the ever-increasing number of MFIs. In 2011, the Central Bank of Ghana initiated the first steps to regulate microfinance activities. MFIs were to register with the Office of the Registrar General to obtain a business certificate.

The Bank took the bold steps for the following reasons: first, since some categories of MFIs take deposits, there is the need to protect depositors' hard-earned funds. Second, the regulation seeks to address the needs of those in the informal financial sector since most clients are subjected to high uncertainties that require innovative procedures and high operating costs.[14] Third, financial sector development also implies more sophisticated regulation and supervision of financial institutions, which may also help improve the efficiency of MFIs[15]. Therefore, regulation is beneficial for enhancing the efficiency of all stakeholders in the financial market.

[12] Article 183 of the 1992 Constitution establishes all the powers of the Bank of Ghana.
[13] Arun Thankom, 'Regulating for Development: The Case of Microfinance' (2005) 346-357 The Quarterly Review of Economics and Finance.
[14] Arun Thankom, 'Regulating for Development: The Case of Microfinance' (2005) 346-357 The Quarterly Review of Economics and Finance.
[15] Shakil Quayes, 'Depth of Outreach and Financial Sustainability of Microfinance Institutions' (2012) 3421–3433 Applied Economics.

Like many other developing countries, Ghana transformed its unregulated microfinance into a regulated one. It took this step to respond to public outcry and the frequent loss of deposits. Therefore, the main objective of the regulation was to protect depositors and ensure sound financial operations within the microfinance sector. In July 2011, the Bank of Ghana issued the Microfinance Institutions (Operation Rules and Guidelines) Notice No.BG/GOV/SEC/2011/04 which specified the various categories and operational activities of each category of microfinance tiers.

The tiered structure represented a reasonable classification of different types of institutions in terms of size and risk to financial stability. Four categories were outlined, and the structure prescribed different levels of capital requirements for each category. Tier 1 comprises Rural and Community Banks, Finance Houses, and Savings and Loans Companies. Tier 2 includes Susu companies and deposit and profit-making Financial Non-Governmental Organisations (FNGOs). Money lenders and non-deposit taking FNGOs are in the Tier 3 category, while Susu collectors and Individual money lenders come under Tier 4.

The new regulatory guidelines (Business Rules and Sanctions for Microfinance Institutions -Tiers 2, 3, and 4) consolidated all previous guidelines issued since July 2011. In addition to the previous guidelines and notices, the current microfinance laws included issues from existing laws such as Non-Bank Financial Institutions Law (NBFI Law) 2008 Act 774 and the Banking Act 2004 (Act 673 as amended). In 2016, these laws were replaced by the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). The act covers finance houses, remittance companies, savings and loans companies, and leasing companies, among others. It is important to recognise and appreciate the importance and essence of the regulatory instruments.

Under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), the Bank of Ghana finalised a full-fledged regulation document for all categories of MFIs in Ghana.[16] Among the tools for regulating MFIs are licensing and supervision, capital adequacy and solvency requirements, reporting requirements, sanctions, remedial measures and administrative penalties.[17] These tools are to promote soundness and enhance the liquidity. They are also to ensure that MFIs operate under good corporate governance. Yet, regulation seems disproportionately centred on minimum capital prescription than other facets that

[16] https://www.bog.gov.gh/wp-content/uploads/2019/09/banks-and-specialised-deposit-act-2016.pdf.
[17] Ibid.

may pose risks. For instance, between 2003 and 2014, the Bank of Ghana prescribed five capital requirements (from 2.5 million Ghana cedis to 400 million Ghana cedis) for commercial banks and MFIs alike. Therefore, capital adequacy requirements dominated other supervisory tools outlined in the regulatory document. Nonetheless, the current legal regime does not adequately address regulatory issues for MFIs.

Post-Regulation Environment

In behavioural economics, trust is important in explaining the relationship between an institution and its clients. Trust affects an individual's willingness to use a particular financial institution based on their subjective assessment of its reliability. In any economic transaction, one party's lack of trust in the other is an implicit cost due to moral hazard. This mistrust can either increase monitoring and enforcement costs or lead to unconsummated transactions. Therefore, trust is a key ingredient for the survival of financial institutions.

Prior to the regulation of microfinance activities, the banking sector in Ghana was experiencing some misalignments with due diligence, which subsequently cascaded to the microfinance sector. Consequently, the post-regulatory period presented more challenging scenarios. For example, the quality of bank assets has been deteriorating since 2002. According to Ackah and Asiamah.[18] this trend continued till 2013 when the country witnessed an escalation in threats to its financial system from both external and domestic sources. Despite the regulatory reinforcements, the weaknesses in the banking sector threatened the survival of MFIs. High-risk lending was an important factor that led to the crisis because most MFIs could not implement strong risk management practices to enhance loan quality. Bank of Ghana confirmed that non-performing loans and poor credit/loan underwriting were key factors which led to the subsequent withdrawal of some licences.

Revocation of licences of Microfinance Companies

Microfinance Companies fall under the second tier of the microfinance categorisation in Ghana. These are companies limited by shares but not listed on the Ghana Stock Exchange (GSE). In 2019, the Bank of Ghana prescribed a minimum capital of two million Ghana cedis (equivalent to USD 400,000). A significant number of institutions were unable to comply. Consequently, the revocation of licences started with Microfinance Companies on Friday, May 31

[18] Charles Ackah and Johnson Asiamah, 'Financial Regulation in Ghana: Balancing Inclusive Growth with Financial Stability' (2014) Working Paper / Overseas Development Institute.

2019, following an announcement that 347 MFCs were insolvent.[19] The Bank of Ghana explained that it took action under section 123 (1) of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). The Act requires the Central Bank to revoke the licence of a bank or Specialised Deposit-Taking Institution (SDI) where the regulator determines that the institution is insolvent or is likely to become insolvent within the next 60 days. Unfortunately, most of the affected institutions had been insolvent for more than the legal 60 days.

It must be emphasised that many of these MFCs could not meet their minimum capital for an extended period before the revocation. This presupposes that capital adequacy-based bank regulation may be ineffective in Ghana, but guidance may yield positive effects. Moreover, it could also be asserted that the Central Bank had not been proactive enough in collaborating with institutions to manage their strategy to comply with the requirement. Most importantly, the sudden nature of the news release into the public domain may not have helped prudential regulation. Some depositors may have misinterpreted the requirement as a looming problem to spark a panic withdrawal, further deteriorating the capital requirement and facilitating their imminent closures.

To correct this 'market distortion', the government decided to bail out affected institutions by paying customers about 900 million Ghana cedis (equivalent to US$ 196 million). This was a loan contracted by the Ghana Government from the World Bank to clean up the sector. Many have argued that the bail-out process was imprudent because the funds could have been used to resuscitate the affected institutions. This option would keep them in business to avoid job losses and a dissipation of public confidence. In some countries where banking crises have occurred, the institutions are revamped rather than paying monies directly to customers.

During the global financial crisis of 2007/08, the United Kingdom government decided to inject £137 billion to rescue some ailing banks and to stabilise the financial system.[20] Although the bailout included a component to compensate depositors, it largely consisted of support schemes such as credit guarantees, special liquidity, and asset protection schemes. In Ghana, the absolute closures

[19] https://www.bog.gov.gh/wp-content/uploads/2019/07/notice-of-revocation-of-licences-of-insolvent-microfinance-companies-and-appointment-of-receiver.pdf. The list of institutions is provided online at https://www.graphic.com.gh/business/business-news/full-list-of-347-microfinance-companies-whose-licences-have-been-revoked.html

[20] Federico Mor, 'Bank Rescues of 2007-09: Outcomes and Cost' (2018) 5748 House of Commons Briefing Paper, Retrieved from https://researchbriefings.files.parliament.uk/documents/SN05748/SN05748.pdf

agitated political debates in the media waves even though the government proceeded to instruct the receiver to pay customers.

Revocation of licences of some NBFIs

Savings and Loans Companies (S&Ls) and Finance Houses are regulated by the NBFI Law 1998 (Act 774) and classified as Tier One MFIs. After revoking the licences of 347 MFCs, the Bank of Ghana targeted the Savings and Loans Companies and Finance Houses. On 16th August 2019, the Bank of Ghana issued a notice revoking the licence of 23 Savings and Loans Companies and Finance Houses[21] in compliance with Section 123 (1) of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). The notice provides the reasons for revoking each institution's licence. The main reason offered by the regulator was that the level of capital held by some of these institutions violated the minimum regulatory capital required by Act 930. Low liquidity heightens the precarity of these institutions to continue their deposit-taking services due to the direct or indirect risks they pose to their depositors and other counterparties.

Among the reasons cited were:

1. Excessive risk-taking without the required risk management functions to manage associated exposures;
2. The use of depositors' funds to finance personal or related-party transactions or businesses on terms that were not commercial, leading to little or no income accruing to the relevant institutions and thereby compounding their liquidity challenges;
3. Corporate governance weaknesses (weak board oversight, poor accountability, and override of internal controls);
4. Creative accounting practices and under-provisioning for impaired assets, thereby misrepresenting their true financial condition to the regulator and other stakeholders; and,
5. Persistent regulatory breaches, involving non-compliance with the Bank of Ghana's prudential rules, and failure to implement on-site examination recommendation.

Table 1 summarises the reasons identified by the Bank of Ghana across the 23 institutions listed. Twenty-one (21) separate issues were uncovered. The four prevailing issues include negative capital adequacy ratio, negative net worth, serious liquidity challenges and violation of regulatory limits to related companies.

[21] https://www.bog.gov.gh/wp-content/uploads/2019/08/Revocation-of-Licenses-of-SDIs-16.8.19.pdf

UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.21-41
DOI: 10.47963/ucclj.v4i1.1546

Table 1: Reasons for licence revocation of S&Ls and Finance Houses

S/N	Reasons	No. of Institutions	%
1	Negative net worth	22	95.3
2	Negative capital adequacy ratio	23	100.0
3	Serious liquidity challenges	15	65.2
4	No supporting and concealing documentations	2	8.7
5	Non-performing loans	10	43.8
6	Misrepresentation of the institution's true financial condition	4	17.4
7	Corporate governance weaknesses	5	21.7
8	Engaging in non-permissible activities	2	8.7
9	Breach of minimum cash reserve ratio	12	52.2
10	High management fee paid	1	4.3
11	Weakness in board and senior management oversight	3	13.3
12	Poor credit, loan underwriting and risk management function	5	21.7
13	Window dressing of accounts	5	21.7
14	Violation of regulatory limits to related companies	15	65.2
15	Failure to implement Bank of Ghana on-site recommendations	9	39.1
16	Ceased operation and closed offices	5	21.7
17	Change of name and relocation without approval	1	4.3
18	Failure to sell repossessed collaterals	1	4.3
19	Failure to submit and publish audited financial statements	6	26.1
20	Loans without proper documentations	1	4.3
21	High rent expenses	1	4.3
	Total	23	-

Source: Data obtained from Bank of Ghana, 2019[22]

There is a tendency to suggest that the failures may not have occurred if the regulatory requirements had been explicit on the breaches enumerated in Table 1. While some issues are fully explicated in the guidelines and sanctions document, others are either partially indicated or unclear. It is worth noting that some of the issues raised by the regulator did not happen in one day, signalling an oversight omission. For instance, liquidity challenges may have accumulated in many MFIs for years, causing the liquidity crunch. It is worrisome that currently, the regulator applies the NBFI Act, 2008 to all non-deposit-taking MFIs contrary to the

[22] The data was collated from the Bank of Ghana's publication on 16th August 2019. https://www.bog.gov.gh/wp-content/uploads/2019/08/Revocation-of-Licenses-of-SDIs-16.8.19.pdf

provisions of the Act.

So far, the regulator is weathering the storm in the microfinance sector. However, there is an urgent need to think through the lessons learnt for policy purposes. A National Microfinance Policy[23] is being drafted to provide a fresh direction for the sector. This policy document is not meant for regulatory purposes but to ensure that the sector continues to provide the much-needed services to underserved communities and small businesses. The national policy has come at the right time to inject a new wave of energy and promise into a frail sector. One important lesson is that without regulation, it is easy to fall into unlawful practices that create an environment of mistrust between financial institutions and clients. Despite the challenges, the regulator continues to play an important role in defining and enforcing vital rules and regulations such as KYC (know your customer) policy,[24] AML (anti-money laundering) and CFT (combating the finance of terrorism). Having effective and robust regulations can also help build trust among MFI clients.

LESSONS LEARNT

This section focuses on the lessons learned so far from microfinance regulation in Ghana. Market distortions from information asymmetries and externalities require robust regulations. In Ghana, MFI regulation has taken three main forms: simple registration as a legal entity; non-prudential regulations (provides standards of business operations and oversight, such as submitting operating and financial reports); and full prudential supervision. MFIs in Ghana are supposed to graduate from the simple to the complex requirements. While regulation has sanitised the sector by expunging unscrupulous institutions, it has also resulted in some negative consequences from which lessons must be learned. The following lessons have been gleaned from the study:

Regulation without recourse to MFI methodology

In the Ghanaian context, microfinance regulation has produced limited benefits because commercial banking standards are applied to MFIs without adequate

[23] The policy is set to replace existing regulatory frameworks that are considered inadequate and not responsive to needs of Microfinance Institutions (MFI) in Ghana. It will focus on re-emphasizing the social mission of the industry while creating the conditions for its supervisory framework to function.

[24] In its paper on 'Customer Due Diligence for Banks' published in October 2001, the Basel Committee on Banking Supervision issued guidelines for implementing customer due diligence. The document would assist banks to recognise the importance of instituting adequate controls and procedures to know and protect their customers.

consideration of microfinance methodologies. Using traditional banking approaches to regulate MFIs has not helped the sector due to the methodological difference between microfinance delivery and traditional banking. It is also important to note that MFI clients are not just micro-entrepreneurs seeking to finance their businesses but the whole range of poor clients who also use financial services to manage emergencies, acquire household assets, improve their homes, smooth consumption, and fund social obligations.[25] In most cases, the regulating team may not appreciate microfinance delivery models and adopted operations.

From the regulator's perspective, there could be misconceptions and assumptions that microfinance is similar to universal banking because of their predominant familiarity with traditional banking activities: granting loans and accepting deposits. For instance, the emphasis has always been on capital requirements, which is positive. However, capital adequacy does not entirely mitigate risks, such as irrational MFI runs. Using traditional banking tenets, principles, and practices with no distinctive criteria for regulating microfinance could be confusing and problematic.

Mission drift?

Regulation is expected to keep institutions afloat, but the unintended consequence may cause mission drift. Due to the tension between the welfare objective and financial sustainability, MFIs will have to present themselves as focusing on clients' economic and social welfare while operating on a commercial and sustainable basis. This institutional transformation, coupled with the demands of both prudential and non-prudential regulation, has unintentionally shifted their balance in favour of commercialisation.[26] Data collected in 2015 revealed that profit-maximising institutions granted over three-quarters of microloans (76%).[27] Given the extent of their operations, regulatory requirements may have compounded operational costs and widened the mission drift. The profit motive and additional regulatory burden have shifted attention from the poor to the non-poor.

[25] Robert Perk Christen and Timothy Layman and Richard Rosenberg, 'Guiding principles on regulation and supervision of microfinance', International Monetary Fund. accessed 10 August
[26] Enrico Bellazzecca and Olga Biosca, 'Intended and unintended effects of specialised regulation on microfinance institutions' double-bottom line management' (2022) 977-999, Annals of Public Cooperative Economics, 93(4).
[27] Rural and Agricultural Finance Programme (RAFiP), 'Poverty outreach and impact of rural and microfinance institutions and government credit programmes in Ghana' (2016) Ministry of Finance and Economic Planning.

UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.21-41
DOI: 10.47963/ucclj.v4i1.1546

The mass exodus of MFIs

Commercialisation of the microfinance sector led to rapid growth in the industry, especially after the 2011 regulatory intervention. According to Ewusie and others,[28] profit-oriented microfinance companies topped the league table of microfinance institutions in 2015. The study revealed that Rural and Community Banks (RCBs) had been relegated to second place by the commercial MFCs, which had a market share of 22.3 per cent. Even though RCBs were initially granting subsidised loans to promote small-scale agriculture, they formed 21.4 per cent of microfinance operations, followed by Credit Unions (17.1%), Savings and Loans Companies (15.7%), Susu Collectors (12.7%), Money Lenders (9.2%) and Financial Non-Governmental Organisations (1.6%). In a rapidly growing pro-poor financial market overtaken by profit-seeking entities, financial system soundness may be compromised by sporadic and unregulated institutions. This necessitates the need for rigorous intervention.

In doing so, the tendency to weed out some viable institutions may be high. During the clean-up campaign conducted by the Bank of Ghana, over 400 MFIs had their licences revoked for insolvency. The figure includes licences revoked for MFCs, Microcredit Credit Companies (MCCs) and Savings and Loans Companies (S&Ls).[29] This action was pursuant to section 123 (1) of the Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930). By 2015, the regulator had issued licences to about 484 MFCs.[30] Following the clean-up, the number of deposit-taking microfinance institutions has fallen to 133.[31]

Undoubtedly, the regulator took positive steps to safeguard financial stability. Nonetheless, the exodus has implications for providing financial services to the underserved in hard-to-reach areas. Instead of strengthening the base and operations of MFIs, a significant number of institutions have folded up. The clean-up has succeeded in protecting clients from predatory institutions. However, the risk of taking down some potentially viable institutions could have been high. One lesson that needs to be learnt is that the soundness of the financial system is not mainly about capital adequacy. There is a fundamental need for a holistic approach towards regulation.

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[28] Ewura-Adwoa Ewusie and Samuel Kobina Annim and William Brafu-Insaidoo, 'The density of microfinance institutions and multiple borrowing in Ghana: Are rural borrowers vulnerable?' (2021) 1217-1237, Journal of International Development, 33(8).

[29] https://www.mofep.gov.gh/sites/default/files/adverts/ToR-for-Tech%20-Assistance-to-Strenthen-SDI-Subsector.pdf

[30] https://www.bog.gov.gh/wp-content/uploads/2019/07/notice-of-revocation-of-licences-of-insolvent-microfinance-companies-and-appointment-of-receiver.pdf

[31] https://www.bog.gov.gh/supervision-regulation/ofisd/list-of-ofis/. This figure is not disaggregated to indicate the number for MFCs, S&Ls and CUs.

DOI: 10.47963/ucclj.v4i1.1546

Regulation without good governance

Regulation without good governance provides numerous avenues for the breaches cited by the Central Bank. Good governance rules should focus on the structures and processes fit for microfinance functions. They require boards to have an adequate number of independent members from sufficiently diverse and appropriate backgrounds who have been given proper induction and can regularly evaluate institutional performance. Over the years, the regulator has not been entirely robust regarding the governance of MFI structures as compared to the banking sector. More attention has been given to the traditional banks.

Even though the guidelines for regulating tier 2, 3, and 4 MFIs sufficiently document some form of governance structures, the enforcement has been weak. The clean-up clearly shows that most MFIs lack corporate culture and values, which suggests that loyalty principles and the duty of care are missing. No matter the regulatory tools applied, institutions will continue to fail if the governance systems are weak and ineffective.

Insurance against risks of losses on deposits

MFIs fragility, combined with the important functions they perform, engenders a belief that they need to be regulated and also required to offer insurance to depositors against the risks of failures. Unfortunately, not much emphasis has been given to the concept of deposit insurance until after the enactment of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) and the Ghana Deposit Protection Act, 2016 (Act 931). The latter was amended in 2018. The Ghana Deposit Protection (Amendment) Act, 2018 (Act 968) is to be implemented in conjunction with the initial Act. Nevertheless, it is not just about the promulgation of the Act; it is also about its enforcement. Good as it may be, an Act cannot promote accountability or improve lives if it is not rigorously enforced. In the past, a number of laws have been passed but the enforcement has been less potent.

Another issue is whether the Deposit Protection Act extends to MFIs. It is apparent that the universal banks have fully embraced it. However, the challenge is with the MFIs due to weak enforcement. In safeguarding deposits, a critical problem that the regulator has not been able to address is that of unscrupulous and unidentifiable institutions that engage in microfinance. They mobilise deposits but are unable to pay customers upon maturity. The regulations do not seem to consider the threat posed by clandestine institutions that emerge and operate below the radar. Therefore, enforcing complementary laws such as the Deposit Protection Act and swiftly identifying unregistered institutions would go a long way to mitigate risks

for depositors.

Regulatory Capacity

There is no doubt that the regulator is capable of regulating MFIs in Ghana. Nonetheless, the Bank alone cannot tackle the magnitude of the oversight required. It must also be noted that good laws and regulations are only partially adequate. They require a regulatory cadre that is well-staffed, well-trained, and well-paid. The scattered nature of MFIs nationwide requires extra intervention and competent personnel to reach out. The Ghana Microfinance Institutions Network (GHAMFIN) is the apex body of Microfinance Associations in Ghana. It evolved from the Ghana MFI Action Research Network (GAMFIARN), established in 1996. Under the regulatory framework, the Microfinance Associations were empowered to supervise their members. However, their supervisory powers are not explicitly stated in any of the laws that regulate MFIs, thus weakening their capacity to enforce rules and guidelines. Even where it is stated, it does not empower the Associations to sanction the defaulting members.

Summary of Lessons Learnt

The events of the microfinance sector in Ghana demonstrate that the existing regulatory frameworks are not responsive to MFIs' needs. One important insight from microfinance regulation in Ghana is that without regulation, it is easy to fall into irrefutable practices and create an environment of mistrust between service providers, financial institutions, and clients. On a positive note, microfinance regulation in Ghana has contributed to some extent in strengthening staff capacity and weeding out an appreciable number of unscrupulous institutions. However, the regulation has also unravelled issues with learning opportunities.

We identified six lessons that could inform decision-making and future policy actions on microfinance regulation. These include regulatory methodology mismatch, mission drift tension, the collapse of potentially rescuable institutions, lack of good governance, implementation of complementary laws and inadequate regulatory capacity. These lessons suggest that regulatory efforts in Ghana would benefit from a critical review to strengthen the industry and promote effective financial inclusion.

This study adopted a desk review approach to examine microfinance regulation from its inception to the post-regulatory environment. Future research can use primary data to examine institutional challenges and expert opinions on how regulation impacts the operational flexibility and financial soundness of MFIs.

UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.21-41
DOI: 10.47963/ucclj.v4i1.1546

CONCLUSION AND POLICY IMPLICATIONS

This paper examined microfinance regulation in Ghana to gather lessons that could be learnt to inform policy decisions. Our analysis suggests that there are crucial lessons that can inform best practices. These are regulatory methodology mismatch, mission drift tension, the collapse of potentially rescuable institutions, lack of good governance, implementation of complementary laws and inadequate regulatory capacity. These lessons have various implications for the industry, its smooth functioning and the stability of the financial sector.

The review suggests that microfinance regulation has been conducted without recourse to typical microfinance delivery methodology. Traditional tools for regulating commercial banks have been adopted for MFIs with adverse consequences. For effective regulation, there should be a clear working definition of microfinance in the Ghanaian context. Other non-bank financial institutions should also be distinguished from microfinance institutions. The situation where laws are made for all non-deposit taking institutions, including microfinance, needs to be revisited. A *one size fits all* approach to regulatory framework may not work for microfinance.

Microfinance needs its own laws or legislative instruments to govern it. Typical microfinance institutions need a separate law (not guidelines) to regulate them. The starting point of microfinance law is through enacting an Act of Parliament. MFI regulation should also not compromise on mission drift. Regulation should not lead to a mass exodus of MFIs but should rather strengthen their operations. Like the microfinance categorisation, there should be some distinction between deposit and non-deposit taking institutions in terms of the regulatory requirements. For non-deposit MFIs such as tier 3 and 4, there is the need for some amount of flexibility since they do not take deposits.

On governance and customer protection, the current Corporate Governance Directive issued in 2018 for Banks, Savings and Loans Companies, Finance Houses, and Financial Holding Companies may not work for all MFIs, especially the tier 3 and 4 institutions. Therefore, specialised corporate governance directives are needed for tier 2, 3 and 4 MFIs. Insurance against risks of losses on deposits in the MFI sector is also crucial.

Regulating microfinance in Ghana cannot be effective without the support and collaboration of the Microfinance Associations. The Associations can enforce regulations, bylaws, rules, and codes of conduct. However, legal support from the regulator is paramount. Involving the Associations may correspond with *delegated supervision* - an arrangement where the regulator delegates direct supervision to

an outside body, while monitoring and controlling that body's work. This strategy could reduce the overwhelming tasks carried out by the Central Bank.

Based on the policy implications outlined, we recommend that the Bank of Ghana should separate the regulatory architecture for banks and NBFIs. Like other countries, the government should establish a specialised institution to take charge of microfinance regulation or create a dedicated unit committed to the prompt, regular and effective supervision and implementation of laws and complementary guidelines.

The regulator should provide a specialised corporate governance directive for tier 2, 3 and 4 MFIs. Microfinance Associations should also be empowered to strengthen supervision. Additionally, the regulator should consider establishing a special deposit protection fund for MFIs. Learning from other countries' best practices is fundamental. Beyond policy, the regulator should advocate for a specific legislative instrument (LI) or an Act of Parliament that would be promulgated into law to regulate microfinance activities in Ghana.

The lessons gathered and suggested recommendations should aid the policy-making process to devise customised MFI laws and a regulatory framework that directly seeks to resolve particular monitoring and supervision issues within the microfinance sector. These efforts should enable the industry to sustainably provide timely, diversified, affordable and dependable financial services to the low-income population in an integrated financial ecosystem.

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.42-92
DOI: 10.47963/ucclj.v4i1.1547

INTERNATIONAL LAW AND THE PEACEFUL SETTLEMENT OF DISPUTES

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ABSTRACT

International law functions principally in maintaining the fabric of international relations, which reflects the overriding desire by states to resort to a supra-national power of legal mechanisms to resolve disputes that may arise among them on territorial claims without force and in a peaceful manner. The United Nations (UN), its Security Council, and its judicial organ - the International Court of Justice (ICJ) - were established after the Second World War primarily to achieve international peace and security. Consequently, the Constitutive Charter of the UN placed an obligation on member-states to resolve all disputes in a peaceful manner which was ostensibly geared towards forestalling the occurrence of another world war. Under the auspices of the UN, the world has achieved a comprehensive body of international law and dispute resolution mechanisms, some of which have helped to resolve disputes that would have otherwise threatened international peace and security. Despite this, scholars have paid less attention to how international law and the implementing agencies of the UN have contributed to global dispute settlement. This paper examines the significance of international law and its implementing agencies in the peaceful settlement of disputes. We argue that international law and its implementation agencies provide an effective framework for peaceful dispute settlement among nations, promoting global security and cooperation.

Keywords: International law, United Nations, Legal mechanisms, Peace and security, Settlement of disputes, War

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.42-92
DOI: 10.47963/ucclj.v4i1.1547

INTRODUCTION

> Insofar as international law is observed, it provides us with stability and order and with a means of predicting the behaviour of those with whom we have reciprocal legal obligations.[4]

The effectiveness of international law in promoting peaceful settlement of disputes remains a pressing concern in global governance. Despite the proliferation of international treaties, organizations and courts, interstate conflicts persist, often escalating into violent confrontations. This paper examines the importance of international law and its enforcement entities in the peaceful resolution of disputes. It is argued that international law and its enforcement agencies provide an effective framework for peaceful dispute resolution between nations, fostering global security and cooperation. This research contributes to the development of more effective international legal strategies for promoting peaceful dispute resolution in the international arena. Using the desktop approach, various international treaties and institutions are examined in the context of their implications for dispute settlement. This research contributes to the literature on international law, international dispute settlement, law and society, and historical jurisprudence.

The international legal regime has undergone considerable change since the end of the First World War. There has also been a shift in the old order since the Second World War. States now focus on international institutions as an important means of peacefully resolving disputes, promoting economic trade, and upholding fundamental human rights and dignity.[5] After the dissolution of the League of Nations and the establishment of the UN system, and the subsequent disintegration of Eastern Europe in the early 1990s, the 20th century marked a shift from traditional international law, which existed between states, to the modern concept of universalism in international law, which is open to new institutions.[6] In the 21st century, the state-centered international system

[4] JW Fulbright on international relations and law. This quote has implications for dispute settlement as it emphasizes reciprocal legal obligations.
[5] Ibid.
[6] WTO, The Place of the WTO and its law in the international legal order, *The European Journal of International Law 17 5* (2007).

has been replaced by a system of various transnational actors, in which technology and information play key roles.[7]

In his classic work, Professor James Brierly defined the law of nations or international law as the "body of rules and principles of action which are binding upon civilised states in their relations with one another".[8] Professor Onuma intimates that international law should transcend beyond its traditional boundaries that are "West-centric," "state-centric," and "judicial-centric" formulations to embrace other cultural, religious, and civilised perspectives.[9] He did not postulate different laws for the various cultures as well as civilisations of the world, but instead one universal non "West-centric" international law. Here international law was conceptualised as "the law of power whose natural evolution gives place to the law of global governance" with the authority to make binding decisions to ensure a peaceful world as has been emphasised by both academics and diplomats.[10]

The universality of international law means that it is valid and embraced globally by all nations, as well as binding. Its acceptance as well as global validity does not negate the fact that there could be regional (customary or conventional) international law or a regime of treaties that operates as sub-systems to the global ones. This does not discount the coming into emergence of bilateral legal covenants between states.[11] The international legal regime is then seen from the interrelationships between different subjects helping in its crystallisation and implementation either directly or through international institutions. In the view of Anghie,[12] international law developed in the 16th century after the Spanish had encountered the Indians. During that period, one of the founding fathers of international law, Francisco de Vitoria put in place a

[7] EB Weis, Legacies of Louis B Sohn: The United Nations Charter and International Environmental Law, *Willamette Journal of International Law and Dispute Resolution* (2008) 212-224; Mitchell and Hensel, Regime type is also thought to influence resolution of disputes (2007).
[8] L Brierly, The Law of Nations, H Waldock (ed.) *The Law Institute of America* (6th edn 1963) 1.
[9] LF Damrosch, M Teresa, T1 Caffi and J deLisle, How international is international law? 3 *Proceedings of the Annual Meeting* (American Society of International Law 2017) 69-78.
[10] Damrosch et al., (n 7).
[11] Ibid.
[12] A Anghie, Time present and time past: globalization, international financial institutions and the third world, *NYUJ Int'l L. & Pol.*(1999) *32*, 243; A Anghie, The Bush administration preemption doctrine and the United Nations, In *Proceedings of the ASIL Annual Meeting* 98 (Cambridge University Press 2004) 326-329.

"secular and universalising basis for legal authority" to replace the "religious papal authority". He opined that, in view of the fact that, the Indians were capable of comprehending issues in the same way as the Spanish, they could both be incorporated under the same system of natural law due to the fact that both were endowed with reason.[13] Anghie[14] further shared that instead of seeing international law as a 'preexisting system' brought unto the Indians, rather it should be seen as a dilemma that helped shape international law.

The establishment of a system of international law usually starts from the international order of nation-states as provided by the "Treaty of Westphalia in 1648" where the developing states in Europe agreed to a regime where the sovereignty and independence of each state were duly recognised.[15] The Osnabruck and Munster Peace Treaties which were signed respectively in May and October 1648, brought the Thirty Years and Eighty Years Wars to an end, which culminated in the Peace Treaty of Westphalia which led to the new demarcation of the political boundaries of central Europe.[16] This led to the development of the "Westphalian system of inter-state law", a system of independent sovereign states whose interaction was to be fashioned out by legal rules.[17]Article 123 of the Treaty of Münster stipulates a three-year period within which states were to use peaceful means to resolve any purported disputes between them.

The development of international law had implications for war and the peaceful settlement of disputes. According to Kelsen,[18] when international law is looked at in a larger sense, right from the Covenant of the "League of Nations" to the Briand-Kellog Pact, then eventually the UN Charter:

> It is hardly possible to say any longer today that according to valid international law any state, unless it has obligated itself otherwise, may wage war against any other state for any reason without violating international law; it is hardly possible, in other

[13] Ibid.
[14] Ibid.
[15] DJ Bederman, *International law in antiquity* 16 (Cambridge University Press 2001).
[16] D Bethlehem, The changing nature of the international system and the challenge to international law, *The European Journal of International Law* (OUP 2014).
[17] Ibid.
[18]H Kelsen, The role of war in international law ( ) 87.

> words, to deny the general validity of the *bellum justum* principle.

Ladd[19] in one of his expositions described the consequences of war in the following terms:

> The evils of war, though admitted by all, are fully understood by none. Its waste of property; its havoc, its desolation of whole empires; its baleful influence on agriculture, commerce and manufactures, on the arts and sciences, on liberty and learning, on morals and religion, on the happiness of individuals, and the prosperity of nations, on the chief interests of mankind for time and eternity, all these well-nigh bid defiance to calculation or conception.

This was a reflection shared during the end of the First World War. The primary objective for the establishment of the League of Nations was to prevent the occurrence of war.[20] In all, the League of Nations dealt with over sixty international disputes, with the major successes being chalked in the first decade. The Covenant for the League of Nations made provisions that were to deal with war that may arise. Members of the League agreed not to use war except in some 'defined circumstances', while they undertook binding agreements to make use of peaceful procedures for the settlement of international disputes and to use sanctions on member states that violated these cardinal principles of not to wage war.[21]

At all material times, the League was geared towards filling the legal "gaps" of the main Covenant and emphasising the need not to resort to war, but to use peaceful means of settling all disputes. In essence, the organisation was preoccupied with the development of a legal order with emphasis on justice, respect for obligations under the Covenant and to promote conditions for international peace and security. Even though fundamentally the organisation had purposed to achieve international peace and security, the Charter had also emphasised justice and respect for legal rules.[22] And that, so long as member

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[19] W Ladd, A Congress of Nations for the Peaceful Adjustment of All International Disputes, *World Affairs 129 3* (Sage Publications 1966) 176-182.
[20] L Lloyd, The League of Nations and the settlement of disputes Woodrow Wilson and the League of Nations *World Affairs 157 4* (Sage Publications Spring 1995) 160-174.
[21] LM Goodrich, The peaceful settlement of disputes *Journal of International Affairs 9 2* (Editorial Board 1955). The United Nations after ten years (1955) 12-20.
[22] Goodrich et al., (n 19).

states and their citizens had good relations with one another, international differences will exist, but at a minimum.[23] It has been maintained time and time again that, like the League of Nations, the UN was established for the "maintenance of international peace and security".[24]

Like other international organisations, membership to the UN is contingent on "the principle of voluntary membership of states fulfilling the conditions laid down in article 4 of the United Nations Charter, which includes being a "peace-loving" country.[25]After the First World War, the Covenant for the League of Nations established in 1920 made restrictions on war explicitly in the preamble: "In order to promote international co-operation and to achieve international peace and security, by the acceptance of obligations not to resort to war . . . ".[26] Article 12 prohibited Member States from resorting to war until three months after a dispute settlement process had concluded, whether via arbitration, judicial settlement, or a report by the League of Nations Council.[27]

The United Nations (UN) Charter was promulgated after the League of Nations had been saddled with a lot of challenges which culminated in the Second World War.[28] The UN Constitutive Charter was geared towards forestalling the occurrence of another world war, which primarily meant that, the provisions and the structures established were designed to achieve world peace. The atrocities committed during the First and Second World Wars outraged the conscience of mankind, so the UN was established to prevent another war from occurring and to ensure and maintain world peace.[29] Key among the objectives of the UN was the development of friendly and cordial relations among member countries, advancing the progress of member countries, and respecting

[23] GH Hackworth, The peaceful settlement of international differences, *World Affairs 102 3* (Sage Publications Inc September 1939) 149-152.
[24] Goodrich et al., (n 19).
[25] RK Dixit, Non-Member States and the Settlement of Disputes in the Security Council, *The University of Toronto Law Journal 12 2* (University of Toronto Press 1958).
[26] League of Nations Covenant (1920).
[27]Ibid, Article 12 ("The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to enquiry by the [League of Nations] Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. . .").
[28] C Fenwick, The failure of the League of Nations, *The American Journal of International Law* (1936) 506; W Nigel, The legacy of the League of Nations: Continuity or Change?" *Revista Espanola de Derecho Internacional (2019)* 277-278.
[29] W Detley and J Muller, 'The United Nations at Sixty: Getting Serious with Conflict Prevention' *Die Friedens-Warte* (2005) 333-334.

the fundamental freedoms of all the people of the world.[30] The UN is a unique international organisation, due mainly to its Constitutive Charter and broad membership from all the regions of the world. Apart from the Holy See and Palestine which are not members of the UN, but do have observer status,[31] 193 countries of the world are members.

The development of the Constitutive Charter of the UN has also led to the promulgation of several international conventions, treaties and instruments to regulate the relationship between states, promote international relations and also to advance the protection of fundamental human rights and rule of law to ensure global peace and security. Significant among these are the Bill of Rights which is made up of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCRs) and the International Covenant on Civil and Political Rights (ICCPRs).[32] The UDHR is an important international convention because it contains provisions that takes care of the basic entitlements of humanity. It enjoins all members of the UN to ensure that, human rights are applied and enjoyed by all members of the human race regardless of race, colour, nationality, religion or social status.[33] The Charter has played a significant role in maintaining the sovereignty of all the member states, by prohibiting the use of force.[34]

The "Congress of Nations, for the Peaceful Adjustment of all International Disputes"[35] described war as follows and put mankind to this challenge:

> That a little reflection must convince everyone, that war, like every other wrong custom, may be abolished by the right use of appropriate means. Its continuance depends entirely on the will of men. It exists solely because they choose it; and, whenever

[30]C Burnham, 'What is the purpose of the United Nations'? *The Annals of the American Academy of Political and Social Science* (1947) 1 3-4; L Dolivet, *United Nations: A Handbook on the New World Organization* (1946) 15-23.
[31] G Mower, *Observer Countries: Group Members of the United Nations* (1966) 266-277.
[32] G Bennette, Dignity and Governance: The Universal Declaration of Human Rights in the book *Technicians of Human Dignity* (2016) 13-19; Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21st Century World* (2016) 357-359.
[33] United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action *International Legal Materials* (1993) 1161-1670.
[34] M Newitt, Climate Change and the Specter of Statelessness, *Georgetown Environmental Law Review 35* (2023).
[35] The Advocate of Peace, "A congress of Nations, for the Peaceful Adjustment of All International Disputes (1837-1845)" *2 10* (Sage Publications, Inc. November 1838) 121-132.

> that choice shall be changed, the practice must of necessity come to an end at once, and forever. It is a foul libel on mankind to suppose, that their war-sentiments cannot even by the gospel be changed into a permanent, universal preference of peace. There is nothing in their passions or habits; nothing in the structure of society or government; nothing in the nature, long continuance, and deep inveteracy of this custom; nothing in all the influences wages been accumulating in its support; nothing in the past history, the present condition, or the future prospects of our race, to forbid the hope of its entire abolition.

This perspective emphasises human agency, moral transformation, and the power of collective choice in achieving lasting peace.

The peaceful settlement of international disputes is deeply rooted in the fundamental principles of international law, particularly sovereignty, non-interference, self-determination and the prohibition on the use of force. The UN Charter's Article 2(3) and Article 33(1) specifically mandate states to resolve disputes through peaceful means, reinforcing the principles of *pacta sunt servanda* (agreements must be kept) and good faith. Furthermore, customary international law emphasizes the duty of states to negotiate, mediate, or arbitrate conflicts, aligning with the principles of equality, reciprocity, and non-discrimination. By upholding these principles, international law provides a framework for states to resolve disputes peacefully, promoting stability, justice, and cooperation within the global community. Effective implementation of these principles is crucial for preventing conflict escalation and fostering durable peace.

ESTABLISHING THE FUNDAMENTAL PRINCIPLES UNDER INTERNATIONAL LAW

International law developed to fill the vacuum left by the "medieval order" that was used to create legal relations between countries in Europe.[36] The creation of the "international legal personality" of the various independent countries was a key requirement for the development of international law.[37] Moreover, the sovereignty of states was also considered crucial for the successful creation

[36] Territorial Integrity and Political Independence; see also History of International Law, Ancient Times to 1648.
[37]Max Planck Encyclopedia of Public International Law www.mpepil.com.

of international law.[38] According to the Permanent Court of International Justice (PCIJ), a state is said to be 'Independent' when it has the authority to decide on matters 'economic, political, financial or other' as stated in the advisory opinion of the court in the *Customs Régime case*[39] between Germany and Austria – and the said state must also have the authority to exercise its powers on the frontiers of the state. The very essence of the state is also stated under the "*Montevideo Convention on the Rights and Duties of States*" of 1933,[40] which emphasises the linkage of a "defined territory and a permanent population, a government, and capacity to enter into international relations" as the core attributes of a state.

The most important principle under the Charter of the UN is the 'sovereign equality' of members. The UN Charter stipulates the prohibition of any threat on the use of force 'against the territorial integrity or political independence of any state',[41] and the sovereignty of states, which must be respected by all and to which there should not be any interference.[42] All of these are deeply rooted in the geography of the state. As intimated by the UN Secretary-General at the General Assembly in 2004, international law emphasises equality of all states as a fundamental requirement in world affairs. So, at the international level, "all states – strong and weak, big and small – need a framework of fair rules, which each can be confident that others will obey. Fortunately, such a framework exists. From trade to terrorism, from the law of the sea to weapons of mass destruction, states have created an impressive body of norms and laws".[43] International law is provided for in the *Statute of the International*

[38] History of International Law 1648 to 1815; History of International Law 1815 to World War I. Max Planck Encyclopedia of Public International Law www.mpepil.com.
[39] *Customs Régime Between Germany and Austria*, Advisory Opinion Series A/B No 41 (5 September 1931) 12.
[40] Article 1 reads: 'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states)" LNTS No. 3802.
[41] Article 2 (4) of the United Nations Charter adopted on 26 June 1945 and came into force (24 October1945).
[42] Ibid, Article 2(7).
[43] "Address by Kofi Annan at the opening of the General Debate of the 59th Session of the General Assembly New York (September 2004)" available at http://www.un.org/Pubs/chronicle/2004/issue3/0304p4.asp.

Court of Justice (1945).[44] Further, in the well-known "*Lotus*"[45] case, the Permanent Court of International Justice" states as follows:

> International law governs relations between independent states. The rules of law binding upon states emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between co-existing independent communities or with a view to achievement of common aims.

The primary significance of international law is the establishment of a 'regime" to regulate the relationship that should exist among states. Fundamentally, international law confers 'legal superiority' to the territorial sovereignty and the security of the state.[46] International law, most importantly is created by international agreements, which establish "civilised practices" that bind nation-states after they have ratified and signed them.[47] It is these rules and practices which stipulate laid down 'patterns of conduct' that states are under obligation to honour at the international level.[48] According to Kiss and Shelton,[49] international law is seen as the "regime of rules that binds states in the global arena and regulate how states relate to each other".

International law consists of "rules and principles of general application dealing with the conduct of states and international organisations and with their relations *inter se*, as well as with some of their relationships with persons, whether natural or juridical".[50] Hobbes argues succinctly in The Leviathan on the need to have a sovereign authority with the power to make binding decisions to ensure international security as follows:[51]

> And covenants, without the sword, are but words and of no strength to secure a man at all. Therefore, notwithstanding the

[44] Article 38 (1) of the Statute.
[45] *The S. S. Lotus*, PCIJ Ser. A (No 10 1927).
[46] Y Roznai, The insecurity of human security, *Wisconsin International Law Journal* (2014) 32, 95.
[47] MN Shaw, *International law* (7th edn. New York CUP 2014).
[48] Ibid.
[49] A Kiss and D Shelton, *Guide to international environmental law* (Leiden: Brill (2007).

[50] American Law Institute, Restatement of the Law, The Foreign Relations Law of the United States (3rd edn. 1988) para. 101, 222.
[51]T Hobbes, The Leviathan II XVII 2 www.oregonstate.edu/instruct/phl302/texts/hobbes/leviathanc.html#CHAPTERXVII.

> laws of nature (which everyone hath then kept, when he has the will to keep them, when he can do it safely), if there be no power erected, or not great enough for our security, every man will and may lawfully rely on his own strength and art for caution against all other men.

Brierly has also intimated the need for a binding authority at the international level: "Man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live". Scott[52] has opined that one key characterisation of governance at the global level in the last century is that it is "rule-based" and that in modern times, this rules-based global order is underpinned by international law. One of the issues that has confronted humanity up to today is the law regarding war and how it should be resolved by international law.[53] Grotius placed all of the international law under the *De Jure Belli ac Pacis*. Grotius quoting Cicero intimated that "there is no middle ground between peace and war". The House of Lords speaking through Lord MacNaghten in *Janson* v. *Driefontein Consolidated Mines Ltd*[54] stated it succinctly as follows:

> I think the learned counsel for the respondent was right in saying that the law recognises a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither one thing nor the other-neither peace nor war.

International law has grown in the last century to include a "growing body of anthropological research on its principles and practices". This has helped social scientists, activists, and lawyers to understand how international law develops and works.[55] The principal frameworks of modern international law hinge on the following: how to deal with war, the treatment of the combatants engaged in the war as well as non-combatants and the international peace and security; the peaceful settlement of disputes; economic arrangements and trade

[52] SV Scott, *International law in world politics: An Introduction* (3rd edn. 2017).
[53] PC Jessup, Should international law recognise an intermediate status between peace and war? *The American Journal of International Law* 48, 1 (January 1954) 98-103.
[54] [1902] A.C. 484
[55] SE Merry, Anthropology and international law First published online as a Review in Advance (27 April 2006). The Annual Review of Anthropology is online at anthro.annualreviews.org.

agreements; the regulation of the global commons such as space, polar regions, and the oceans; environmental issues; the law of the sea; and human rights.[56]

Aside from the principle of the sovereignty of nations, another key principle is non-interference. This principle prohibits states from intervening in the internal or external affairs of other states. This respects territorial integrity, political independence, and sovereignty. The UN Charter's Article 2(7) and the 1970 Declaration on Principles of International Law reaffirm this principle. States are barred from coercion, subversion, or intervention in internal conflicts, safeguarding national autonomy.

Self-determination empowers people to freely determine their political status and pursue economic, social, and cultural development. This principle rejects colonialism, foreign domination, and oppressive regimes. The UN Charter's Article 1(2) and the 1966 International Covenant on Civil and Political Rights enshrine self-determination. Nations recognize autonomy, independence, and national identity.

The prohibition on the use of force bans threats or aggression against territorial integrity or political independence. Peaceful dispute resolution, non-aggression, and self-defense are emphasized. The UN Charter's Article 2(4) and the 1928 Kellogg-Briand Pact establish this principle. Military intervention is restricted, except for self-defense or UN-authorized actions.

These interconnected principles of international law regulate state interactions, ensuring national sovereignty, territorial integrity, and global cooperation. They underpin international relations, fostering diplomacy, peace and stability. Effective implementation relies on adherence by states, international organizations, and the global community.

JUS COGENS NORMS

There are some key principles in international law that are known and accepted in all jurisdictions, which have become settled practices and known as customary law, *jus cogens* –which literally translates as (compelling law), in the same way as much as 'informal law and custom' do form the fundamentals for the social ordering of norms in communities.[57] *Jus cogens* norms are principles that have become settled very much to an extent that, they need not

[56] Merry (n 66).
[57] Nader 1969, 1990; Nader & Todd 1978.

be enforced in the day-to-day scheme of things and they do not depend on consent. The Vienna Convention of the Law of Treaties 1969, defines international agreements that have become *jus cogens* norms as those "accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted."[58] Some of the norms of international law, generally proceed from "nonbinding resolutions or statements of general principles" typical among these are the UDHR, ICCPRs, as well as the ICESCRs which have become settled practices over time through UN resolutions and discussions.

States become bound by international treaties and are obliged to comply with its terms after ratification. Further, non-binding declarations and treaties may in the future become crystallised and binding.[59] The world has gone through a lot of change since the end of the Cold War, which has also culminated in significant changes in international law. In so far as the international scene is made up of sovereign states, international law was seen as a peaceful means of resolving all differences.[60] The key features of the state are catered for under international law, including its special 'rights and privileges'.[61] Moreover, as states promulgate laws to govern themselves, their consent must be sought before any international document can bind it. Hersch Lauterpacht has opined that international law should function principally to bring peace to all nations and the protection and promotion of fundamental human rights.[62]

This perspective has been buttressed by Hans Kelsen,[63] whose works include "Peace through Law", which emphasises that the maintenance of international peace could be attained through patience and commitment to civilised international norms and legal institutions such as international tribunals and arbitration fora. Kelsen[64]emphasised that, "He who wishes to approach the aim

[58] Art. 53, Vienna Convention on the Law of Treaties 155 (23 May 1969) 331 U.N.T.S. quoted in Satterthwaite (2005) 43.
[59] Bederman 2001 p 27.
[60] O Kessler, The same as it never was? Uncertainty and the changing contours of international law *Review of International Studies* 37 5 (Cambridge University Press December 2011) 2163-2182.
[61] Kiss & Shelton (n 58)
[62] H Lauterpacht, The Grotian Tradition in International Law, 23 *Brit. Y.B. Int'l Law 1, 51* (1946).
[63] H Kelsen, Peace through law (1944); ME O'connell, Peace and war, In *The Oxford Handbook Of The History of international law* 272 (Bruno Fassbender & Anne Peters eds. 2012).
[64] Ibid.

of world peace in a realistic way must take this problem quite soberly, as one of a slow and steady perfection of the international order". In later stages, Grenville Clark and Lois Sohn[65] also researched into getting "World Peace through World Law" where they envisioned the establishment of a "World Conciliation Board", a "World Equity Tribunal", compulsory jurisdiction for the ICJ, transferring the important responsibility for the maintenance of international peace and security from the Security Council to the General Assembly, and the disarmament of the world undertaken by regional courts.

This resonates with the Kantian conception of the interlinked values of democracy and development. Hence, the significance of international institutions ensuring the survival of mankind such as "FAO, IFAD, UNESCO, WHO, ILO, World Bank, IMF, WTO DSM, UN Climate Change Regime and the UN Environment Programme, UN Oceans, the UN human rights committees" and UN programmes addressing sustainable development and poverty reduction.[66] A peaceful way for the settlement of disputes is at the heart of most legal systems and norms as well as sub-systems, whether in the national, regional, or international space.[67] The peaceful resolution of international disputes is fundamental to the continuous and uninterrupted process which helps solidify international law, where all states are treated equally with respect to the rights to be enjoyed.[68] Bailliet and Mujezinovic,[69] has also posited that one challenge faced by the world when articulating peace as a key pre-requisite within the international context is, what constitutes peace exactly and how to promote it through international law.

DEFINING THE CONCEPT OF "PEACE"

Peace is derived from the 'Latin word pax' which literally means "a pact, a contract, an agreement to end war or any dispute and conflict between two

[65] C Grenville and LB Sohn, "World peace through world law" (1958).
[66] Bailliet (n 45) 308-312.
[67] FG von der Dunk, Space for dispute settlement mechanisms - dispute Anisms - Dispute resolution mechanisms for anisms for space? A few legal considerations (University of Nebraska Lincoln 2001).
[68] Pinteală (n 49).
[69] CM Bailliet and KL Mujezinovic eds. (2015).

people, nations or antagonistic groups of people".[70] According to Einstein,[71] "Peace is not merely the absence of war, but the presence of justice, of law and order – in short, of government." Peace, consequently is seen as "a state of harmonious relations and the absence of violence".[72] The concept of peace also involves the inculcation of "nonviolent" values as part of the civilised practices of human behaviour in society.[73] Fundamentally, peace connotes the existence of affairs where there are no antagonisms between societies and intractable conflict, the absence of "aggressive and disturbing patterns" of life in society, and the nurturing of respect and tolerance for the rights of others.[74]

Scholars in the field of peace studies have placed a distinction between positive and negative peace. Galtung[75] viewed positive peace as an occurrence in a society where the human family is integrated in such a way that there are no structures that perpetuate violence. Positive peace entails "social justice", where all the causes of violence in the social, economic, and political fronts in society have been eliminated.[76] This also involves respect for fundamental human rights and the rule of law. Structural violence hinges on instances within the society where there are unfavourable policies, and discriminatory practices which put the individual in a suffering mode.[77] Negative peace entails the absence of intractable violence, 'physical or direct violence', while positive peace refers to a situation in life where there are just and favourable conditions for an individual's development.[78] From this perspective, it means there should not be institutions and structures that maintain violent behaviours. Societal violence should also be absent, and the existing social structures should be geared towards inculcating values of fairness, justice, and social well-being in individuals within the society.

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[70] K Nakamura, Art Education for Peace─ John Dewey's view of intercultural experience after his visit to Japan in 1919, *Bulletin of the Graduate School of Education* 21 67 (Hiroshima University Learning and curriculum development December 2018) 73-81.
[71] A Einstein, Einstein on Peace, Nathan and Norden (Eds) (New York Schocken 1968).
[72] KA Tuffuor, Peace, justice and security in Ghana: The need for peace education *Elsevier* 3 (World Development Sustainability 2023).
[73] Nakamura (n 90).
[74] Ibid.
[75] Galtung, 1996a, VIII
[76] Ibid.
[77] D Hicks, Education for peace: principles into practice *Cambridge Journal of Education* 1, 17 (February 1987) 3-12.
[78] Tuffuor (n 92).

Peace also entails an environment characterised by the development of "social, economic and political justice" which fosters the development of 'positive peace'.[79] Ibeanu[80] buttressed this when he stated that peace is also "sociological", and could be attained by citizens in situations where there are no antagonisms in society and people are able to go about their objects in life without obstacles. Political peace denotes situations where the institutions in society become mature and perform their key functions in a creditable manner without any hindrance.[81] Peaceful coexistence resonates more with "negative peace" than "positive peace", and its fundamental components were incorporated within the UN Charter[82] and the 1970 "UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States", which is now considered customary international law.[83]

Galtung's general theory of "Peace by Peaceful Means",[84]is grounded on the notion of 'conflict' in his fundamental peace paradigm as follows:

> ...Conflict is much more than what meets the naked eye as 'trouble', direct violence. There is also the violence frozen into structures, and the culture that legitimises violence. To transform a conflict between some parties, more than a new architecture for their relationship is needed. The parties have to be transformed so that the conflict is not reproduced forever.

Peace theory stipulates two components of it, that is negative peace which refers to the "absence of war, prevention of war, termination of war, transition from war" as stipulated under the UN Charter:[85] "The second component is about positive peace, which encapsulates international relations, global cooperation, "social justice, respect for human rights, including equality and

[79] Hicks (n 97).
[80]O Ibeanu, Conceptualising peace: Introduction to peace and conflict studies in West Africa (Ibadan Spectrum Books Limited 2012) 3-14.
[81]E Rwamasirabo, Education for democracy, dialogue and peace. 2007 August 30. Retrieved from https://archive.unu.edu/globalization/2007/files/ws2_presentations_EducationForDemocracy.pdf (accessed on 09/04/2023).
[82]UN, Charter of United Nations (n 40).
[83] Bailliet (n 45).
[84] J Galtung, Peace by peaceful means: Peace and conflict, development and civilization, *Peace by Peaceful Means* (1996) 1-292.
[85] Article 2 (4) (n 40).

non-discrimination, and the elimination of structural violence that causes inequality, poverty, and exclusion" as advocated by Johan Galtung. This therefore calls for the need to pursue policies that enhance positive peace. Article 55 of the UN Charter stipulates that peace has 'inter- and intrastate' dimensions which makes it imperative to promote respect for fundamental human rights, which is a pre-requisite for peace.[86]

The aim of positive peace is to bring to the fore many social, economic, and political measures all of which are contingent on law.[87] As Schaller[88] has argued, "the establishment of conditions for a positive and durable peace is also inseparably linked to effectively guaranteeing human rights. The "UN Declaration on the Right to Peace"[89] underscores the positive realm of peace that involves "mutual understanding, cooperation, and socioeconomic development," and this resonates with the agenda of the UN, and "the world commitment to eradicate poverty and to promote sustained economic growth, sustainable development, and global prosperity for all, and the need to reduce inequalities within and among countries".

In 1975, Immanuel Kant's essay, "Toward Perpetual Peace: A Philosophical Sketch"[90] starts with pessimism, that humanity can only find eternal peace in a vast grave where all the horrors of violence or those responsible for them would be buried". Kant pioneered the modern definition of peace as developing from the 'state of nature among nations under a new form of cosmopolitan law based on a peaceful federation of all the peoples of the earth'.[91] Would it then really be impossible to obtain real peace even in the 21st century world? A fundamental objective of the modern international legal order, which is founded upon the Charter of the United Nations, is the maintenance of international peace and security.

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[86] Article 55 (n 40).
[87] C Rojas-Orozco, International Law in the Colombian Transition Book: International Law and Transition to Peace in Colombia *Assessing Jus Post Bellum in Practice Book* (Brill Nijhoff 2021).
[88]*Article 154, Congreso de la República de Colombia, Ley 1448 Ley de Víctimas y Restitución de Tierras.*
[89] UN General Assembly, 'Declaration on the Right to Peace,' Pub. L. No. A/hrc/res/32/28 (2016) 2–3).
[90] I Kant, "Toward perpetual peace: A philosophical sketch", in H.Reiss (ed.), Kant's Political Writings (Cambridge 1970) 105.
[91] J Bohman and ML Bachmann (eds.), Perpetual Peace: Essays on Kant's cosmopolitan ideal (Cambridge The MIT Press 1997) I.

The UN Charter[92] contains not less than 35 references to "peace" in which member states are to relate to one another in the international world underpinned by international law to protect all. Articles 1(1, 2), 2(3, 6), 11(1, 2, 3), 12(2), 15(1), 18(1), 23(1), 24(1), 26, 33(1), 34, 37(2), 39, 42, 43(1), 47(1), 48(1), 51, 52(1), 54, 73, 76, 84, 99, 106 emphases "peace", while peace and its derivations such as "peaceful", "pacific", "peace-loving" are also mentioned in at least nine other Articles of the Charter. These are Articles 1(1), 2(3), 4(1), 14, 33(1), 35(2), 38, 52(2, 3), 55). This is an ample testimony that the Charter was made to promote a peaceful world.

INTERNATIONAL LAW AND THE PEACEFUL SETTLEMENT OF DISPUTES

There are several means for the settlement of international disputes, which is crucial for the maintenance of international peace and security. The UN Constitutive Charter[93] stipulates as follows:

> That to maintain international peace and security it is necessary for the United Nations to take two kinds of measures: (a) to take effective collective measures to suppress acts of aggression; and (b) "to bring about by peaceful means, and inconformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The implicit premise of this provision in the charter is that, if disputes can be resolved through peaceful means which is acceptable to all the parties, then such a dispute will not degenerate to threaten international peace and security and further escalate into a war of aggression.[94] The general part of the "Definition of Aggression" reads as follows:[95] "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition". Under Article 2 of the 1974 Definition, "the first use of armed force by a State in contravention of

[92] UN Charter (n 40).
[93] Article 1 (1) (n 40).
[94]LB Sohn, In Theory Peaceful Settlement of Disputes and International Security (Accessed November 18 2022) Downloaded from HeinOnline.

[95] Article 1, Definition of Aggression.

the United Nations Charter constitutes prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.[96]

Further, Article 2 (3) of the UN Charter, places an obligation on all member states of the organisation to act in full compliance with the dictates of this provision to "settle their international disputes by peaceful means in such a manner that international peace and security and justice, are not endangered." In essence, the charter in its statement of purpose and enunciation of members' obligation, places emphasis on the linkages between "the maintenance of international peace, security, and justice." The Charter allows for the free choice of settlement methods and is clear on the objects to be achieved by such procedure.[97] Two main approaches in the settlement of international disputes are available, with the first being those agreed to bind the parties in treaties and conventions in the event of dispute settlement when they occur, and those put up by parties after a dispute has arisen.[98] Where the parties themselves have devised a specific procedure for the settlement of an issue, and the disagreement could be resolved by either of the two approaches, a party can elect to use any of the two. If the parties to a dispute have accepted in advance a particular procedure for the settlement of specified categories of disputes, and a dispute falls within one of these categories, any party to the dispute can unilaterally submit the dispute to that procedure.[99]

In some instances, agreements would have to be reached by the parties to the dispute on which procedure to be adopted before one could be selected. However, good faith negotiations, diplomatic settlement, conciliation, and arbitration are some of the procedures to be adopted in the settlement of disputes.[100] According to the Manila Declaration on the Peaceful Settlement of International Disputes,[101] which the General Assembly of the UN approved in

[96] UN GA Res. 3314 (XXIX), Annex.
[97] Un Charter (n 40).
[98] Ibid.
[99] Sohn (n 114).
[100] Sohn (114).
[101] UN General Assembly, "Manila Declaration on the Peaceful Settlement of International Disputes (1982)".

1982, "states shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes" by negotiation or other peaceful means of their own choice. Other dispute settlement methods that the Charter sanction are "consultations, good offices, mediation, fact-finding, inquiry, and judicial settlement". Moreover, the Security Council established under Article 23 of Chapter V and Article 36 of the UN Charter to also make recommendations to the disputing parties "appropriate procedures or methods of adjustment" and to admonish parties to the International Court of Justice for the just settlement of legal disputes.

The Security Council has the mandate of keeping the peace under Chapter 5 of the Constitutive Charter,[102] in situations where the parties are unable to resolve their differences on their own and may proffer a solution, especially in instances where the said conflict has the tendency to jeopardise international peace and security. Article 33 (1)[103] under Chapter VI on the settlement of disputes states as follows:

> 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
>
> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means. The Security Council is enjoined to abide by the dictates of the charter that the solution to the problem as stipulated supra should not compromise "the principles of justice and international law.

The 1970 General Assembly Resolution established the "friendly relations among states."[104] The International Court of Justice (ICJ) reflected the customary international law in the Court's decision on *Military and*

[102] UN Charter (n 40).
[103] UN Charter (n 40).
[104] GA Res. 2625 (XXV) of 1970, "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

Paramilitary Activities in and against Nicaragua.[105] Article 17 of the Declaration[106] emphasised the "principle of non-intervention in matters within the domestic jurisdiction of any state," including that:

> [n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. … No State may use or encourage the use of economic, political or any other type of measures to coerce another. State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

From this viewpoint, it could be stated that the declaration sought to prohibit intervention in the domestic affairs of independent states, even beyond the territorial boundaries of the state, which is crucial to the principle of the "sovereignty of the state". The Bandung Declaration on principles for the Settlement of all international disputes by peaceful means, such as negotiations, conciliations, arbitration, or judicial settlement as well as other peaceful means of the parties was also adopted by the Foreign Policy Committee of African countries which had just become independent. This resonates with Article 1 of the Charter of the UN. This was adopted by the first Conference of African States that had just become independent in April 1958 in Accra.[107] Applications for membership to the UN in the first decade were sometimes rejected by the UNSC purely for political reasons. In some instances, they were couched as "bona fide legal considerations". First, either the sovereignty of the state was in doubt (in the case of Jordan, and Ceylon),[108] and secondly, the state was not "peace-loving or willing to carry out its obligations under the Charter" (in the case of Albania, Bulgaria, Hungary, and Romania),[109] or that the state in question is incapable of carrying out the obligations enshrined under the Charter (in the case of the Mongolian People's Republic).[110]

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[105] *Nicaragua v United States of America* Merits, Judgment [1986] ICJ Rep. 14 at para. 191.
[106] UN, "Friendly Relations among states Declaration (1970)".
[107] Awakening Africa (Accra 1963) p 85).
[108] DW Greig, The advisory jurisdiction of the International Court and the settlement of disputes between states *The International and Comparative Law Quarterly 15, 2* (Cambridge University Press April 1966) 325-368.
[109] Ibid.
[110] Ibid.

The intervention of international NGOs over the years has also led to the "Third Committee of the General Assembly" approving the "Declaration of the Right to Peace" in 2016. It simply rehashed the UN Charter's principles on the "prohibition of the threat or use of force against the sovereignty of another state, ensuring the peaceful settlement of disputes, the obligation of nonintervention, cooperation, equal rights and self-determination of peoples, and sovereign equality". Moreover, it outlawed terrorism and stipulated in the following terms:

> peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognising that development, peace and security and human rights are interlinked and mutually reinforcing." It calls for attention to peaceful communication, [r]ecognizing that peace is not only the absence of conflict but also requires a positive, dynamic participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation, and socioeconomic development is ensured.

The "Declaration of the Right to Peace"[111] mandates states to be the key referents when it comes to the guarantee of the necessary architecture for the enjoyment of both internal and external peace. It is incumbent on states to ensure the implementation of "respect, promote equality and non-discrimination, justice and the rule of law, and guarantee freedom from fear and want as a means to build peace within and between societies". Article 4 stipulates an international system for the "promotion of institutional peace, strengthening both international and national institutions for Peace Education to strengthen relations among the people of the world, foster the spirit of tolerance, dialogue, cooperation and solidarity, invariably, establishing the rule of law within the international society".[112]

Article III of the Organisation of African Unity Charter[113] also emphasises peaceful settlement of disputes which states as follows:

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[111] *Article 2*.
[112] C Greenwood, The Practice of International Law Proceedings of the Annual Meeting 112 (American Society of International Law April 2018) 161-167.
[113] *Charter of the Organisation of African Unity*.

> The Member States, in pursuit of the purposes stated in Article II, solemnly affirm and declare their adherence to the following principles: 4. [Peaceful] settlement of disputes by negotiation, mediation, conciliation or arbitration. Furthermore, Article XIX provides that: Member States pledge to settle all disputes among themselves by peaceful means and, to this end decide to establish a Commission of Mediation, Conciliation and Arbitration, the composition of which and conditions of service shall be defined by a separate Protocol to be approved by the Assembly of Heads of State and Government. Said Protocol shall be regarded as forming an integral part of the present Charter.

In the peaceful settlement of disputes between nation-states, international law obliges member states to enter into negotiations geared towards ensuring peace and to submit all disputes to an international tribunal, a "board of arbitration or conciliation".[114] The failure of the League of Nations, coupled with horrendous violence with several million dead, motivates mankind now not to lean on the powers of the state, because in contemporary times international politics has been overshadowed by a myriad of "international institutions and nongovernmental organisations" that function principally in the promotion of social and economic cooperation.[115]

THE UN AND THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

There are two schools of thought when it comes to examining the contribution of the UN to the settlement of international disputes. The first group sees "a glass more than half full', with the potential of the UN to achieve more, if only the members will resort to the dispute resolution mechanisms stipulated under the Charter.[116] This group consists of the "institutionalist or functionalist" whose philosophical orientation is that the UN as an independent international

[114] The East China Sea: The Role of International Law in the Settlement of Disputes *Duke Law Journal* 4 (Published by Duke University School of Law September 1973) 823-865
[115] O Okoi, limits of international law: settlement of the Nigeria-Cameroon territorial conflict *International Journal on World Peace* 33, 2 (Published by Paragon House June 2016) 77-102.
[116] SR Ratner, Image and reality in the UN's peaceful settlement of disputes *EUR. J. INT'l L.* 6 426 (1995).

organisation can achieve more in the settlement of international disputes.[117] This is reinforced by Chapter VI of the UN Charter which dwells on the "pacific" resolution of international disputes. The other school consists of 'skeptics' of Chapter VI on the peaceful settlement of disputes who see the "glass nearly empty," who see the organisation as a failure.[118]

The functionalist group views the UN as successful in view of the various diplomatic achievements which it has been able to achieve, and the resolution of many disputes which had the potential to destabilise international peace and security.[119] Others include successful interventions in Kashmir, Cyprus, the Golan Heights, and elsewhere. They always see the UN as a unique international organisation for the ventilation of views which hitherto could have led to international crisis of big magnitude. Chapter VI of the UN Charter has become a 'shorthand' for all the activities that come under the settlement of international disputes and the maintenance of peace and security.[120] Article 1(1) of the UN Charter spells out the main object of the organisation as the maintenance of peace and eliminating threats to peace and bringing about the peaceful settlement of disputes in the world.

The same Chapter VI mandates the UN in general terms to resolve disputes through pacific means. This conforms with the obligation of all parties under Article 33 to resolve all disputes by peaceful means. The drafters of the Charter were mindful of the fact that, if the Security Council was given the power to investigate a matter first, that would whittle the responsibility of member states, and so this was put under Article 34.[121] However, the Charter places four responsibilities on the Council. First, to urge disputing parties to end any agreement through any of the "traditional peaceful means of settlement.[122] Second, the Council was also to investigate disagreements between parties and to determine its implications on international peace and security.[123] Thirdly, to make appropriate recommendations on 'procedures or methods of adjustment'

[117] Ibid.
[118] Ibid.
[119] Franck and Nolte, 'The Good Offices function of the UN Secretary-General', and Morphet, 'UN Peace-keeping and Election-Monitoring', in A Roberts and B Kingsbury (eds), United Nations, Divided World: The UN's Roles in International Relations (2 edition 1993) 143, 183.
[120] Ratner (n 139).
[121]LM Goodrich, E Hambro and AP Simons, Charter of the United Nations: Commentary and Documents (3d revised edition 1969) 259-60.
[122] Article 33(2) of the UN Constitutive Charter.
[123] Article 34 (n 40).

for the settlement of such disputes.[124] And lastly, but not least, to proffer appropriate settlement terms for the expeditious resolution of such disputes.[125] Further, under Article 38 of the Charter, the parties to the dispute can also reach the Council for a solution to the dispute at hand, and the Council can make recommendations. In the *Corfu Chanel* Case,[126] the Security Council recommended that Albania and Britain take their disputes concerning mines placed in the channel to the World Court.

The Council also recommended that India and Pakistan settle their row over Kashmir in a plebiscite to be done under the supervision of an administrator appointed by the UN. Through a Security Council resolution in 1948, it admonished Israel and the Arab States to lend their support to the UN mediator that was appointed to help the warring parties resolve their disputes.[127] The Council again made recommendations to the Netherlands and Indonesia to resolve their pending disagreement via the UN Commission for Indonesia.[128] Even though, the realists who support a stronger state are against Chapter VI, which they claim is the main reason why the UN cannot work efficiently as an international "peace actor", the institutionalists are however, appreciative of the significant role of the UN in ensuring international peace.[129] They also portend that, "but for the UN" the world would not have been enjoying the peace prevailing currently.[130]

With regard to the settlement of international disputes, paragraph (3) of Article 2 of the UN Charter promulgated in 1945 stipulates that "all Members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice are not endangered." The peaceful settlement of international disputes hinges on this. The article enjoins members of the UN to resolve their international disputes by peaceful means so as not to jeopardise international peace and security. Article 33(1) of the UN Charter stipulates the peaceful settlement of disputes as follows: "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional

[124] Article 36(1).
[125] Article 37 (2).
[126] UN Security Council Resolution 22 (9 April 1947 UN SCOR, Res. and Dec. 2nd Year 3, SINF/2/Rev.1 (I).
[127] Security Council Resolution 50 (May 29 1948) 20.
[128] Security Council Resolution 67 (January 281949) UN SCOR Res. 2, S/INF/3/Rev.1).
[129] Ratner (n 139).
[130] Ibid.

agencies or arrangements, or other peaceful means". This peaceful way of settlement of disputes is accepted as a binding principle of international law by African States.[131]

Further, the Organisation of African Unity Charter[132] places an obligation on Member states to resolve all their disputes in a peaceful way through the use of "negotiation, mediation, conciliation and arbitration". The coming into inception of the United Nations Convention on the Law of the Sea in 1982[133] ("UNCLOS"), has been one of the most remarkable developments in the peaceful settlement of international disputes, since members ratified the UN Charter as well as the Statute of the International Court of Justice.[134] The principle stated in article 2(3) of the Charter[135] is developed further and carried into Article 33, which provides as follows:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Even though the UN performs crucial functions in the world towards the advancement of human welfare, the framers of the Charter were convinced without a shred of doubt that, the organisation would be able to achieve much success if it is able to ensure peace in the world. The mandate to attain this primary objective was not conceived in narrow terms in San Francisco during the promulgation of the Charter.[136] The various governments that were represented at the conference to draft the Charter did not doubt that there was an imperative need for cooperation to promote human welfare in order to create the necessary conditions for international peace and security. It was also agreed by the participants at the conference that, the maintenance of international

[131] T Maluwa, The peaceful settlement of disputes among African states, 1963-1983: Some conceptual issues and practical trends, *The International and Comparative Law Quarterly* 38, 2 (April 1989) 299-320.
[132] Article 111 (4).
[133] UNCLOS coming into force on 16 November 1994.
[134]AE Boyle, Dispute settlement and the Law of the Sea Convention: Problems of fragmentation and jurisdiction *The International and Comparative Law* (1997) 37-5.
[135] UN Charter (n 40).
[136] Goodrich et al., (n 144).

peace and security was not only simply about the repression of violence. It was imperative that principles and procedures be adopted that would permit disputes to be settled and conflicting interests to be 'adjusted' through peaceful means without resorting to violence.[137]

On actions that could be taken by the Security Council to preserve international peace and security, Article 39 of the UN Charter emphasises that the Security Council, "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42 to restore international peace and security". Article 36(1) of the Charter[138] provides that: 'the Security Council may, at any stage of a dispute of a nature referred to in Article 33 or of a situation of a like nature, recommend appropriate procedures or methods of adjustment'. Paragraph 2 of the Article directs the Council to 'take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties'. Article 37(2) empowers the Council to recommend 'such terms of settlement as it may consider appropriate'. Moreover, Article 36 mandates the Security Council to recommend the modalities for settlement or the framework within which a settlement process may be undertaken. Article 37 enables it to directly recommend the terms of settlement in Article 1.[139]

On actions that come under the domain of self-defense, Article 51 stipulates that "nothing in the present Charter shall impair the inherent right of an individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security". These were deemed to be the only legitimate exceptions to war. The principles of non-intervention in the domestic affairs of member countries were further emphasised by the General Assembly declarations, such as the "Declaration on the Inadmissibility of Intervention" adopted by the UN[140] which made it unlawful to intervene

[137] Ibid.
[138] UN Charter (n 40).
[139] L Conant, "Whose Agent? The interpretation of international law in national courts," in Jeffrey L. Dunoff and Mark A. Pollack (ed.), Interdisciplinary perspectives on international law and international relations: The state of the art (Cambridge: Cambridge University Press).
[140] "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their independence and Sovereignty, G.A. Res. 20/2131 (XX), UN. Doc. A/Res/20/2131 (21 December 1965)".

either "directly or indirectly, for any reason whatever, in the internal or external affairs of any other State".

Article 43 sets a framework for the conclusion of agreements and arrangements between the United Nations Member States contributing to the maintenance of international peace and security and the Security Council. Article 52 of the UN Charter requires parties of regional dispute settlement arrangements to make every effort to achieve pacific settlement through such arrangements or the agencies (organisations) they create. Pellet[141] is of the view that there is "force-centric" which sees the obligation of peaceful settlement as a "corollary" to the non-use of force under Article 2(4) of the Charter. In the view of Brownlie, there is no obligation on parties under public international law to resort to the settlement of disputes; unless resorting to the use of force, the parties in dispute have the free will to decide on the method that is favourable to them.[142] As Pan explains, this view interprets Article 2(3) of the Charter to say that as long as States do not resort to force, they satisfy the obligation of peaceful settlement.[143] A second, "peace-centric" view places a premium on Article 33 of the UN Charter as the real source of the obligation of peaceful settlement.[144] Article 103 of the Charter stipulates explicitly as follows: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

THE INTERNATIONAL COURT OF JUSTICE (ICJ) AND PEACEFUL SETTLEMENT OF DISPUTES

The ICJ was established under the Statute of the International Court of Justice in 1945. The statute stipulates that the "International Court of Justice is established by the United Nations Charter as the principal judicial organ of the United Nations".[145] Only states that are party to the statute can bring disputes to the ICJ, while non-members need a recommendation from the Security Council approved by the General Assembly. It is made up of fifteen judges,

[141] Pellet, Peaceful settlement's "only real obligation is not to resort to armed force to settle disputes", para. 16
[142] Brownlie, Malcolm N. Shaw, *International law* (6th edition 2008) 701.
[143] J Pan, Toward a new framework for peaceful settlement of China's territorial and boundary disputes (2009) 50-51.
[144] R Higgins, Peaceful settlement of disputes, *Soc'y Int'l L*. 89 Proc. Ann. Meeting (1995) 293-296.
[145] Article 1 of the "Statute of the International Court of Justice"..

from different countries selected by the General Assembly and the Security Council from a list provided by national groups. Its jurisdiction spans as follows: (1) The subject matter of the dispute it submits is called contentious jurisdiction, and (2) Jurisdiction providing legal advice/advisory opinion is referred to as noncontentious jurisdiction. One of the example cases brought before the Court was the *North Sea Continental Shelf.*[146]

The ICJ is guided by a special framework called 'the Statute of the Court.' It is an annexure to the UN Charter, so once you become a member of the UN you are automatically a member. It performs a dual role, first as a world court, and second giving advisory opinions on questions of law at the request of the UN.[147] In some situations, disputes are sent to the ICJ taking into cognisance the necessary declarations under Article 36(2) of the Statute of the Court. It is crucial to note that, even though most of the member countries of the UN have accepted to be bound by the Court's judgment, some countries have been flouting the UN Charter[148] which stipulates as follows: 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party, and 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Chapter VII of the Charter mandates the Security Council to ensure peace and security. The Charter further stipulates what needs to be done to secure peace such as respect for fundamental human rights, economic and social development, and the peaceful settlement of disputes. These tasks are ascribed to different organs of the UN, and other functional bodies have been added over time. The ICJ's significance to maintain peace is not to rival the Security Council, but to adjudicate disputes between member states by the use of legal means.[149] Article 36 (6) of the Charter states that "legal disputes should as a general rule be referred by the parties to the ICJ in accordance with the provisions of the statute of the court". The Court's dockets in the past consist

[146] ICJ (n 168).
[147] K Askandar and C Sukim, Making peace over a disputed territory in Southeast Asia, *The Journal of Territorial and Maritime Studies* 3, 1 (Published by: McFarland & Company January 2016) 65-85.
[148] Article 94 (n 40).
[149] Higgins (n 167).

of cases concerning Spain and Canada, Qatar and Bahrain, Libya and the United Kingdom, Libya and the United States, Bosnia-Herzegovina and Yugoslavia, Iran and the United States, Hungary and Slovakia, Cameroon and Nigeria, Botswana and Namibia. Others include Paraguay and the United States, the United Nations and Malaysia, Germany and the USA, Indonesia and Malaysia, Guinea and the Congo, Congo v Uganda, Rwanda and Burundi, and Yugoslavia and various NATO states.[150]

Despite the obligations placed on states under Article 59 of the Statutes of the Court, which makes the judgments of the court binding on parties who are locked in disagreements, most member states have failed to comply with the binding judgments of the court. In such situations, the UN Charter mandates the "Security Council" to decide on the appropriate measures to take to give effect to the decision of the court. Regarding this, the International Court of Justice has been positioned in a positive mode in the resolution of intractable disputes.[151] It has been advocated that the most fundamental approach to settling disputes peacefully is by resorting to international law. In the decided case of *German External Debts,*[152] the ICJ intimated that the obligation on parties to find an amicable means towards the peaceful resolution of disputes is not always found in agreements negotiated earlier, but rather, "it does imply that serious efforts to move upwards must be made". Its mandate "to settle, in accordance with international law, legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it", places it in a crucial position when it comes to dispute settlement.

At a time when the General Assembly requested the ICJ to decide on the conditions an applicant state could be admitted to the UN, the Court outlined the following criteria:[153] The majority of the Court went on to hold that the conditions laid down in Article 4 (1) that, "an applicant must (1) be a state; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so" were exhaustive.

[150] Higgins (n 167).
[151] Chetail, 2003
[152] *German External Debts*
[153] DW Greig, The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States *The International and Comparative Law Quarterly* 15, 2 (April 1966).

In the Case Concerning *Military and Paramilitary Activities in and Against Nicaragua,*[154]which clarified the importance of the court in the UN system. The ICJ stated as follows:[155]

> The significance of this function of the Court cannot be over-estimated in this nuclear world in which peace is globally indivisible and the rest of the international community is genuinely concerned about war and conflict in any State. There is little doubt that world public opinion is an important factor which could be brought to bear upon the parties to the dispute.

The significance of the ICJ is linked with the achievements of the UN. It could be stated categorically that, international peace and security would have been negated but for the fact that these various UN institutions are there to ensure world peace, else the world would been have chaotic.[156] In a report to the 40th session of the UN, the Secretary-General emphasised that the UN was not established to resolve all the problems of the world. The Secretary-General emphasised the significance of the Court in maintaining international peace and security as he stated that, the Court helps ensure the "important principle of equality between states in international relations".[157] As opined by Rovine: ...weaker states derive an obvious advantage from legal settlement in disputes with more powerful opponents.... The strong give up much of their leverage in a contest of legal briefs and argumentation. This is precisely why many leading nations are not particularly anxious to establish a Court regime of peaceful change. The alternative of negotiation, even if within a treaty or general legal framework, provides an easier way to self-assertion and nation.

Research has shown that recognition of the ICJ alone has a pacifying effect on UN member states. Member States who use the court are able to achieve justice better, are able to avoid military conflicts, and are predisposed to settle their disputes in a "win-win situation".[158] Mitchell and Hensel[159] have intimated

[154] *Nicaragua v. United States of America* [1986] I.C.J. Rep.
[155] BS Chimni, The international court and the maintenance of peace and security: The Nicaragua Decision and the United States Response *The International and Comparative Law Quarterly* 35, 4 (Published by Cambridge University Press October 1986) 960-970.
[156] Chimni (n 178).
[157] UNGA Doc.A/40/553 Study on Concepts of Security: Report of the Secretary-General (1985) 36.
[158] Mitchell & Powell, 2011
[159] Mitchell and Hensel.

that, "ICJ judgments are substantial". The authors found out that, twenty-eight out of a total number of twenty-nine ICJ decisions that centered on "territorial, maritime, or river disputes" have been fully complied with by states. In a similar vein, Paulson opined that the majority of ICJ judgments bring finality to ongoing disputes that threaten international peace and security. The UN Secretary-General is on record as saying (1994) that "everyone is now well aware that differences and conflicts between States must be settled by recourse to law. It must, however, be acknowledged that international justice has not yet - far from it - become part of the customs of States." Judge Nagendra Singh, addressing the UN General Assembly, expressed the hope that:

> throughout the world, there might be an awakening of the people, that men might know the principles of law and become aware of the existence of international law, conscious of the fact that respect for judicial process is a cardinal virtue of mankind.

Judge Mohammed Bedjaoui, President of the Court, in his advisory opinion in the *Legality on the Use of Nuclear Weapons*[160] addressed the situation of mankind in the twentieth century in the following terms:

> Though endowed with reason, mankind has never been so unreasonable; its destiny is clouded over; its conscience is obscured; its vision is troubled and its ethical guidelines fall like dead leaves from the tree of life'. The Court, he said, had a part to play, however minimal, in the work of 'salvation for humanity'. It did, in the event, add unanimously a vital extra clause to its judgment. 'There exists an obligation to pursue in good faith and bring to a conclusion, negotiations leading to nuclear disarmament.

Need be to state here that, no institution in the contemporary world, is cloaked with such enormous power to provide such a significant explanation on this crucial issue, other than the World Court. The principles on the prohibition of the use of force were enshrined in the UN Charter right from the beginning to 'have a higher legal standing and character' as compared to other regulations and have settled to become part of customary international law. The UN Charter and international law prohibit the use of force and stipulate the peaceful settlement of disputes as an obligation on the international society. It has been

[160] *Legality on the Use of Nuclear Weapons.*

advocated that dispute settlement with the use of force should be made as a form of a resolution in the UNSC or the right of self-defence.[161] But, the caveat here is that this should be done only when there is not an avenue for resolving the dispute peacefully.[162]

SIGNIFICANCE OF INTERNATIONAL LAW TO INTERNATIONAL PEACE AND SECURITY

Hamza and Todorovic[163] intimates that international peace and security can be preserved at best under international law, hence the establishment of the "League of Nations in 1919 and the United Nations in 1945". The ICJ has heard approximately 180 cases since its 1946 creation,[164] the WTO has heard over 600 disputes, and 98 foreign investment cases involving more than 140 states which have produced more than a thousand arbitral proceedings.[165] But, for the peaceful means adopted by these international institutions in the settlement of these disputes, some of them could have threatened "international peace and security". The most fundamental importance of international law is the promotion of international peace. In the quest to achieve this noble objective, a regime must be in place that ensures the peaceful settlement of international disputes. This is because the 'art' of resolving international disputes in our current world is a "multidimensional and fascinating field".[166]

Significantly, international law has developed to a stage where "it does not exhaust itself in correlative rights and obligations" that exist between states but also gives due recognition to the interests of the international community, inclusive of states and humanity.[167] International law provides crucial guiding principles for a peaceful co-existence. Further, it provides the framework for identifying states and organisations, and the 'nationality' of individuals and

[161] Cheol-Young Choi, Legal tasks of the End-of-War declaration and the peace treaty in the Korean Peace Process, *Humanitäres Völkerrecht*: *Journal of International Law of Peace and Armed Conflict* 2, 1/2 (Published by *Berliner Wissenschafts-Verlag* 2019) 89-106.
[162] Ibid.
[163] Hamza and Todorovic, 2017
[164]ICJ, List of All Cases (https://www.icj-cij.org/en/list-of-all-cases).
[165]WTO, Dispute Settlement: The Disputes https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_ e.htm.
[166] EJ, "What is the Use of International Law? International Law as a Century Guardian of Welfare", *Michigan Journal of International Law* 28 (2007) 815-817.
[167] B Simma, Universality of International Law from the Perspective of a Practitioner *The European Journal of International Law* 20, 2 (EJIL 2009) 265 – 297.

legal entities within the state.[168] Again, international law helps define the 'political and territorial limits' and the jurisdiction of states, and the immunities to be enjoyed in the jurisdiction they are.[169] International law helps provide the grounds for the civil responsibility of states for breaches of international law, as well as the appropriate means of redressing such challenges as and when they occur.[170] Moreover, international law provides the 'principles and modalities' that govern the peaceful resolution of disputes that arise between States.[171]

Consequently, the existence of a dispute is the foremost condition for the ICJ to exercise its jurisdiction and, it is not sufficient for a party to claim that no dispute exists, since "whether there exists an international dispute is a matter for objective determination" by the Court.[172] Through international law and the peaceful settlement of disputes, many 'maritime delimitation' cases have been resolved in accordance with Annex VII of the United Nations Convention on the Law of the Sea. These include cases such as the Southern Blue Fin Tuna case,[173] Barbados and the Republic of Trinidad and Tobago,[174] and the case of Guyana and Suriname.[175] The other category of cases of arbitration involves those that were heard on ad hoc special agreements or compromises. Since 1945, examples of such cases include the Rann of Kutch Case (India and Pakistan),[176] Anglo-French Continental Shelf Case,[177]and the Case concerning the Air Services Agreement of 27 March 1946.[178]

In addition to the above, others that had the potential to threaten "international peace and security" include Guinea-Guinea (Bissau) Maritime Delimitation Case,[179] the Dispute concerning Filleting within the Gulf of St. Lawrence

[168] I Brownlie, The Peaceful Settlement of International Disputes, The Wang Tieya Lecture in Public International Law (Published by Oxford University Press 3 July 2009).
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172]*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase), Advisory Opinion, I.C.J. Reports 1950, p. 74).
[173] *Australia* and *New Zealand v. Japan*) Award dated (August 4 2000) 119 ILR, 508.
[174] Permanent Court of Arbitration (Award dated 11 April 2006) www.pca-cpa.org/showpage.asp?pag_id=1029) Past Cases.
[175] Award dated (17 September 2007) 47 ILM 164.
[176] Award dated (19 February1968) 50 ILR 2.
[177] Award dated (30 June 1977) 54 ILR 5) (3).
[178] *United States* v *France* Award dated (9 December 1978) 54 ILR 303.
[179] Award dated (14 February1985) 77 ILR 635.

(Canada/France)[180], the Taba Case (Boundary Pillars between Egypt and Israel)[181], Rainbow Warrior Case (New Zealand v. France),[182] St. Pierre et Miquelon (Maritime Delimitation between Canada and France),[183] Determination of Maritime Boundary (Guinea-Bissau v. Senegal) were all resolved peacefully.*[184]* After the award, Guinea-Bissau tried to resort to the ICJ to get a "declaration of nullity" in the award but was not successful.[185] Further, other cases worthy of mention here also include Heathrow Airport User Charges (United States–United Kingdom),[186] and, lastly, the Red Sea Islands Case (Eritrea and Yemen).[187]

Between 1946 and 1984, the ICJ dealt with 110 cases and gave 24 advisory opinions upon requests by members or the UN itself.[188] In the evaluation of the Court in general, Ian Brownie has argued that "the prognosis is good". Anglo-Norwegian Fisheries,[189] Gulf of Maine case, [190]Chad v. Libya.[191] Denmark v. Norway,[192] Cameroon v. Nigeria[193] were all settled through peaceful means. Brownie has posited that the system of peaceful resolution of disputes between states is an important aspect of "the universe of international relations."[194] As the Covenant of the League of Nations and the Kellogg–Briand Pact were unable to prevent the Second World War, it was an aim of those drafting the Charter of the United Nations to remedy the shortcomings of both instruments.[195] Article 2(4) has been referred to as "the cornerstone of peace in

[180] Award dated (17 July 1986) 82 ILR 591.
[181] Award dated (29 September 1988) 80 ILR 224.
[182] Award dated (30 April 1990) 82 ILR 499 (Issues of State responsibility in re ruling of Secretary-General).
[183]Award dated (10 June 1992) 95 ILR 645.
[184]Award dated (July 1989) 83 ILR 1.
[185] ICJ Reports (31 July1991) 53.
[186] Award dated (30 November 1992) Suppl. Decision (November 1 1993) 102 ILR 215.
[187] Award dated (9 October 1998) 114 ILR 1(Phase One) Award dated (December 17) 1 119 ILR 417 (Phase Two).
[188] Ian Brownie (n 197).
[189] ICJ Reports (1951) 116.
[190] ICJ Reports (1984) 246.
[191] ICJ Reports (1994) 6.
[192] ICJ Reports (1993) 38.
[193] ICJ Reports (2002) 303.
[194] Z Trávníčková, The International Law Commission and the International Law Codification Market Seventy Years of the International Law Commission Book, Drawing a balance for the future (The United Nations Published by Brill 2021).
[195] Y Dinstein, War, aggression and self-defence (3rd edn. Cambridge Cambridge University Press 2001) 116.

the Charter", "the heart of the United Nations Charter" or the "basic rule of contemporary public international law".[196] Randelzhofer[197] has specified that States which are not members of the United Nations "are protected, though not bound" by Article 2(4).

The 1970 Friendly Relations Declaration explained the prohibition of the use of force in the following terms: Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts when the acts referred to in the present paragraph involve a threat or use of force.

These provisions captured in the Friendly Relations Declaration were recognised by the ICJ when it referred to them in its *Nicaragua* Judgment of 27 June 1986, in explaining the prohibition of the use of force in customary international law. These have also been confirmed in explicit terms by the "United Nations Security Council in Resolution 672 (1990)" and by the ICJ in the 2004 *Wall Advisory Opinion*. Professor Antonio Cassese[198] explained these opinions of these important institutions of the UN as follows:

> At present general international law has departed markedly from the principle of effectiveness: *de facto* situations brought about by force of arms are no longer automatically endorsed and sanctioned by international legal standards. At present the principle of legality is overriding – at least at the normative level – and effectiveness must yield to it.

One of the significant roles of international law is to ensure the maintenance of stability in international relations that underpin efficient governance of actions by aggressive states in their relations with others. The first of these crucial

[196]P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th London and New York Routledge 1997) 309.
[197] A Randelzhofer, "Article 2(4)", in Simma B. (ed.), *The Charter of the United Nations: A Commentary* (Oxford Oxford University Press 1994) 115.
[198]A Cassese, "Considerations on the international status of Jerusalem", 3 *Palestinian Yearbook of International Law* 22 (1986).

norms is the principle of peaceful settlement of disputes.[199] International disputes are bound to occur in international interactions. But, when they do occur, it is incumbent on parties to resort to the UN Charter to settle such disputes in a peaceful manner.[200] Since the establishment of the UN, the international community has made important efforts to prohibit the use of force in the settlement of disputes by promoting a peaceful approach.[201] "Peaceful non-settlement" is an approach where the parties to the dispute agree to put their claims on freeze while sticking to their legal claims. It is a crucial supplement to the principle of peaceful settlement of disputes and plays a significant role in the resolution of longstanding disputes.[202] History has shown that the international community regards international law as a means to ensure the establishment and preservation of world peace and security. The maintenance of international peace and security has always been the major purpose of international law.

The direct cause of war and violence always emanates from a dispute between states, and it is in the interest of peace and security that disputes should be brought to a peaceful end. Methods and procedures for the peaceful settlement of disputes have been made available under international law.[203] It is through international law that important information about peaceful approaches to territorial disputes is established.[204] Alain Pellet has described the law of peaceful settlement in contemporary times as "weak and imperfect".[205] Some scholars are also of the view that the obligation of peaceful settlement of international disputes is not feasible.[206] But, in all, it is pivotal to resort to

[199] A Hsiu–An Hsiao, Unilateral actions and the rule of law in maritime boundary disputes *Asian Yearbook of International Law Book* 22 Seokwoo L, Hee L, Lowell Bautista and Keyuan Z (Published by Brill 2016).
[200] J Crawford, The current political discourse concerning international law *The Modern Law Review* 81, 1 (January 2018).
[201]UN (n 40).
[202] H Yao, Non-settlement as part of efforts to build a community with a shared future for mankind *Social Sciences in China* 42, 4 (2021) 38-54.
[203] A M Hamza and M Todorovic, Peaceful settlement of disputes, *Global Journal of Commerce and Management Perspective* (Published by Global Institute for Research & Education 2017).
[204]B Hollis and E Tikk, Peaceful settlement in International Law.
[205] A Pellet, Peaceful settlement of international disputes, in Max Planck Encyclopedia of Public International Law R. Wolfram (ed.) (2013) para. 12.
[206] C Tomuschat and M Kohen, Flexibility in international dispute settlement (2020).

international dispute settlement mechanisms in order not to threaten global security.

International law provides a common set of standards that help in the evaluation of claims by opposing parties.[207] This is key when it comes to the resolution, settlement awards, and the final coordination of the challenges that centres on territorial disputes and this makes it very clear in the identification of the several pathways to settle the 'disputed territory' between the parties by experts.[208]

CONCLUSION AND RECOMMENDATIONS

This paper examined the role of international law in the peaceful settlement of disputes. It is argued that international law and its enforcement agencies provide an effective framework for peaceful dispute resolution between nations, fostering global security and cooperation. Using the desktop approach, various international treaties and institutions are examined in the context of their implications for dispute settlement. It is deduced that the settlement of international disputes is crucial for maintaining global peace and security. The UN Charter emphasizes resolving disputes peacefully, through negotiation, mediation, conciliation, arbitration, and judicial settlement. It obliges member states to prioritize peaceful means, respecting sovereignty, non-interference, and self-determination. Various declarations, including the Manila Declaration and the Declaration of the Right to Peace, reinforce these principles. International law encourages cooperation, equal rights, and socioeconomic development, with institutions like the International Court of Justice and organizations promoting peaceful dispute resolution. Effective implementation relies on states' adherence to these principles, ensuring global stability and security.

The United Nations plays a crucial role in settling international disputes, with its Charter emphasizing peaceful resolution through negotiation, mediation, conciliation, arbitration, and judicial settlement. Two schools of thought assess the UN's contribution: institutionalists, who see the potential for success if members utilize dispute resolution mechanisms, and skeptics, who view the organization as ineffective. Despite differing views, the UN has achieved

[207] P K Huth, Bringing law to the table: Legal claims, focal points, and the settlement of territorial disputes since 1945 (University of Maryland 2000).
[208] Ibid.

notable diplomatic successes, resolving disputes in Kashmir, Cyprus and the Golan Heights. Chapter VI of the UN Charter mandates pacific dispute resolution, with Article 33 outlining peaceful settlement methods. The Security Council recommends procedures and terms for dispute settlement, as seen in cases like the Corfu Channel dispute and Kashmir conflict. The Organisation of African Unity Charter and UN Convention on the Law of the Sea also promote peaceful dispute resolution. While challenges persist, the UN's commitment to peaceful settlement underscores its significance in maintaining international peace and security.

The International Court of Justice plays a vital role in maintaining global peace and security by resolving disputes between states through legal means, providing advisory opinions and promoting peaceful settlement of disputes, as mandated by the UN Charter and its Statute, thereby ensuring respect for international law, equality among nations and protection of human rights.

From the discussions and analysis done supra, it is recommended that major international documents should be put together in the form of a "code" to be used to settle disputes. International law, when embraced by mankind for the settlement of disputes will serve as a focal point, especially when the legal principles crucial for the settlement of the dispute are explicit and clearly established.

It is imperative that the principle of the obligation on members of the UN to settle disputes in a peaceful manner is implemented, making use of international institutions established for that purpose as a way of "institutionalising international norms". It is now established that states can be held accountable for 'any negative impact of their wrongful acts', but the determination of the wrongful act together with its implementation is significant for the success and effectiveness of an efficient legal system.[209] It is imperative that two key institutions within the UN are looked at again especially when it comes to the peaceful settlement of disputes. These are the "General Assembly" and the "Security Council". It is prudent that, responsibility for world peace and security is assigned to the "General Assembly", the Parliament of the UN since ideological differences between the

[209] The Place of the WTO and its law in the international legal order *The European Journal of International Law* 17, 5 (EJIL 2007).

"veto" wielding powers are serving as a barrier in the attainment of world peace by the "Security Council". The other recommendation is also that, when the UN was established after the Second World War, the population of the world was about half the current population. The "veto" power has to be looked at and the membership of the "Security Council" expanded to reflect geographical dynamics.

Brierly has suggested a wide array of approaches for the peaceful settlement of disputes. He states as follows:

> It is simply the truth—or truism—that the causes of any war are extremely complicated, because the acts and events which have contributed in some measure to the final issue are so numerous, and many of them are so difficult to recover from the obscurity of the past, that the assignment of ultimate responsibility becomes a task of the utmost difficulty… We must aim at creating an international order in which the temptation to resort to war as an instrument of national policy will be less than it has hitherto been, and this involves an increasing watch over those matters on which the national policies of different states are likely to conflict, a study of all possible expedients for reconciling conflicting policies, and the acceptance internationally of arrangements of some sort which will make it easy and natural for states to resort to whatever means of reconciliation seem likely to be most appropriate to any particular case as it arises.

This last statement from Brierly summarises the whole essence of having a supra national body that will serve as an international executive to ensure the peaceful resolution of disputes among the states of the world, so as not to have wars that have the potential to threaten international peace and security, like the one currently ongoing between two members of the UN, Russia, and Ukraine.

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.93-116
DOI: 10.47963/ucclj.v4i1.1548

ADOPTING A STRICT LIABILITY APPROACH TOWARD GENOCIDE

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ABSTRACT

The Genocide Convention lists intent as a critical element that must be proven to secure convictions for genocide. Many defendants have been acquitted or convicted of lesser crimes due to the difficulty in proving genocidal intent. The argument presented in this paper is that the large-scale negative impact of genocide on humanity should be considered when defining its scope in penal legislation. *A fortiori*, the crime of genocide should be given similar consideration to other crimes that have been classified as strict liability crimes due to their severity and cost to society. Intent as an element should, therefore, be deduced from the general purpose of the perpetrator's acts. Although the strict legality principle is not perfect and has some flaws, it is still the most just, effective, coherent, persuasive, and proper reading of the genocide convention. The goal here is to contribute to the conversation on the limitations of genocidal intent to the effectiveness of the enforcement of the crime of genocide in international criminal law.

Keywords: Genocide, Intent, Convictions, Penal legislation, International criminal law, Strict liability

INTRODUCTION

Before the organized brutalities of the Nazis against the Jews, the term "genocide" did not exist.[2] Although there were killings on a large scale and mass destruction that occurred during wars, they could not be used to properly

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[2] L Daniel and N Sznaider, 'The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights' (2004) 3 *J Hum Rights* 143, 157.

capture the core of the Nazi's actions against Jews.[3] The word '*genocide*' derived from two words, "*genos"* and "*cido,"* which mean 'people' and 'killed,' respectively, was coined by Raphael Lemkin, a Polish Lawyer who combined the two Greek words to define genocide and went on to explain it as the intentional extermination of certain groups based on political, social, cultural, language, national feelings, religion, and the economic existence of national identity.[4] This definition restricted the scope of genocide to destructive acts directed against individuals in a group rather than personal injury or harm caused to one in the manner of homicide or bodily injury. After the dust of World War II settled, the Allies began to evaluate what penalties would be suitable for the wrongdoings of Nazi Germany. This led to the Nuremberg Trials in 1945. The Trials covered crimes against peace, war crimes, and crimes against humanity.[5] At the time, discussions around genocide as a crime had started, and it was even mentioned in the trial documents, but none of the accused persons were convicted of it, rather, convictions for crimes against humanity and its accompanying sentences were meted out to convicted persons.[6]

Following this outcome, Lemkin, along with others, advocated more avidly for a UN Resolution addressing genocide. Their efforts intensified after it became glaringly apparent during the Nuremberg Trials that the Nuremberg Charter did not cover a lot of the actions that Adolf Hitler led against the Jews.[7] These efforts to establish penal laws against genocide resulted in productive discussions at the UN General Assembly. On 11 December 1946, the General Assembly Resolution 96(I) declared as follows: *"Genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accomplices—whether private individuals, public officials, or statesmen, and whether the crime is committed on religious, racial,*

[3] L David, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 *Chi J Int'l L* 303.
[4] Ibid
[5]G Katherine, 'The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5 *Genocide Studies and Prevention* 238, 257.
[6] It is interesting to note that during the Nuremberg Trials, the indictment included a charge of "*deliberate and systematic genocide*" and prosecutors mentioned genocide in their closing arguments. See D L Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 Texas International Law Journal 231, 249.
[7] Ibid 249

political or any other grounds—are punishable." The General Assembly went further to state emphatically that genocide was homicide on a large scale which was repugnant to moral law "*and the spirit and aims of the United Nations."*[8] On December 9, 1948, the General Assembly recognized genocide as a crime under international law. The adoption of the Convention marked a significant achievement in criminalizing genocide. However, the wording of the Convention took a narrow approach, which limited the scope of Lemkin's definition of genocide rather than expanding it. As a result, political and cultural groups were excluded from being recognized as textbook victims of genocide. Furthermore, the Convention introduced the requirement of proving intent in genocide trials[9], which is the central point of focus in this paper.

The Convention defined Genocide in the following terms: "*acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group."*[10] According to this definition, to establish a case of genocide, a prosecutor must also prove the intent to destroy the targeted group. A critical challenge within this framework is the necessity to prove genocidal intent—dolus specialis. This requirement demands direct evidence of the perpetrator's intent to destroy the group, which is often difficult to obtain. Hence, proving intent is currently a significant challenge, especially for complex crimes such as genocidal rape, religious genocide, and newer forms of genocide involving multiple actors and diverse conduct classes. This challenge is compounded when there are multiple defendants involved. Determining an actor's mental state is a nuanced process, and rarely is the answer a simple yes or no. Conclusions, to this end, can differ widely among scholars and jurists.

The complexity of proving intent has resulted in significant hurdles for prosecutors, leading to numerous acquittals despite the presence of compelling

[8] 'The Crime of Genocide,' 55th Plenary Meeting, UN Doc A/RES/96(I) (1946).
[9] L Matthew, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3 *Boston University International Law Journal* 1.
[10] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

evidence of genocidal acts. The existing limitations tied to the requirement for specific intent have sparked debates about the need to reconsider the criteria for prosecuting genocide. This paper aims to contribute to this ongoing discourse by exploring the proposition that a strict liability approach, which prioritizes the severity and scale of the acts rather than the specific intent, could better align with the objectives of the Genocide Convention. By shifting the focus to the nature of the acts and their impact on the targeted group, a strict liability standard may help address the challenges related to providing evidence and bolster accountability for perpetrators.

In examining this hypothesis, the paper will analyze relevant international conventions, case law, and legal scholarship using a black letter methodology of case law and statute analysis to assess the potential benefits of adopting a strict liability framework. It will also consider the implications of such a shift for international criminal justice and the broader goal of preventing and punishing genocide. While it is true that the question of whether genocide should be considered a strict liability crime is undoubtedly complex and contentious, the advantages of doing so outweigh the drawbacks. This approach would not only align more closely with the original aims of the Genocide Convention but also provide a more practical and effective means of prosecuting those responsible for such heinous crimes.

THE REQUIREMENT OF GENOCIDAL INTENT

Generally, the concept of intent in criminal law flows from the maxim; "*actus non facit reum nisi mens sit rea,"* which posits that for a person to be found guilty of a crime, the prosecution must show that he knowingly and willingly committed the crime he is accused of– the *mens rea* ("guilty mind")[11]. This guilty mind is often sufficiently proven by showing that the accused intended to commit the act, resulting in the commission of the crime for which she is charged.[12] Genocidal intent as a sort of special intent (*dolus specialis*)[13] refers to the direct and special intent of a perpetrator in destroying, wholly or partly,

[11] A guilty mind has been interpreted by jurists to mean, intent or motive or generally expressing a preconceived plan to commit a crime. See *Prosecutor v Kayishema & Ruzindana* (ICTR-95-1-T) (International Criminal Tribunal for Rwanda, 1999) 276.
[12]Albert Levitt, 'Origin of the Doctrine of Mens Rea' (1923) 1*7 Illinois Law Review* 117.
[13] N Pisani, 'The Mental Element in International Crime' in F Lattanzi and W Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Aquila: IL SERENTE EDITTRICE, 2004).

a national, ethnic, racial, or religious group. This definition effectively excludes negligence to act as a basis upon which to infer an intent to commit genocide because genocidal intent requires that the perpetrator knowingly and willfully acted to commit the crime.[14]

The intent to commit genocide might not always be qualified as a 'special or specific intent."[15] The regime of international law in this area only requires that an act be committed with the ordinary intent "*to destroy."* It is deemed sufficient that the perpetrator does not have a motive because, in genocide cases, the reason why the accused sought to destroy the victim group is not a key determinant of guilt or innocence.[16] Thus, the scope of a perpetrator's motives is irrelevant, and while they may be geared towards the achievement of the destruction of a group of people and may also point to intent, no liability attaches unless the destructive acts were accompanied by the hatred of the targeted groups and the genocidal intent to destroy them.[17]

How the Courts Assess Genocidal Intent

The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu* noted that *"intent is a mental factor which is difficult, if not impossible, to determine" directly, at least without a confession.*[18] In that case, the accused, Jean-Paul Akayesu, the mayor of Taba, in Rwanda, was found guilty of genocide by the ICTR. This was the first time that an international tribunal ruled that rape could constitute genocide. In that case, the tribunal found genocidal intent from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. The tribunal also stated that other factors, such as the scale of atrocities committed, their general nature, in a region or a country,

[14]GP Fletcher and JD Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 *Journal of International Criminal Justice* 539.
[15] Alexander K A Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 2259.
[16] *Prosecutor v Stakic* (Case No IT-97-24-T) (Judgment, 2003) 45.; See also *Prosecutor v Jelisic* (Case No IT-95-10-A) (Judgment, 5 July 2001) 49. (noting the "irrelevance" of motive to criminal intent); *Prosecutor v Tadic* (Case No IT-95-1-A) (Judgment, 15 July 1999) 269.
[17] A T Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' (2008) 6 *Journal of International Criminal Justice* 829, 837.
[18] *Prosecutor v Akayesu* (Case No ICTR-96-4-T) (Judgment, 2 September 1998) 523. *Akayesu*'s formulation for inferring genocidal intent was widely adopted and followed in subsequent ICTR decisions. See *Prosecutor v Georges Rutaganda* (Case No ICTR-96-3-T) (Judgment, 6 December 1999) 61.

or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act. Thus, intent can be established through evidence of the perpetrator's words, actions, and surrounding circumstances, the scale and pattern of the atrocities, the language used, and any evidence of a plan or policy to target a particular group.[19]

Over the years, the Tribunals have considered the following factors in establishing genocidal intent: (1) statements indicating genocidal intent;[20] (2) the scale of the atrocities committed;[21] (2) systematic targeting of the protected group; and (4) evidence suggesting that the commission of the *actus reus* was consciously planned.[22] These factors are not exhaustive, as the courts may consider other factors depending on the facts presented. The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber noted in the *Jelisic case* that no two precise factors determine the presence of genocidal intent, even seemingly straightforward verbal expressions of genocidal intent, combined with dozens of murders targeting a protected group, is not necessarily sufficient contextual evidence from which to infer genocidal intent. Instead, courts conduct a holistic inquiry into whether the overall factual context constitutes "the physical expression of an affirmed resolve to destroy ... a group as such".[23]

The courts have applied this holistic approach in several cases. In the *Kayishema and Ruzindana Case,*[24] genocidal intent was inferred from the combination of several factors, including the scale and pattern of the atrocities, the language used, and the targeting of a specific group. This was also the case

[19] *Ibid*
[20] A witness testifying that the accused had publicly declared that if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found to abort the pregnancy was used to infer intent. See, *Akayesu (n 17)*.
[21] The ICTY in *Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, 633 (ICTY, 2001)* determined that the murder of 7,000 to 8,000 Bosnian Muslim men – out of a geographically limited population of at least four times that number provided a sufficient scale of killing for a finding of genocidal intent on the part of the perpetrators.
[22] P. Ryan. 'Proving Genocidal Intent: International Precedent and ECCC Case 002' 129 Rutgers L. REV. 63 (2010) 4.
[23]Though *Jelisic* personally murdered dozens of Muslims, the Tribunal found that he had acted "arbitrarily rather than with the clear intention to destroy a group" *Jelisic* (n*15)*
[24] Kayishema (n10)

in the 2007 *Bosnia* Case[25], where the ICTY weighed all the evidence, including testimonies from witnesses and intercepted communications between Bosnian Serb military commanders, documents seized during the war, and reports from forensic experts of the exhumed remains of victims to determine whether former Bosnian military commander, Ratko Mladic had committed genocide between 1992-1995 when more than 7000 Muslim males were forcibly removed from Srebrenica and surrounding areas. Genocidal intent may also be inferred from aiding and abetting. Here, the abettor assumes the genocidal intent possessed by the principal actor.[26] Thus, co-conspirators do not need to prove to have independently possessed the requisite intent to commit genocide.

The scope of what constitutes genocidal intent for a very long time was broad and included anything that could prove that genocidal conduct was not merely a consequence of some other objective not aligned with the destruction of a group. However, the ICTR, in its decision in *Bagilishema*[27], raised that standard by requiring that proof of genocide must be of a specific intent beyond a reasonable doubt. Thus, when a defendant commits acts satisfying the *actus reus* of genocide while motivated by racial, ethnic, national, or religious animus, it is insufficient unless it is directly linked to an intention proven beyond a reasonable doubt to destroy a protected group and nothing less.[28]

Implications of the Intent Requirement on the Enforcement of the Genocide Convention

The jurisprudence on genocidal intent has massive consequences on successive prosecutorial outcomes. It is, therefore, not surprising that most of the crimes committed by the Khmer Rouge were not viewed as genocide because there

[25] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43.
[26] In Akayesu (n16) 545 the Tribunal found that an individual can be held responsible as an accomplice to genocide if they knowingly helped or encouraged one or more persons to commit genocide, while being aware that such persons were engaged in genocide, even if the individual did not have the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group themselves.
[27]The Chamber believes that a crime of genocide is proven if it is established beyond a reasonable doubt that, firstly, one of the acts listed under Article 2(2) of the Statute was committed, and secondly, that this act was committed against a specifically targeted national, ethnical, racial, or religious group with the specific intent to destroy, in whole or in part, that group. Genocide, therefore, requires analysis under two main points: the prohibited underlying acts and the specific genocidal intent or "dolus specialis, see Bagilishema (n15) 55.
[28] In Jelisic(n15) 61-64 The Tribunal found genocidal intent lacking despite the accused's demonstrated apparent hatred of Muslims.

was no proof beyond reasonable doubt that it was not intended to destroy political enemies.[29] Perhaps these political considerations slowed down the start of the Extraordinary Chambers in the Courts of Cambodia (ECCC) for years -as the Cambodian government insisted on maintaining a casting vote over most proceedings - this was a warning of the difficulties that confront international justice today when it has proved very hard, for example, to bring the Myanmar military to account for the atrocities against the Rohingya population.[30] Another example of this challenge is seen in the application filed by The Gambia against Myanmar in November 2019[31]; the question remains whether the Gambia can prove beyond a reasonable doubt that the atrocities committed by the Myanmar authorities were committed with genocidal intent.

In *Musema*[32], the accused nearly escaped punishment when the ICTR found that the evidence gathered could not support the charge. However, he was finally convicted based on the part of the evidence presented to the courts that showed that he was an active participant in attacks, and his alibi for that period could not be held under the scrutiny of the court. He was also found to have raped a woman and encouraged others to rape the said woman. For these repulsive acts, the ICTR found Mus ema guilty of genocide and crimes against humanity and sentenced him to life imprisonment. His conviction was more for complicity than for the actual commission of genocide in the true sense of the word.

There have been several instances where the court declined to convict alleged perpetrators because of the high threshold of proving the specific intent of genocide. One such example is the case of Bosnian Serb General Radislav Krstic, who was initially convicted by the ICTY of genocide for his role in the Srebrenica massacre, where more than 8,000 Bosniak men and boys were killed.[33] However, his conviction was later overturned by the appeals chamber

[29] Anne Heindel, 'Overview of the Extraordinary Chambers in ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS' in John D Ciorciari & Anne Heindel (eds, 2009) 91.
[30] Jonathan Head, 'Khmer Rouge: What Did a 16-Year Genocide Trial Achieve?' (22 September 2022) BBC News https://www.bbc.com/news/world-asia-62992329 accessed 20 February 2024.
[31] Kamal Ahmed, 'ICJ Ruling Takes Rohingyas One Step Closer to Justice' (10 April 2023) The Daily Star https://www.thedailystar.net/opinion/views/news/icj-ruling-takes-rohingyas-one-step-closer-justice-3079091 accessed 20 February 2024.
[32] *Prosecutor v Alfred Musema* (Judgment and Sentence) (ICTR-96-13-T, 27 January 2000).
[33] *Prosecutor v. Krstić*, (Case No IT-98-33-T) (Judgment, 2 August 2001) 633.

of the ICTY, which ruled that the prosecution had failed to prove that *Krstić* had genocidal intent.[34] The Appeals Chamber found that the evidence did not establish *Krstić's* direct involvement in assisting executions. However, the Appeals Chamber found that the evidence did establish that *Krstić* knew that the killings were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances, the Appeals Chamber found that Krstic's criminal responsibility was that of an aider and abettor to murder, extermination, and persecutions and not of a principal perpetrator. Furthermore, the Appeals Chamber found that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff. However, there was a demonstrable failure by the Trial Chamber to supply adequate proof that Krstić possessed genocidal intent. It is unacceptable that he was not convicted of the crime he committed (genocide) despite receiving a forty-year sentence for other crimes he committed.

Another example is the case of Jean-Pierre Bemba, a Congolese politician and military commander who was accused of war crimes and crimes against humanity, including rape and murder, committed by his troops during the Central African Republic conflict. Bemba was initially convicted of these crimes, but his conviction was overturned on appeal, with the appeals chamber of the International Criminal Court ruling that the prosecution had failed to prove that he had knowledge of the crimes committed by his troops or that he had intended to commit them.[35] In all of these cases, the defendants were not convicted for perpetrating genocide as principal actors because the prosecution could not prove genocidal intent.

The Russia-Ukraine war, which has been ongoing since 2014, has typically not been considered genocide because Russian sympathizers may argue that there has not been evidence of a systematic attempt to destroy the nationals of Ukraine and that if any culpability should arise, it should be for war crimes.[36] Prosecutors who attempt to take Russia on for genocide will have to deal with the problem of insufficient evidence to back their claims because intent cannot

[34] *Prosecutor v. Krstić* (Case No IT-98-33-A) (Judgment, 19 April 2004) 135.
[35] *Prosecutor v. Bemba Gombo*, (ICC-01/05-01/08-3343) (Judgment, Trial Chamber III, 21 March 2016) 212.
[36] Ashish Kumar Sen, 'Is Russia Committing Genocide in Ukraine?' (21 September 2022) *US Institute of Peace* https://www.usip.org/publications/2022/09/russia-committing-genocide-ukraine accessed 20 February 2024.

be proven without establishing that a general plan to commit genocide is evidenced by documents, policy statements, confessions, or that a long-term systematic pattern of such atrocities is attributable to the perpetrator. Proving Russia's culpability will be especially difficult because they claim that they attacked to stop Ukraine from committing genocide against the Russian-speaking population in Ukraine.[37] Thus, their argument might be that the use of force was justified and proportionate to their need to protect the Russian-speaking population in Ukraine. These political considerations muddy the work of prosecutors, further complexifying the already existing complexity of proving genocidal intent in today's world.

Similarly, one could argue that the self-determination efforts of Palestine and the violence of Israel against them are political issues best discussed outside of the concept of genocide. In recent times, the Republic of South Africa has alleged that Israel has violated the Genocide Convention with regard to its actions in Gaza. Israel rejected these allegations in proceedings before the International Court of Justice (ICJ). However, the ICJ granted the interim measures sought by South Africa and issued orders to Israel asking them to "*take all measures within its power' to prevent the commission of acts prohibited in the Convention, in particular killings, causing serious physical or mental harm, the deliberate infliction of conditions of life calculated to bring about the physical destruction of the population in whole or in part, and the imposition of measures intended to prevent births*."[38] The outcome of this case is difficult to predict because even though the ICJ has determined prima facie that it has jurisdiction over the case because genocide is *erga omnes* and States can be held liable for Genocide, intent to commit genocide will be hard to prove because the violent acts of Israel may easily fit in war crimes or even more convincing will be the argument that there is a breach of international humanitarian law rather than genocide properly so-called.

The aforementioned cases underscore the significant influence of the intent requirement not only in the prosecution of genocide but also in determining whether an individual can be charged with genocide, even when committing

[37] Alexander Hinton, 'Putin's Claims that Ukraine is Committing Genocide are Baseless, but Not Unprecedented' (The Conversation, 25 February 2022) https://theconversation.com/putins-claims-that-ukraine-is-committing-genocide-are-baseless-but-not-unprecedented-177511 accessed 20 February 2024.
[38] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) No 2024/16 (16 February 2024).

genocidal acts in plain view of the public. To address this issue, it is essential to reconsider the specific intent requirement and replace it with a more effective standard while still maintaining an objective benchmark for establishing guilt in cases of genocide. In the following section of this paper, I will outline why I advocate for the consideration of a strict liability approach as the standard for genocide trials.

CONSIDERING A STRICT LIABILITY APPROACH TO GENOCIDAL INTENT

The definition of strict liability varies considerably in academic scholarship worldwide. However, for this paper, strict liability is defined as criminal liability without the requisite intent.[39] In this sense, only the *mens rea* requirement is waived; the actus reus requirement remains.[40] Under strict liability, a defendant (motorist) may be held responsible for speeding even if they did not intend to, were not aware of their actions, or acted without proper care. The only condition for a conviction is that they exceeded the speed limit. The court may overlook intent by stating that the defendant should have foreseen the potential danger of their actions, in line with the traditional concept of strict liability.

This form of strict liability was applied in early common law courts through a mechanism known as "*the moral test."*[41] This moral test was used to determine cases where culpability required that there be *mens rea* vis-a`-vis some element of the actus reus. In cases where the actus reus was found to be present, the *mens rea* requirement of intent was dispensed of if the crime in itself was extremely repugnant to the prevailing standards of social morality.[42] For example, forced intercourse with a young female itself is morally wrong. So,

[39] R A Duff, 'Strict Liability, Legal Presumptions, and the Presumption of Innocence' in A P Simester (ed), Appraising Strict Liability (Oxford University Press 2005) 125.
[40] The relationship between the overall actus reus requirement and the requirement that there be a voluntary
act is explored at length in Michael Moore, Act and Crime: The Implications of the Philosophy of Action for the Criminal Law (Oxford University Press 1993, paperback edn. 2010).
[41] The classic source of the moral wrong test is said to be Regina v Prince [1875] 2 Crown Cases Reserved 154.
[42] Ibid

the intent-driven element of 'knowing the age of the female' in the actus reus of statutory rape was immaterial.[43]

Common law strict liability is generally not entirely strict in the traditional sense. Rather, it is comprised of instances where liability is imposed regardless of the defendant's mental state with respect to their intended goal at the time of the act. For example, a person may be held responsible for murder when they intended only to commit robbery, but the robbery resulted in death (felony murder). Similarly, a person may be held responsible for aiding in a more serious crime committed by another when they only intended to aid in a lesser crime (the foreseeable additional crimes doctrine for accomplice liability). Other examples include intending to inflict grievous bodily harm but causing death or intending to scare someone but inadvertently causing harm.[44] Strict liability theorists argue that all types of criminal culpability are based on two factors. First, an individual is considered culpable for an act if they committed it intending to achieve the criminal outcome or if they intended the act as a means to another desired end, even if the act was not necessary to achieve that goal. In such cases, strict liability attaches when it is shown that the actor chose to do an act, either as an end, as a means, or as a foreseen side effect.[45] The magnitude and extent of these actions can serve as a basis for inferring intent. It can be assumed that the perpetrator must have been aware that the crime was a predictable outcome of their actions and therefore must have had the necessary intent before committing the act.[46]

Second, the belief that an act is wrongful or that an act was done intending wrongfulness is not always easy to prove during the prosecution. Many examples in history demonstrate that people rely on a certain moral justification for some of the world's most heinous crimes: Hitler, Pol Pot, Mao, Custer, etc. Despite their belief in the justness of their evil actions, the world still viewed them as being responsible and held them responsible for deliberately doing the

[43] Michael S Moore, 'The Strictness of Strict Liability' (2018) 12 *Criminal Law and Philosophy* 513.-529.
[44] Ibid
[45] Choice is translated into the three modalities of practical rationality (belief, desire, and intention) in Michael Moore, ''Intention as a Marker of Moral Responsibility and Legal Punishability", in Antony Duff and Stuart Green, eds., The Philosophical Foundations of Criminal Law (Oxford, 2011)179,205
[46] The thesis of H.L.A. Hart, ''Negligence, Mens Rea, and Criminal Responsibility,'' in his Punishment and Responsibility (Oxford, 1968)186, 209.

wrongs they committed based on the world's view of good and bad.[47] Although morality may be a weak measure for classifying crimes and for imputing strict liability on the one hand, it may be useful as a tool to measure the cost of an act to society. For where an act causes much harm, the moral abhorrence is likely to be high and the ensuing criminal liability will be higher to ensure deterrence.[48]

Considering this, strict liability may then be used as a means to show societal disapproval of a particular act. Usually, the offender is punished according to the amount of normative destabilization they have caused by the message sent with their wrongful act.[49] This framework for the strict liability in penal law may be applied to genocide because the effect of genocidal acts are massive cataclysms and whether an actor intended the outcome or not, the outcome of the acts described in the Convention will always lead to the complete annihilation of the group of people. Although it is important to ensure that any legal framework for holding individuals accountable for acts of genocide is effective, fair, and just, it is also just as important that in setting up such a framework, the substantive costs of genocide be considered.

For instance, the number of deaths caused by genocide over the years is alarming; 1932; six to ten million deaths were caused by the famine Joseph Stalin and the Soviet Union inflicted upon Ukraine; Nazi Germany, under Adolf Hitler, killed six million Jewish people in Germany, Poland, the Soviet Union and other areas around Europe during World War II; Khmer Rouge leader Pol Pot's attempt to turn Cambodia into a Communist peasant farming society leading to deaths of up to two million people from starvation, forced labor and executions; Yugoslavia, led by President Slobodan Milosevic, attacks Bosnia killing about 100,000 people; in Rwanda, an estimated 800,000 civilians, mostly from the Tutsi ethnic group, are killed; ISIS fighters attack the northern Iraqi town of Sinjar, home of a religious minority group called the Yazidis killing 500, while 70 children died of thirst and women were sold into

[47] It is true that we do not uniformly blame the morally ignorant for their wrongful actions done in ignorance; the level of blame hinges on the degree of moral error because our epistemic certainty (about perceiving the correct standard by which to gauge moral error) determines how and why we impute liability.
[48] P H Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much? (Oxford University Press 2008).
[49] Monika Simmler, Strict Liability and the Purpose of Punishment (2020) 23 *New Criminal Law Review* 536.

slavery, etc. [50] These numbers are unacceptable and one way to communicate this is by making genocide a strict liability crime and sending a strong message that acts of genocide will not be tolerated. This could serve as a powerful deterrent against such acts and ensure a system where perpetrators plead ignorance of genocidal intent as a way out of their crimes.

A Strict Liability Approach reflects the original objectives of the Genocide Convention

Lemkin's early writings explored genocide, as a crime that occurred when a group of people were destroyed, without emphasis on the justifications, motives, or exact purposes and motivations the perpetrators had in mind. He defined genocide as a "*coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups*" without much recourse to intent.[51] Similarly, in its original composition genocide, was conceived as a crime against humanity for which the intent component is not a strict requirement. For example, the French presented the following characterization of genocide as a proposed format during the deliberation. Article 1 of the proposed wording stated as follows: "*The crime against humanity known as genocide is an attack on the life of a human group or of an individual as a member of such group*."[52] This was again pointed out at the ICTR in the Kayishema and Ruzindana Judgement: ''*The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of 'extermination and persecutions on political, racial or religious grounds.'. . . The crime of genocide is a type of crime against humanity*.''[53]

Although intent is a requirement in Article 17(5) of the ILC's Draft Codes of Crimes against Humanity and Peace, it goes on in Article 17(10) of the Code to assert that such intent can be inferred from the perpetrator's knowledge of the discriminatory effects of his acts committed in the destruction of an intended group. The perpetrator must have a foundational knowledge of the objectives and consequences of his actions to be held liable but that is not to

[50] CNN Editorial Research, 'Genocide Fast Facts' (17 March 2023) *CNN News* https://www.cnn.com/2013/09/20/world/genocide-fast-facts/index.html accessed 20 February 2024.
[51] Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (The Lawbook Exchange, Ltd 2008) 79.
[52] Genocide, France: Draft Convention on Genocide' UN Doc E/623/Add.1 (5 February 1948).
[53] Kayishema (n 10)

say he must have every detail of a comprehensive plan or policy of genocide or show specific intent. Ignoring the obvious does not exempt an individual from criminal responsibility. It is impossible for a soldier who is ordered to kill only members of a particular group to be unaware of the significance of their membership in that group and the irrelevance of their identity. He cannot ignore the destructive effect of his criminal conduct on the group. As a result, it is possible to infer the necessary degree of knowledge and intent from the nature of the order to commit prohibited acts of destruction against individuals who have been singled out as immediate victims of the crime.[54]

Genocidal intent advocates insist that adopting general intent or strict liability as the legal standard will operate to remove the distinct character of the crime of genocide which separates it from other cruel acts of mass destruction towards ethnic groups or war crimes affecting large populations that are not substantially genocidal acts. These crimes may involve the mass extermination of large groups of people during wars, coup d'états, and the like.[55] In *Akayesu supra,* the court discussing genocidal intent stated, "*Genocide is distinct from other crimes inasmuch as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy*, in whole or in part, a national, ethnical, racial or religious group, as such."[56]

This view that genocide is separate from crimes against humanity is the foremost reason for the intent requirement which does not apply to crimes against humanity. Law Professor, Menachem Rosensaft observes quite profoundly in his article, the Long and Tortured History of Genocide, that this view which is accompanied by the restrictive requirement of proving genocidal intent poses a question of whether we might not have been better off with a convention on the prevention and punishment of crimes against humanity with genocide as a subset rather than a Genocide convention which is quite

[54] Ibid 45
[55] Devrim Aydin, 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78 *Journal of Criminal Law* 5, 423, 441.
[56] Akayesu (n 17) 498

restrictive.[57] This question will be at the forefront of South Africa's case against Israel in the coming years.

It is correct that genocide would not happen if people did not organize and orchestrate the process and/or plan. However, it is also true that genocide could not go beyond the stages of planning if people did not willingly act. Most people who commit the actus reus of genocide are not just aiding and abetting or being complicit in the crime of genocide. These people are in fact at the center of the prohibited acts that constitute genocide and, therefore, at the center of the crime. For this reason, they should not be allowed to escape punishment for that crime. To plead ignorance is inappropriate. The intent requirement is thus unsuitable because, regardless of an individual's expressed intentions, before he/she is convicted of genocide based on the principle of strict liability there will be evidence that he/she was or is still actively involved in genocidal acts. The focus should be on preventing group destruction, not only on punishing people with specific intent. We are accommodating the criminality of perpetrators by requiring strict and specific intent, proven beyond a reasonable doubt, as it is in a court of law. There is a high possibility that these perpetrators will not only deny the occurrence of the crime but also destroy all evidence, making it challenging to prove the crime.

Genocide thrives on the denial of the victims' very existence, it is, therefore, to be expected that anyone committing the crime will deny that such events have taken place, shrink responsibility for the destruction, or agree that genocide'' applies to what occurred.[58] Before specific intent was held to be the required intent in the Akayesu trial, no legal document or UN paper had associated it with the crime.[59] While considering the Travaux Pre´paratoires, it was argued that judges should have the flexibility to interpret cases on an individual basis, given the unique circumstances and varying levels of involvement. However, this was not intended to permit a judge's ruling to limit future decisions. It is adequate for most crimes in that the perpetrator acts with

[57] Menachem Rosensaft, 'The Long and Tortured History of Genocide' (30 April 2019) *Tablet News* https://www.tabletmag.com/sections/news/articles/the-long-and-tortured-history-of-genocide accessed 20 February 2024.
[58] Caroline Fournet, The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory (Ashgate Publishing Company 2007) 83.
[59] K Goldsmith, 'The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5(3) *Genocide Studies and Prevention* 238

general intent.[60] In such cases, the law may consider committing an act with the general intent of willingly and knowingly engaging in criminal conduct as a sufficient basis to impute guilt without the need to prove specific intent geared towards showing that the perpetrator was motivated towards achieving a particular criminal result.[61] This approach to imputing intent becomes very practicable when considered in light of the very heinous nature of the crime of genocide and the resulting large-scale destruction which makes it easy to impute wrongdoing on the part of genocide perpetrators without the need to show a genocidal intent per se. It follows that one can be held liable for a crime if the evidence points to a staggering awareness of the effects of his actions, thus, the issue of proving intent was not mentioned during the Nuremberg trials because the evidence before the court directly pointed to the vast extermination of Polish Jews. The court correctly concluded without any doubt based on the actions of the Nazi forces that the perpetrators' intent was ultimately the destruction of Polish Jews even if they denied intending to achieve that effect.[62]

Similarly, a strict liability approach will allow courts to decide based on all the evidence presented before them, whether the scope of the harm caused and the scale of the acts that were committed supposes that the perpetrator must have foreseen that his actions would result in genocide. This standard eliminates the second requirement for intent and makes it easy to convict without being inhibited by the current challenges discussed above. This approach is worthwhile and serves its purpose of protecting groups while simultaneously maintaining the distinct identity of the crime of genocide within the canon of international criminal law.[63] Accepting the foresight of consequence as the intent is the strict liability approach that reflects the ideal the Genocide Convention is trying to achieve.[64] Requiring strict proof of genocidal intent is a high price to pay to preserve the unique character of the crime of genocide because the ends of justice can only be achieved on a large scale if the effects

[60] David L Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 *Texas International Law Journal* 231, 124.
[61] Ibid
[62] Radu Ioanid, The Holocaust in Romania: The Destruction of Jews and Gypsies under the Antonescu Regime, 1940-1944 (Ivan R Dee 2008).
[63] Alexander K A Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 Columbia Law Review 2259.
[64] Mohamed Elewa Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) Criminal Law Forum 486.

of the actus reus are used to attribute genocidal intent and in some cases even to impute complicity.[65]

An example of the benefit of inferring genocidal intent from genocidal acts can be seen in the Karadžić case. This case demonstrated an evolution in judicial interpretation of the Convention, as ICTY judges in Karadžić appeared to be more willing to infer genocidal intent from genocidal acts and to embrace a broader view of the Convention.[66] For his role in the 1992-1995 Bosnian war and the July 1995 Srebrenica massacre, Karadžić was charged with genocide, crimes against humanity, and severe breaches of the Geneva Convention. According to the Trial Chamber, his actions in Bosnia met the actus reus of genocide, but the specific mens rea was not proven.[67] The Trial Chamber opined that genocidal intent could not be inferred from the speeches, statements, and actions of Karadžić and other members of the joint criminal enterprise, or the overall pattern of the crimes. Although Karadžić and others may have engaged in ethnic cleansing by removing Muslim Bosnians from many parts of Bosnia, this finding did not establish genocidal intent on their part. Ultimately, the statements cited by the prosecution and actions of Karadžić were taken as an intent to intimidate Bosnian Muslims into not pursuing independence rather than an intent to commit genocide.[68] Thus, Karadžić was acquitted of genocide on account of his actions in Bosnia.

Notwithstanding this, Karadžić was convicted of genocide for the killings in Srebrenica, the ICTY Trial Chamber reached this conclusion based on an inference. The prosecution was never able to find concrete evidence that Karadžić truly knew that the killings would occur and that Karadžić intended for the killings to take place. Instead, the prosecution's case was circumstantial. The Trial Chamber relied on the conversations between Karadžić and his co-actors to infer that Karadžić knew about the killings in Srebrenica. The Trial

[65] See Krstić *(n 20*) concluded that Krstić participated in a joint criminal enterprise to kill the Bosnian Muslim military-aged men from Srebrenica. The decision was controversial given the absence of elements to demonstrate specific intent. The Appeals Chamber reversed this finding and concluded that Krstić merely knew that a genocidal criminal enterprise was underway (aiding and abetting). See also Krstić (n 33) (reversing the controversial trial court decision which has compromised further efforts towards prosecuting participating persons or complicit individuals)

[66] M Sterio, 'The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide' (2017) 31 *Emory International Law Review* 271.

[67] *Prosecutor v Karadžić* (Case No IT-95-5/18-T) (Judgment, 24 March 2016). 2537, 6071.

[68] Ibid 2605

Chamber also drew inferences about the content of these conversations, without any direct evidence linking to specific intent. After establishing that Karadžić knew about the Srebrenica killings, the prosecution also needed to demonstrate, beyond a reasonable doubt, that Karadžić intended for the killings to take place. The Trial Chamber determined this based on yet another inference: the Chamber found that Karadžić adopted and embraced the expansion of the plan to kill Bosnian Muslim men and boys in Srebrenica during his conversation with Deronjić on the evening of 13 July 1995. The Trial Chamber also established that Karadžić's failure to prosecute the direct perpetrators of the Srebrenica massacre, as well as his praise and reward of the direct perpetrators, demonstrated Karadžić's genocidal intent.

In the Chamber's view, there was no doubt that the accused knew that the thousands of Bosnian Muslim male detainees being held by the Bosnian Serb Forces in the Srebrenica area constituted a very significant percentage of the Bosnian Muslim males from Srebrenica. Based on Karadžić's actions and knowledge about the events at Srebrenica, the Trial Chamber inferred that Karadžić must have agreed with the other actors in the massacre that Bosniaks should be eliminated from Srebrenica. The Chamber also relied on the fact that, despite his contemporaneous knowledge of its progress as set out above, the accused did not intervene to halt or hinder the killing aspect of the plan to eliminate between the evening of 13 July and 17 July. Instead, he ordered that the detainees be moved to Zvornik, where they were killed.

The decision of the Trial Chamber provided a broader interpretation of the *mens rea* requirement for genocide, using circumstantial evidence as a basis for conviction. Marko Milanovic has noted, "*It is clear that had it not been for the phone conversation and subsequent meetings with Deronjić, Karadžić could not have been convicted as a participant in the genocidal JCE.*"[69] Had the Tribunal decided to require a smoking gun type of evidence to convict, Karadžić would certainly have been acquitted resulting in an outcome that reflects poorly on the efficacy of the Genocide Convention.

Going forward, a sure way to ensure that intent is not used to undermine the efficacy of the Genocide Convention will be to amend the definition of Genocide to include an inference of intent from genocidal acts rather than the

[69] Marko Milanovic, 'ICTY Convicts Radovan Karadzic' (25 March 2016) *EJIL: Talk!* accessed 20 February 2024.

DOI: 10.47963/ucclj.v4i1.1548

requirement of standalone proof. This strict liability approach will streamline judicial decisions on the subject and increase the efficacy of the Genocide Convention to punish perpetrators of genocide in alignment with the objectives of the Convention.

CONCLUSION

This paper suggested that adopting a strict liability approach to interpreting the Genocide Convention, which prioritizes the severity of genocidal acts over the specific intent behind them, could better serve the Convention's objectives and enhance accountability for perpetrators. This proposal was informed by a comprehensive analysis of the inherent challenges associated with proving genocidal intent under current legal standards, which frequently lead to acquittals despite compelling evidence of genocidal actions.

The analysis revealed three primary findings. Firstly, the challenge of proving genocidal intent, which requires demonstrating a specific intention to destroy a targeted group, presents significant difficulties. This often leads to acquittals when direct evidence of intent is lacking, even when substantial evidence of genocidal acts is present. Secondly, adopting a strict liability approach, which focuses on the gravity of the acts rather than intent, could simplify the burden of proof and ensure that individuals involved in genocidal acts are held accountable. This shift would align more closely with the fundamental objectives of the Genocide Convention, which prioritize the protection of targeted groups and the prevention of mass atrocities. Thirdly, implementing strict liability could enhance deterrence by clearly signaling that genocide will not be tolerated, thus fostering greater accountability and potentially preventing future genocides.

Despite these insights, the paper acknowledges several limitations. While theoretically promising, the proposed strict liability approach faces practical and ethical challenges. The complexity of international law and the diverse interpretations of the Genocide Convention could hinder the effective implementation of strict liability. Furthermore, the paper's reliance on legal theory and analysis, rather than empirical data or case studies, limits the ability to assess the practical impacts of the proposed approach fully. To address these limitations, future research should focus on empirical studies to evaluate the effectiveness of strict liability in various legal contexts. Comparative studies could offer insights into how different jurisdictions handle genocidal intent and

the potential integration of strict liability. Additionally, a review of case law from international tribunals could provide a more nuanced understanding of how genocidal intent and strict liability are applied in practice.

Given the ongoing challenges in prosecuting genocide and ensuring justice for victims, legal scholars, policymakers, and international bodies must consider adopting a strict liability standard for genocide. Such a change could enhance the efficacy of international justice systems, improve accountability for perpetrators, and contribute to preventing future atrocities. Under a strict liability regime, prosecutors would not need to prove that an accused individual had the specific intent to commit genocide. This could simplify the burden of proof in genocide cases and make it easier to prosecute individuals for acts of genocide. This approach represents a vital step towards achieving justice for victims and upholding the principles enshrined in the Genocide Convention.

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DOI: 10.47963/ucclj.v4i1.1549

A CRITIQUE OF THE CONSTITUTIONALITY AND CONSTITUTIONALISATION OF THE RIGHT TO SELF-DETERMINATION UNDER THE NIGERIAN CONSTITUTION

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ABSTRACT

As the quest for self-determination in Nigeria surges to a record high in recent times, the Nigerian government has repeatedly adopted every means including the use of force to quell the agitations for this right on the basis that it violates the constitution and endangers the territorial integrity of Nigeria. The advocates of this right contend that it is an inalienable right that is recognized under international laws to which Nigeria is a signatory. Therefore, enforceable in Nigeria. This paper examined the constitutionality of the right to self-determination in Nigeria. It found that though the constitution of Nigeria emphasizes the indivisibility and indissolubility of Nigeria, there is a constitutional silence on the right to self-determination. The study found further that the amalgamation of the southern and northern protectorates in 1914, political and economic marginalisation, failure of federalism, and legitimacy question surrounding the 1999 constitution amongst others are factors responsible for the various agitations in the country. Moreso, there is no express affirmation or denial of the right to self-determination under the Nigerian constitution. The study thus concluded that the Nigerian constitution must take a decisive position on the legality of self-determination agitation in Nigeria instead of leaving the challenge to the judiciary.

Keywords: Self-determination, Human rights, Constitutionalizing, Constitutional silence, Secession, Agitation

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.117-157
DOI: 10.47963/ucclj.v4i1.1549

INTRODUCTION

The agitations for self-determination in Nigeria have been an ongoing struggle since shortly after the independence of Nigeria which today has surged to a record high[3]. The proponents of this agitation have justified their struggle on the lack of control over their resources, ethnic oppression, political marginalisation, violation of human rights, growing insecurity in the country, poor operation of the federal system, and so on[4]. They argue that the right to self-determination is recognised under various international laws to which Nigeria is a signatory and by which an obligation is imposed on the Nigerian government to respect and protect it. Contrariwise, over the decades, the attitude of the Nigerian government has been complete opposition to any struggle, agitation, or protest under the guise of self-determination. This is evident in the reprisal approaches of the Nigerian government to the declaration for the Republic of Biafra by Lieutenant Colonel Ojukwu in 1967 which led to the bloodiest Civil War in Nigeria[5]. The war lasted two and a half years and spanned from July 6, 1967, to January 15, 1970, and led to the loss of lives of over three million Igbos, widespread malnutrition, devastation, and loss of properties[6].

Further to this, the Federal government of Nigeria militarised the region of the Ogoni people of Rivers State to quell the protest for autonomy (internal self-determination) over the natural resources in the region which also led to the killing

[3] AS Silas, 'An Assessment of the Theory of Self-Determination in the Resolution of Ogoni People's Struggle in Nigeria under International Law' [2022] *African Journal of Politics and Administrative Studies* 15(1) 37; OW Igwe, A Bereprepofa, and O Anthony, 'The Right to Self-Determination under the Contemporary International Law: The Case of Minority Groups in Nigeria' [2020] *International Journal of Innovative Legal and Political Studies* 8(1) 59-62.

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[5] Samuel Fury Childs Daly, 'A History of the Republic of Biafra: Law, Crime and the Nigerian Civil War', (Cambridge University Press, 2020) 2; JN Onwubiko, 'The Biafra Self-Determination Question: Challenges and Prospects' [2023] *African Journal of Comparative and International Law* 31(1) 126.

[6] R Akresh, S Bhalotra, M Leone, and UO Osili, 'War and Stature: Growing Up during the Nigerian Civil War' [2012] *American Economic Review: Papers & Proceedings* 102(3) 273.

of Ken Saro-Wiwa and eight others with several others massacred[7]. Presently, Nigeria consists of thirty-six (36) states and the Federal Capital Territory (Abuja) but is divided into regions for political-administrative convenience. These regions include the North Central(Niger, Nasarawa, Kwara, Kogi, Benue, Plateau & FCT); North West(Sokoto, Katsina, Jigawa, Kano, Zamfara, Kaduna & Kebbi States); South East (Anambra, Abia, Enugu, Ebonyi, & Imo States); South-South (Edo, Delta, Cross River, Akwa Ibom, Rivers & Bayelsa States); South West (Oyo, Osun, Ekiti, Ogun, Ondo & Lagos States); and North-East (Yobe, Borno, Bauchi, Gombe, Adamawa and Taraba States)[8]. The South-East and South-South have experienced calls for self-determination due to political and economic marginalization. However, in recent times, the agitation of the Yoruba people of the Southwest of Nigeria especially during the administration of President Muhammadu Buhari is the most pronounced.

[7] Opeoluwa Oluyemi, 'Suggestible Consequences of the Militarisation Self-Determination Movements in Nigeria: A Case Study of Yoruba Separatist Movements' (2022) *Journal of Humanities and Social Sciences Studies* 4(4) 250; O.A. Oluyemi, 'Militarisation and State Terrorism: A Case Study of Nigerian Military Security Approach' (2023) 6(5) *International Journal of Social Science Research and Review* at 296-307.

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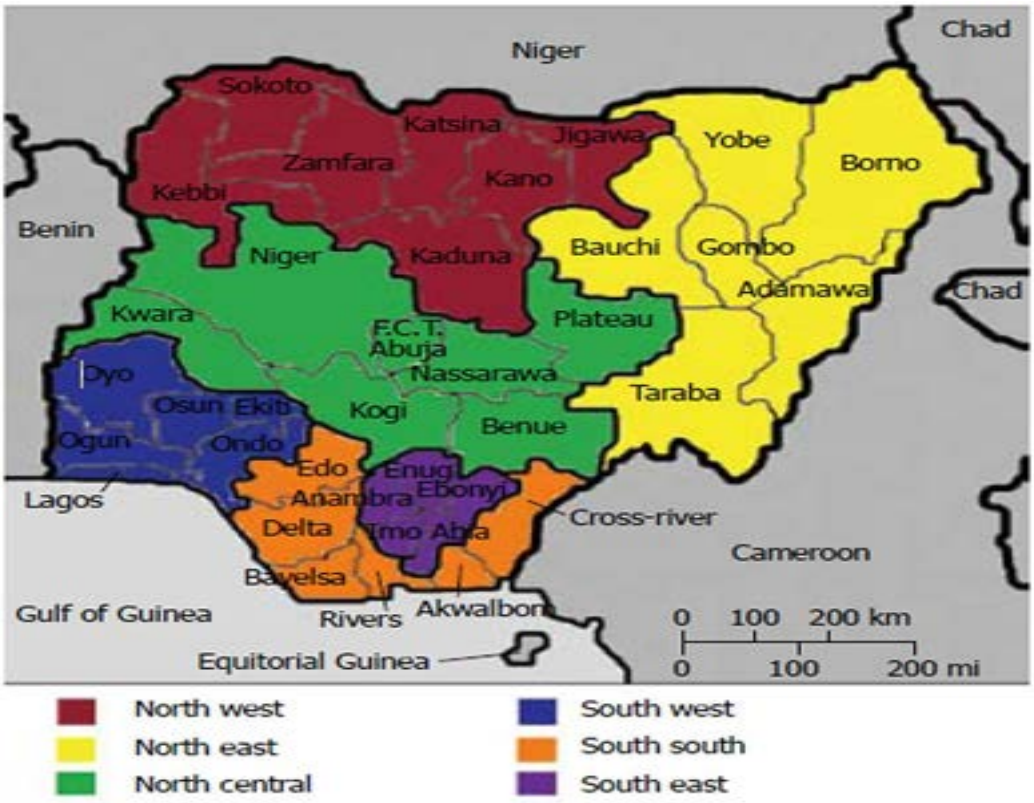

Figure 1: Nigerian map showing the geo-political regions, thirty-six states, and the FCT

The Yoruba separatist in the southwest region premised their agitation on the prevalence of aggravated atrocities such as raping, kidnapping, killings, armed robbery, and so on by the Fulani herdsmen in the region. The Federal government in its usual style clamped down on the agitators by conducting a raid on the residence of Chief Sunday Adeyemo popularly called Sunday Igboho, one of the leaders of the movement which led to the killing of people, destruction of properties, and arrest of several others while Sunday Igboho was declared wanted by the Department of State Security on the allegation of Stockpiling of

ammunitions[9]. Today, the self-determination struggle of the Yoruba people has been quelled by the Federal government of Nigeria with the successful arrest and detention of Sunday Igboho by the Republic of Benin[10]. The Nigerian government justifies its reprisal approach to the various movements for self-determination on the claim that the Nigerian Constitution excludes the right to self-determination. Therefore, the self-determination struggle by any group not only violates the Constitution of Nigeria but also endangers the territorial integrity of the country. Scholars have argued that the Constitution of the Federal Republic of Nigeria neither affirms nor rejects the right to self-determination[11]. The lack of specific affirmation or rejection of the right to self-determination is considered a major factor responsible for the violence that follows the various struggles for self-determination in Nigeria. Furthermore, the constitution of Nigeria imposes the duty on the government of Nigeria to ensure the maintenance of the welfare of the people and the security of their lives and property.

The importance of this paper is made bare by the necessity to address the explosion and incessant demand for self-determination by various ethnic groups in Nigeria due to the failure of the political leaders to wake up to their constitutionally imposed responsibilities to ensure respect and protection of the political, economic, social, and cultural rights of the people which now a threat to the unity of the country. Rather than protecting the lives of the people, the government of Nigeria resorts to aggressive and offensive approaches that threaten and take the lives of the agitators to quell secession demand. Thus, the paper examines the constitutionality or otherwise of the quest for self-determination in Nigeria. The determination of the constitutionality of the quest for secession in Nigeria is critical to ascertaining the legitimacy of this demand in Nigeria. It is imperative to examine

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[9] The Sun Newspaper, 'Yoruba Self-Determination Struggle Suffers Setback" (3rd September 2022). Available at https://sunnewsonline.com/yoruba-self-determination-struggle-suffers-setback/ [13th August 2023].

[10]Sunday Igboho Arrested in Benin Republic. Available at https://www.channelstv.com/2021/07/20/sunday-igboho-arrested-in-benin-republic/ [Accessed 13th August 2023]; How Sunday Igboho beat Security at Benin Airport before his eventual arrest. Available at https://punchng.com/how-sunday-igboho-beat-security-at-benin-airport-before-his-eventual-arrest/ [Accessed 13th August 2023].

[11] PC Eboh, 'Right to Self-determination; the Constitutional Issues: The Case of Indigenous People of Biafra in View' [2015] *Unizik Law Journal 13,* 1-53.

the legal reform by which the government of Nigeria may address the various agitations for self-determination without occasioning the death of the people. Further to this, this paper has the primary objective of examining how the constitutionalisation of the right to self-determination under the Nigerian Constitution can help to secure the unity of Nigeria by reducing the rise in the quest for self-determination and the violence that ensues from its pursuit. To achieve the aim of this research, this paper will adopt a qualitative research methodology using a doctrinal method of legal research. It will rely on both primary and secondary sources of law. The primary sources to be relied on include the Constitution of Nigeria and Ethiopia, and court rulings and decisions. The secondary sources include commentary from judges, newspaper articles, textbooks, articles in journals, and television interviews.

THE MEANING OF THE RIGHT TO SELF-DETERMINATION

The right to self-determination is one of the most highly debated concepts in international law. The concept first emerged as a political principle before it metamorphosed into human rights by its incorporation into the major human rights documents[12]. However, notwithstanding the prominence of this right, its meaning, nature, and scope remain vague with no exact precision[13]. The right to self-determination means a people's legal right to freely choose their political status in connection to becoming an independent country[14] According to Achibugi, the right to self-determination means the right of a colonial people to become a state or the

[12] Article 1 and 55 of the United Nations Charter of 1945; Article 1 of the International Covenant on Civil and Political Rights, 1966; Article 1 of the International Covenant on Economic, Social and Cultural Rights, 1966

[13] H Hannum, 'Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights' (2nd edn, University of Pennsylvania Press 1990) 27; Antonio Cassese, 'Self-determination of Peoples: A Legal Reappraisal' (Cambridge University Press, 1995), 129; Antonio Cassese, 'Self-determination of Peoples: A Legal Reappraisal' (eds) James Crawford, American Society of International Law [1996], Vol. 90(2) 331. Available at http://www.jstor.org/stable/2203697 or https://sci-hub.ru/https://doi.org/10.2307/2203697 [accessed 11th October, 2022]; Simone van den Driest, 'Pro-Democratic Regime Change and the Right to Political Self-Determination: A Case Study of Iraq' (Nijmegen, the Netherlands: Wolf Legal Publishers, 2009), 1.

[14] KU Eze and GN Okeke, 'The Right of People to Self-Determination and the Principle of Non-interference in the Domestic Affairs of a State' (2013) NALSAR Law Review, 7(1) 145

right of minorities in a state to become an autonomous (or join another) state[15]. The right to Self-determination has also been defined as the right of a people to choose their government and political status[16].

To Sterio, the right to self-determination is a political and representative right that belongs to a minority group with a central state or, in an extreme situation, may lead to secession for independence as a final choice and a remedy[17]. Sterio's definition allows for the secession of a minority group from a state in extreme circumstances which suggests situations such as oppression, gross violation of rights, and so on. Sterio's opinion agrees with Quane's conception of the right. According to Quane, the term "people" includes ethnic, racial, linguistic, and religious groupings[18]. He views the right to self-determination as a "peoples" right. In cases where these groups' rights have been abused and all efforts to remedy the situation have failed, he contends that these groups may exercise their right to self-determination in order to be detached from the sovereign state.

Clearly, there are diverse definitions and understanding of the concept which is why Crawford claims that there is no acknowledged definition of the right to self-determination. He believes that the right is like water that assumed the form of a container, which is why there are so many different interpretations of the idea[19]. However, he defines it as the right of a community to have a unique identity that is reflected in the institutions that it is governed[20].

Today, the right to self-determination has become a pillar of contemporary international law since its incorporation in the United Nations Charter in 1945 by

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[15] D Archibugi, 'Critical Analysis of the Self-determination of Peoples: A Cosmopolitan Perspective' (2003) *Constellations* 10(4) 493

[16] SD Ojukwu and OD Okoli, 'A Critical Appraisal of The Right of Self Determination Under International Law' (2021) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 12(1) 131

[17] Milena Sterio, 'The Right to Self-determination Under International Law: "Selfistan", Secession and the Rule of Great Powers (Routledge, 2013) 1-224. Available at https://doi.org/10.4324/9780203083963 [accessed 2nd January 2023.

[18] H. Quane, 'The United Nations and the Evolving Right to Self-Determination', (1998) *International Comparative Law Quarterly* 47(3) 537-572.

[19] James Crawford, 'Brownlie's Principles of Public International Law' (8th edn, Oxford University Press, 2012) 647

[20] Ibid

Article 1 Paragraphs 2 and Article 55 and the two major international instruments on self-determination which are the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)[21] and International Covenant on Civil and Political Rights 1966 (ICCPR)[22]. Though there is an unsettled debate on whether the right is confined to decolonization or it applies outside decolonization[23], it is not the focus of this paper.

CAUSES OF AGITATION FOR SELF-DETERMINATION IN NIGERIA

The agitation for self-determination is not a recent phenomenon in Nigeria. Providing appropriate solutions to the incessant demand for self-determination requires understanding the causes of these agitations. Though not exhaustive, the following briefly explains some of the causes of the agitations for self-determination in Nigeria:

i. Amalgamation of the Southern and Northern Protectorates in 1914

Before colonialism, all the ethnic groups that characterize present-day Nigeria were autonomous entities that enjoyed free control of their economic resources without interference from other existing groups[24]. The headcount between 1952-1953 revealed that there were 200 ethnic entities that were unrelated in terms of culture, religion, customs, traditions, and languages and there was no moment these ethnic groups were being ruled by a single government[25]. However, the

[21]United Nations General Assembly Resolution 220A (XXI) https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [Accessed 5th February 2023]

[22]United Nations General Assembly Resolution 220A (XXI) https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [Accessed 5th February 2023]

[23]Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) *International and Comparative Law Quarterly* 43(4) 857–885; S Eban Ebai, 'The Right to Self-Determination and the Anglophone Cameroon Situation', (2009) *International Journal of Human Rights*, 13(5) 635-637; Simon M Weldehaimanot, 'The ACHPR in the Case of Southern Cameroons', (2012) *SUR-International Journal on Human Rights*, 9(16) 89

[24] I. Sagay, "Nigeria: Federalism, the Constitution, and Resource Control" (2008) 1. Available at http://unpub.wpb.tam.us.siteprotect.com/var/m_f/fa/fa2/22697/235469-nigeria_federalism_.pdf [Accessed 1st May 2023].

[25] IA Ayua and DCJ Dakas, "Federal Republic of Nigeria" in J Kincaid and GA Tarr (eds*). 'Constitutional Origins, Structure, and Change in Federal Countries'* (McGill-Queen's University Press, Montreal & Kingston, 2005) 248.

advent of the British altered this peaceful autonomous arrangement. The British without the consent of these ethnic entities merged the Southern and Northern Protectorates were significantly unrelated in terms of customs, traditions, religion, political beliefs, and even economic resources[26].

The amalgamation of 1914 generated concerns from nationalists such as Chief Obafemi Awolowo and Sir Abubakar Tafawa Balewa who both postulated that Nigeria was a British construct and that it was a mistake to have designated all the ethnic groups as Nigeria because each one was a nation itself just as there are differences between the Germans, Turks, Russian and English. The fact that these ethnic groups have one overlord does not destroy their fundamental differences[27]. Awolowo observed thus:

> Nigeria is not a nation. It is a mere geographical expression. There are no 'Nigerians' in the same sense as there are 'English' or 'Welsh' or 'French'. The word 'Nigeria' is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not[28]

He emphasized the differences between the ethnic groups stating that:

> It is a mistake to designate them as 'tribes'. Each of them is a nation by itself…There is as much difference between them as there is between Germans, English, Russians, and Turks…The fact that they have a common overlord does not destroy this fundamental difference. The languages differ. The readiest means of communication between them is English. Their cultural backgrounds and

[26] IA Kanu, 'Philosophy, Self-Determination, Peace and Intercultural Co-Existence in Nigeria: An Igwebuike Perspective' (2022) *Unizik Journal of Religion and Human Relations* 14(1) 118.
[27] Obafemi Awolowo, '*Path to Nigerian Freedom'* (Faber and Faber: London, 1947), 47-48; Chukwuemeka Nwubu, "Ethnic Identity, Political Integration, and National Development: The Igbo Diasporas in Nigeria" The [1975] *Journal of Modern African* 13(3) 399.
[28] Ibid

> social outlooks differ widely, and their indigenous political institutions have little in common[29].

Sir Abubakar Tafawa Balewa shared the same sentiment with Awolowo when he postulated that since amalgamation Nigeria existed as a nation on paper. It is not united. In his words, he observed thus:

> Since the amalgamation of the Southern and Northern Provinces in 1914, Nigeria has existed as one country only on paper. It is still far from being united. British Government has been trying to make Nigeria into one country, but the Nigerian people themselves are historically different in their backgrounds, in their religious beliefs and customs and do not show themselves any signs of willingness to unite. … Nigerian unity is only a British intention for the country. It is artificial, and ends outside this chamber[30].

These nationalists had at different times threatened to secede from Nigeria due to the obvious unrelated lifestyles and beliefs of these ethnic groups[31]. To today, the ethnic rivalry and pursuit of dominance that accompanied the amalgamation remains. The 1914 amalgamation no doubt is a fundamental root cause of secession demands in Nigeria.

ii. Legitimacy Question Surrounding the 1999 Constitution

The 1999 Constitution since its emergence has been plagued with several debates and controversies concerning its legitimacy. Though the preamble to the Constitution begins by saying "We the People of Nigeria…", the argument remains that there was no time the people of Nigeria volunteered the 1999 Constitution. Rather, it is the product of the illegitimate encroachment of the military on

[29] Ibid
[30] Nigeria Legislative Council Debates; March 20 to April 2, 1947, Lagos, 1947, 208
[31] JB Olawale, 'Questions and Answers on Advanced Level Government (Constitutions) (Jola Publishing Company, Ilesa, Nigeria, 1982) 24-25

Nigerian polity. During the making of the Constitution, only 450 people who were politicians out of about 120 million Nigerian politicians made submissions to the Constitution Debate Committee[32]. The document has been described by many scholars as fraudulent made in the name of Nigerians[33]. Abioye posits that it lacks moral superiority or legitimacy over the people of Nigeria[34]. Ayo Adebanjo, a prominent leader of the Yoruba Separatist movement commented that the forceful seizure of power by the military and the formulation of the 1999 constitution was the beginning of the Nigerian woes. He emphasized that unless the fake document is amended, there would always be separatist struggles in Nigeria[35].

iii. Failure of Federalism and Perceived Political Marginalisation

Nigeria is run by a federal government. However, Nigerian federalism has consistently been applied ineffectively, causing grave concerns over time.[36] Nigeria's federalism is said to have failed due to ethnic exclusion, the consolidation of political power in a single region of the nation, and an unequal allocation of resources, which gives rise to calls for restructuring and self-determination.[37] Nigerian federalism is flawed due to the excessive centralization of the federal system and its inefficient federal nature[38]. The desire to ensure a working federal

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[32] FT Abioye, 'Constitution Making, Legitimacy and Rule of Law: A Comparative Analysis' [2011] *The Comparative and International Law Journal of Southern Africa*n 44 (91) 59-79, 72; JO Omotola 'Democracy and constitutionalism in Nigeria under the Fourth Republic, 1999-2007' [2008] *Africanna* 2(2) 6; JO Ihonvbere 'How to make an Undemocratic Constitution: The Nigerian Example' [2000] *Third World Quarterly* 21(3) 343-366 at 344; TI Ogowewo 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' [2000] *Journal of African Law* 44(2) 135.

[33] TI Ogowewo 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' [2000] *Journal of African Law* 44(2) 135-136

[34] F.T. Abioye (n 30) 72.

[35] Ayo Adebanjo "Current Constitution Must be Changed to Solved Nigeria's Problems" (Arise Tv, October 1, 2023). Available at https://www.arise.tv/adebanjo-current-constitution-must-be-changed-to-solve-nigerias-problems/ [accessed October 2, 2023].

[36] Gabriel Tyungu and Godwin Koko, 'Restructuring, Secession and True Federalism: Ethnic Agitations and the Deepening Crises of Nigerian Federalism' [2018] *World Journal of Research and Review* 7(1) 23-27.

[37] NG Obah-Akpowoghaha, 'The Challenge of Federalism and Its Implications for the Nigerian State' [2017] *International Journal of Politics and Good Governance* Quarter III 8(8.3), 1-24.

[38] Dele Babalola, 'The Efficacy of Federalism in Multi-Ethnic State: Nigeria Experience' [2015] *The Journal of Pan African Studie* 8(2) 76.

system that is devoid of ethnic dominance birthed the inclusion of the Federal Character principle in both the 1979 and 1999 constitutions[39]. The Federal Character principle seeks to prevent one ethnic group from controlling federal institutions and agencies[40].

Tribalism and ethnicity have had a significant impact on how the federal government functions[41], mostly benefiting the Hausas and Fulanis in the North. In fact, ethnicity has become a crucial component of Nigerian politics, with the general public now aware that when someone is elected or appointed to public office, their favourable appointments are determined by the area or ethnic group they belong to. The Yoruba nation's demand for self-determination intensified as a result of President Muhammadu Buhari's implementation of federalism[42]. There was a great deal of controversy in the southern part of Nigeria following President Buhari's appointment of 47 cabinet members, 35 of whom were from the northern part of the nation[43]. Suberu and Agbaje describe Nigerian federalism as "paradoxes, pathologies, and irregularities,[44]" and they attribute the Yoruba nation's movement for independence, various ethno-religious uprisings, and a variety of agitations and undue tension to real or perceived marginalisation,

[39] M Dent, 'Ethnicity and Territorial Politics in Nigeria" in G. Smith, (ed.), Federalism: The Multiethnic Challenge' (London & New York: Longman, 2015) 128-153.
[40] AO Augustine, 'The Crisis of Multi-Ethnic Federations: A Case of Nigeria' [2019] *Journal of Political Science and Public Affair* 7(1) 1-8; T Onimisi, H Ku Samsu, MM Ismail, and MM Mohd Nor, 'Federal Character Principles: A Conceptual Analysis' [2018] *International Journal of Social Science and Humanities Research*, 6(2) 172-177; CE Okeke, 'Implementation and Enforcement of the Federal Character Principle in Nigeria' [2018] *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 10(2) 174-185; CO Udeh, HC Edeh, Q Eyikorogha, PN Ekoyo, and UC Obiagu, 'Banditry-herdsmen Activities in Nigeria and National Development' [2021] *Covenant University Journal of Politics and International Affairs* 9(2), 3732-3752.
[41] E Amah, 'Federalism, Nigerian Federal Constitution and the Practice of Federalism: An Appraisal' [2017] *Beijing Law Review* 8 (3) 287-310.
[42] OS Ubi, 'The Causes of Political Instability in Nigeria' [2017] *African International Journal of Contemporary Research* 4(6) 12-23; CE Malachy and FO Nwobi, 'Integration policies as structures of disintegration: The Political Economy of Nationhood and Resource Control in Nigeria' [2014] *Journal of African Studies and Development*' 6(8)6(8) 148-155.
[43] OI Eme and MI Okeke, 'Buhari Presidency and Federal Character in Nigeria: A Human Needs Theory Perspective'[2017] *International Journal of Philosophy and Social-Psychological Sciences* 3(1) 74-90, 74.
[44] Rotimi Suberu and Adigun Agbaje, 'The Future of Nigeria's Federalism' In Kunle Amuwo (eds), *Federalism and Political Restructuring in Nigeria* (Ibadan: Spectrum, 1998) 335.

dominance, and intimidation during the Buhari administration as seen in his political appointments from 2015 to 2021[45].

iv. Perceived Economic Marginalisation

The uneven distribution of economic resources is one of the major factors that are responsible for the quest for the secession of some ethnic entities in Nigeria[46]. The position that there is economic marginalization in Nigeria is as old as the country itself[47]. The mode of allocation of economic resources appears to be favourable to some ethnic groups over others[48]. Economic participation-related concerns are always at the forefront of national politics in Nigeria. Because of the centralised nature of government, terms like "fiscal federalalism," "derivation formula," revenue sharing, etc. are frequently used in discussions on national issues[49] on generating revenue and allocating it to the three branches of government. The highest percentage of the revenue in the consolidated revenue account of the federal government proceeds from oil explored in the south-south region of Nigeria. This revenue is shared between the federal government and all the states of the federation whereas the oil-producing states are devastated due to the activities of the oil exploitation done on their lands yet they are uncatered for. Furthermore, there are concerns in the southwest region that the federal roads that lead to this region are in a terrible state compared to the ones that connect through

[45] C Udeh, OEC Ezenwa and O Ovaga, 'The Lopsided Appointments of Buhari's Administration; Federal Character Principle and National Integration in Nigeria' [2023] *International Journal of Innovative Legal & Political Studies* 11(2*)* 59-72; PO Okolo, 'Influence of the Federal Character Principle on National Integration in Nigeria' [2014] *American International Journal of Contemporary Research* 4(6)121-138; O Ibeano, N Orji and CK Iwumadi, 'Biafra Separatism: Causes, Consequences and Remedies' [2016] *Institute for Innovations in Development* [2016] 1-60

[46] LA Emokpae, 'Self-Determination in Nigeria: Issues and Prospects' [2023] *International Journal of Research Publication and Reviews* 4(10) 3390-3399, 3397

[47] D A Omemma, 'Marginalisation and Restructuring in Nigeria: An Exploration' [2019] *South East Political Review* 4 (1) 15-28, 20

[48] P LTanyi, C O Odo, A E Omeje & CA Ugwuanyi, 'Ethnic Agitations and Threat of Secession in Nigeria: What Can Social Workers Do?' [2021] *Journal of Social Work in Developing Societies* 3(2) 29-45, 39

[49] SB Lugard, M Zachariah & TM Ngufuwa, 'Self-Determination as a Right of the Marginalized In Nigeria: A Mirage or Reality?' [2015] *Journal of International Human Rights Law* 1(1) 127-158, 137.

the northern parts which grossly affect the commercial activities and consequently the economy in the southwest[50]

THE CONSTITUTIONALITY OF THE RIGHT TO SELF-DETERMINATION IN NIGERIA

The Nigerian Constitution has periodically endured numerous phases of evolution during pre- and post-independence periods. There were several Constitutions that have been in effect in Nigeria during different times that make up the pre-independence and post-independence periods before the introduction of the present Constitution of the Federal Republic of Nigeria, 1999 (herein designated as the 1999 Constitution)[51]. Following the British Conquest of Lagos in 1861 and the amalgamation of the Southern and Northern Protectorates in 1914 until the independence of Nigeria on October 1, 1960, Nigeria had a total of five constitutions[52]. These Constitutions were Clifford's Constitution of 1922, Richard's Constitution of 1947, Macpherson Constitution of 1951, Lyttleton's Constitution of 1954, and the Independence Constitution of 1960[53]

The Nigerian Constitution underwent a number of stages of growth after independence. Four distinct Constitutions have existed. These include the Republican Constitution of 1963, the Constitution of 1979, the Constitution of 1989, and the Constitution of 1999[54]. Today, though gone through different stages of amendments, the 1999 Constitution of Nigeria is the extant organic law in

[50] PDP Knocks Federal Government Over Deplorable Roads in South West (Nigerian Tribune, October 5, 2021); Available at https://tribuneonlineng.com/pdp-knocks-fg-over-deplorable-roads-in-south-west/ (accessed August 22, 2023).
[51] M Ediagbonya, 'Nigerian Constitutional Development in Historical Perspective, 1914-1960' [2020] *American Journal of Humanities and Social Sciences Research* 2017] 242-24; NJ Udombana, 'Constitutional Restructuring in Nigeria: An Impact Assessment' (April 25, 2017) 5. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960030 [accessed 13th August 2023].
[52] Ibid
[53] Ibid. Also, I.M. Suleiman, 'Nigerian Constitutional Development and Constitutionalism' 1-13. Available at https://www.researchgate.net/publication/329024968_NIGERIA'S_CONSTITUTIONAL_DEVELOPMENT_AND_CONSTITUTIONALISM [Accessed 15th April 2023]
[54] Eyene Okpanachi and Ali Garba, 'Federalism and Constitutional Change in Nigeria' [2010] *Federal Governance* 7(1) 1-14

Nigeria. Therefore, this paper will examine the right to self-determination under the current legal regime, that is, the 1999 Constitution of the Federal Republic of Nigeria.

The underlying law governing the people's rights, duties, and privileges is the 1999 Constitution (as amended), which must always be upheld[55]. The court in *Attorney General of Federation v Abubakar*[56] ruled inter alia that the 1999 Constitution is the *grundnorm* and it establishes the Nigerian democracy where the rule of law prevails[57]. The finding that self-determination that leads to secession is not a right guaranteed by the Nigerian Constitution would be supported by a comprehensive reading of some salient provisions of the 1999 Constitution that suggest such a conclusion. The Preamble to the Constitution serves as the first clue to this conclusion. The Preamble to the 1999 Constitution states that:

> We the People of the Federal Republic of Nigeria: Having firmly and solemnly resolved: TO LIVE in unity and harmony as one indivisible, indissoluble, Sovereign Nation under God dedicated to the promotion of inter-African solidarity, world peace, international cooperation, and understanding: AND TO PROVIDE for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equity, and Justice, and for the purpose of consolidating the Unity of our people: DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES THE following constitution.

Even though the validity of the Preamble stated above has been questioned at various times by scholars of constitutional law on the ground that at no time did

[55] OVC Ikpeze, 'Constitutionalism and Development in Nigeria: The 1999 Constitution and Role of Lawyers' [2010] *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 1, 228. Available at https://www.ajol.info/index.php/naujilj/article/view/138210 [Accessed 15th April 2023].
[56] (2007) ALL FWLR (Pt. 37) 1264.
[57] Federal Republic of Nigeria v. Ifegwu (2003) FWLR (Pt.167) p.703.

the people of Nigeria either through referendum or any other means agree to volunteer the Constitution[58], the Constitution remains valid to today and its provisions are binding on all persons, and authorities[59]. The statement "*We the People of the Federal Republic of Nigeria: Having firmly and solemnly resolved: TO LIVE in unity and harmony as one indivisible, indissoluble, Sovereign Nation…*" *as* utilised in the Preamble shows that the 1999 Constitution represents the collective will and aspirations of the Nigerian people to live in unity and harmony as one indivisible and indissoluble nation. Therefore, to divide and dissolve Nigeria must be with the collective affirmation of the people. This is why any activity (such as a self-determination struggle) that is capable of compromising Nigeria's sovereignty, territorial integrity, or unity is forbidden and treated as an act of treason, insurrection, and violation of the constitution of Nigeria[60]

Though the words "self-determination" or "secession" were not pointedly used in the Preamble to the 1999 Constitution, the exercise of the right to self-determination is known to always affect the indivisibility and indissolubility of a sovereign nation[61]. Therefore, it is not difficult to come to the conclusion that the phrase "…*TO LIVE in unity and harmony as one indivisible, indissoluble, Sovereign Nation…*" unequivocally negates the idea of self-determination under any guise. Mrabure opines that since the agreement to *live in unity and harmony as one indivisible and indissoluble sovereign nation* was the collective decision of the people, then, the indivisibility and indissolubility can be undermined by the collective agreement of the people of Nigeria. Mrabure puts his perspective thus:

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[58] JO Ihonvbere, 'How to Make an Undemocratic Constitution: The Nigerian Example' [2000] *Third World Quarterly* 21(2) 343-366.

[59] KO Mrabure, 'The Right to Self-Determination Under International Law: The Current Biafra Struggle' (2015) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence 6,* 66-74. Available at https://www.ajol.info/index.php/naujilj/article/view/136263 [Accessed 15th April 2023].

[60] SB Lugard, M Zechariah, and TM Ngufwang, 'Self-Determination as a Right of the Marginalised in Nigeria: A Mirage or Reality?' [2015] J*ournal of the International Human Rights Law* 1(1) 128-158. Available at https://irepos.unijos.edu.ng/jspui/bitstream/123456789/2233/1/20181018132950.pdf [Accessed 15th April 2023].

[61] Vladyslav Lanovoy, 'Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right' [2015] *Cambridge Journal of International and Comparative Law,* 4(2) 388-404.

> For this principle of indivisibility and indissolubility to be undermined by any part of Nigeria, it will require the people of Nigeria coming together to agree that a part of the nation has a right to what that part considers as self-determination[62].

This postulation by Mrabure amplifies Milena Sterio's theory that a quest for secession must conform with the domestic law of the mother state and with the consent of the mother state before it becomes legal[63]. In furtherance to the Preamble to the Constitution, the provision of Section 2 sub-section 1 of the 1999 Constitution reinforces the indivisibility and indissolubility mentioned in the Preamble. The said provision states that 'Nigeria is one ***indivisible*** and ***indissoluble Sovereign State*** to be known as the Federal Republic of Nigeria'. Once more, the Constitution makes it clear that any political or other goal that tries to divide or abolish Nigeria as a sovereign state is unlawful[64] Okeke argues that the provision of Section 2 sub-section 1 of the 1999 Constitution on the indivisibility and indissolubility of Nigeria is intended to protect the corporate existence of Nigeria. Okeke posits that:

> This provision which is aimed at protecting the territorial integrity of Nigeria and its corporate existence expressly forecloses the possibility of consensual independence of any entity forming part of Nigeria, and so makes a unilateral declaration of independence the only way a new state could emerge from Nigeria"[65]

The above is highly instructive on the position of Nigerian law on the right to self-determination. While scholars argue that the right to self-determination is an

[62] KO Mrabure, (n 57) 68.
[63] Milena Sterio, 'Self-Determination and Secession Under International Law" (2015) *New Framework' ILSA Journal of International and Comparative Law* 21(2) 103.
[64] SB Lugard, M Zechariah, and TM Ngufwang (n 58) 141-142.
[65] CE Okeke, 'Implementation of Self-Determination in Africa through Secession: An Appraisal of the Legal Hurdles' [2021] *African Journal of Criminal Law and Jurisprudence 6*, 175.

inalienable human right[66], a painstaking perusal of the entire provisions of Chapter IV of the 1999 Constitution on fundamental human rights shows that there is no express or implied legislative provision for the right to self-determination. Further to this, provisions of Section 1 sub-sections 1, 2, and 3 of the 1999 Constitution are emphatic on the supremacy of the Constitution which implies that nothing can be read into the Constitution except the same is provided for in the Constitution. Mrabure while justifying the supremacy of the Constitution states that:

> The Constitution is the organic law governing the rights, duties, obligations, and privileges of the people of Nigeria and its supremacy must at all times be fundamentally observed. For any group of persons to seek to divide the Nation under any guise would amount to a brazen attack on the Constitution which is tantamount to the declaration of war.

The Federal government of Nigeria has on several occasions adopted the use of force to safeguard this provision of Section 1 sub-section 1 of the 1999 Constitution on indivisibility and indissolubility. One such occasion was the attempt of the Ogoni People of River States through the Movement for the Survival of the Ogoni People to form an autonomous State within Nigeria[67]. This attempt was forcefully resisted by the Nigerian Government through the use of military resistance. The reprisal method led to the killing of a lot of innocent civilian Ogoni people, arbitrary arrest and detention, and hasty judicial killing of prominent figures such as Ken Saro-Wiwa and eight others in the struggle[68]. Furthermore, a notable instance was the agitation for self-determination of the Indigenous People of Biafra (IPOB) of South-Eastern Nigeria to secede from Nigeria to create the Biafra Republic as a sovereign that was fiercely repelled by the government of Nigeria which led to a bloody war in Nigeria between 30 May 1967 and 15 January

[66] Alice Farmer 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realisation in Resource-Rich Countries' [2006] *International Law and Politics* 418-472. Available at https://nyujilp.org/wp-content/uploads/2013/02/39.2-Farmer.pdf [Accessed 15th April 2023].
[67] ST Udogbo, 'An Exploration of the Ogboni People's Resistance in Nigeria: A Participatory Action Research Approach' being a Thesis Submitted for the Degree of Doctor of Philosophy in Sociology, Department of Sociology, National University of Ireland, Maynooth (2021) 1.
[68] Ibid

1970[69]. Though the Civil War is over, the IPOB agitation for self-determination remains today.

Recently, the Nigerian Army invaded the home of the IPOB leader, Nnamdi Kanu, and some of his men were gruesomely and extra-judicially killed with no just cause[70]. The proscription of the IPOB as a terrorist group on the 20th of September 2017 further empowers the security agencies in Nigeria to adopt the use of force on the indigenous group if found to engage in any activity that further threatens the harmony, indivisibility, and indissolubility of Nigeria[71]. Okeke posits that the primary essence of the domestic law of a sovereign state is to protect the sovereignty and territorial integrity of such a state. This accounts for the consideration as a taboo, the unilateral declaration of secession by an indigenous group within a sovereign state[72]. It is therefore not surprising that most sovereign and independent African states affirm in their constitution the indissolubility of their sovereign state[73].

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[69] EW Nafziger, 'The economic impact of the Nigerian Civil War' [1972] *Journal of Modern African Studies,* 10(2) 223-245.

[70] C Adonu, "IPOB Condemns Fresh Invasion of Nnamdi Kanu's Home" (10th September 2018). Available at https://allafrica.com/stories/201809100175.html [Accessed 15th April 2023]; A Sunday and SL Muhammad 'Interrogating Criminal Label and Scourge of Insecurity in Contemporary Nigeria' [2021] *KIU Journal of Humanities and Social Sciences* 7(4) 63-67; CE Chukwudi, DE Gberevbie, UD Abasilim, and D Imhonopi, 'IPOB Agitations for Self-Determination and the Response of the Federal Government of Nigeria: Implications for Political Stability' [2019] *Academic Journal of Interdisciplinary Studies* 8(3) 179-194; Femi Fani-Kayode, 'Soldiers Invade Nnamdi Kanu' House, Removes his Properties' *Daily Post Newspaper*, 8th October 2017. Available at https://dailypost.ng/2017/10/08/soldiers-invade-nnamdi-kanus-house-remove-properties-fani-kayode%E2%80%8E-alleges/ [Accessed 15th April 2023]; OI Umuo, 'Soldiers Surround Nnamdi Kanu's Home, Invade NUJ Office' (Punch Newspaper, 12th September 2017). Available at https://punchng.com/tension-as-soldiers-return-to-umuahia-invade-nuj-office/ [Accessed 15th April 2023]; C.E. Chukwudi, D.E. Gberevbie, U.D. Abasilim, and D. Imhonopi, 'IPOB Agitations for Self-Determination and the Response of the Federal Government of Nigeria: Implications for Political Stability' [2019] *Academic Journal of Interdisciplinary Studies* 8(3) 179-194.

[71] IM Abada, PH Omeh, and IR Okoye, 'Separatist Agitation by the Indigenous People of Biafra (IPOB), and National Question in Nigeria' [2020] *Journal of Political Science, Public, and International Affairs* 2 (1) 9-17.

[72] CE Okeke (n 63) 175.

[73] Ibid

Though from the pre-independence and post-independence periods, Nigeria has operated a total of nine Constitutions, textually, there is none of the Constitutions of Nigeria including the 1979 Constitution that makes reference to self-determination or make reference to anything that may be construed contextually to mean self-determination. The absence of self-determination in the 1979 Constitution is understandable. This is because the 1979 Constitution which started the second republic came when the horrific experience of the Civil War which was still fresh in the memories of the framers of the said Constitution. It is rather desirable to make laws that will promote the unity and harmony of the country than laws that will further deepen disunity and disintegration[74].

THE ATTITUDE OF NIGERIAN COURTS TO THE RIGHT TO SELF-DETERMINATION

In recent times, the right to self-determination has been a subject of litigation in courts of law. Unfortunately, the Nigerian judiciary appears to be divided on the applicability of the right under Nigerian law. The agitation of the Yoruba nation for self-determination was a subject of litigation in *Chief Sunday Adeyemo v Attorney General of Federation & 2 Ors.*[75], a suit filed by Applicant to enforce the alleged violation of his fundamental human right by the unlawful invasion of his residence by the Department of State Security. The learned trial judge, Hon. Justice A.I. Akintola of the High Court of Justice, Oyo State entered judgment in favor of the Applicant awarding exemplary damages of twenty billion against the respondent for the breach of the Applicant's fundamental human right. Further to this, the trial court also granted the reliefs on self-determination of the Yoruba nation/Oodua Republic.

While commenting on the self-determination of the Yoruba nation, the trial court stated that:

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[74] OK Ogunmodimu, 'The Ambiguity of Constitutional Silence on State Secession in Nigeria: Looking Beyond Politics of Compassion and Prejudice' SSRN Electronic Journal (2017) 13. Available at https://www.researchgate.net/publication/324673226_The_Ambiguity_of_Constitutional_Silence_on_State_Secession_in_Nigeria_Looking_Beyond_Politics_of_Compassion_and_Prejudice or https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014761 [Accessed 15th April 2023]

[75] Suit number M/345/2021 (Unreported).

> The action of the 2nd and 3rd Respondents in trying to arrest and intimidate the applicant on account of the cause of defending Yoruba interests in their quest for self-determination amount to a violation of the right of the applicant to propagate the ideas of Yoruba self-determination which right is protected by Article 20 (1) of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act and Articles 3 & 4 of the United Declaration on the Rights of Indigenous People[76].

On appeal in *Attorney General of Federation & 2Ors. V. Chief Sunday Adeyemo*[77], the Court of Appeal in its judgment delivered on 30th August 2022 upturned the decision of the trial court. In its judgment, the Court of Appeal referred to the cases of *Elder C.C. Mbacci & Ors. v. Attorney General of Anambra State & Another*[78] and *Action Congress and Another v. Independent National Electoral Commission*[79] when it observed that the entire provisions of a statute should be considered collectively and holistically and no single section should be interpreted separately. The Court frowned at the interpretation of Article 20(1) of the African Charter in isolation from Articles 29 (3), (4), and 5 of the African Charter which imposes duties on individuals:

> (3) Not to compromise the security of the state whose national or resident he is;
>
> (4) to preserve and strengthen social and national solidarity, particularly when the latter is threatened;
>
> (5) to preserve and strengthen national independence and the territory of his country and to contribute to its defense in accordance with the law.

[76] Ibid page 394
[77] Suit number CA/IB/373/2021 (Unreported)
[78] (2016) LPELR 41020 (CA) 27-28
[79] (2007) LPELR 66 (SC) 17

The Court of Appeal states that the 2nd and 3rd Appellants who are in charge of the security of the country and as shown on pages 143-144 of the record of proceedings at the trial court received intelligent gathering that the action of the Respondent was a threat to the nation which they have the mandate to investigate. The Court of Appeal states further that there is nothing in Articles 20, 27, 28, and 29 of the African Charter that confers on the Respondent the right to hold arms to struggle for the break-up of Nigeria. On the constitutionality of the right to self-determination in Nigeria, the Court of Appeal held that the secessionist movement in Nigeria is unconstitutional. The Court states that:

> The point to be emphasized here is the Respondent is not permitted under the freedom of association to lead a secessionist movement in Nigeria which may lead to a break-up of the country and as rightly submitted by the appellant the Constitution of Nigeria has not recognized any right that permits people to come together as an association to break up Nigeria or secede from Nigeria and the establishment of another republic within Nigeria. Section 1 of the Constitution of the Federal Republic of Nigeria provides in clear terms that the Federal Republic of Nigeria shall not govern [ed] (sic), nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except by the provisions of this Constitution. Likewise, Section 2 (1) of the Constitution further provides that: "Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria"

The Court of Appeal's resolution of this issue was further anchored on the case of Alhaji Mujahid Asari-Dokubo v Federal Republic of Nigeria[80] where Per Muhammed JSC held that:

> The pronouncement by the court below is that where national security is threatened or there is a real likelihood of it being threatened, human rights or individual rights of those responsible take second place. Human rights or individual rights must be suspended until national security can be protected or well taken care of. This is not anything new. The corporate existence of Nigeria, a harmonious, indivisible, and indissoluble sovereign nation, is certainly greater than any citizen's liberty or right. Once the security of this nation is in jeopardy and it survives in pieces rather than in peace, individual liberty may not even exist.

The decisions of the courts indicate that the Nigerian judiciary is divided on the constitutionality of the right to self-determination in Nigeria. However, the decision of the Court of Appeal on the subject is still extant that the constitution of Nigeria does not recognise the right to self-determination. The trial court had premised its judgment on the provision of Article 20 of the African Charter on Human and Peoples Rights which recognises the right to self-determination and has been domesticated in Nigeria. However, the applicability of domesticated international treaties on self-determination in Nigeria is not the focus of this paper.

THE INTERPRETATION OF THE CONSTITUTIONAL SILENCE ON SELF-DETERMINATION IN NIGERIA

The 1999 Constitution is silent on the right to self-determination[81]. There is no single provision of the 1999 Constitution that expressly forbids or permits the right to self-determination. The term '*Constitutional Silence*' is used in this paper to

[80] (2007) LPELR-958 (SC) at page 38 Para. B-E
[81] KO Mrabure (n 57) 68

mean the lack of specific reference to self-determination in the Constitution. The issue at hand is how should the silence of the Nigerian Constitution on self-determination be interpreted. Should the silence of the Constitution of Nigeria on the right to self-determination be seen as forbidding self-determination or indifferent to it?

To start with, the 1999 Constitution makes salient provisions on the unity, harmony, indivisibility, and indissolubility of Nigeria[82]. The purpose of these clauses is to protect Nigeria's territorial integrity. If the 1999 Constitution's drafters had wanted to protect the right to self-determination, they would have specifically addressed it in either Chapter II or Chapter IV of the Constitution. Ogunmodimu[83] argues using the wisdom of Justice Iredell in ***Calder v Bull***[84] that constitutional silence means whatever is not provided for in a constitution means such thing is not allowed. He opines that constitutional silence is not for an advantage. Arguing further, he states that:

> Borrowing a leave from this case and applying it to the Nigerian constitution via intertextual citing of foreign laws, when a constitution does not cater for certain principles, it simply means the constitution does not believe in those principles and if necessary would mandate the constitution provide for them, then the parliamentarians would have to either amend the constitution through a referendum or pass a statute congenial to the amendment[85].

Ogunmodimu postulates further that using the original intent tool of interpretation and adjudging from the adverse impact of the Civil War on the Nigerian economy, the framers of both the 1979 and 1999 Constitutions would not have introduced any provision(s) that will occasion the disintegration of the country[86]. Therefore,

[82] The Preamble to the Constitution of the Federal Republic of Nigeria, 1999 and Section 2 of the 1999 Constitution.
[83] OK Ogunmodimu (n 72) 12-18
[84] 3 U.S. 386 (1798)
[85] O.K. Ogunmodimu (n 72) 14
[86] Ibid 16-17

it is safe to say that the 1999 Constitution does not permit or recognise the right to self-determination as the territorial integrity of Nigeria appears to prevail over the right to self-determination.

Furthermore, Theodore Christakis[87] postulates that the constitutional silence of certain states on unilateral secession is interpreted mostly by the political actors and apex courts of those states to mean that the right to secession is not a recognised right by those states though he confirmed that several states have introduced into their constitution that unilateral secession is unconstitutional and must be combated fiercely by the state. He asserts that:

> Of 108 constitutions I have reviewed just two (Saint Christopher and Nevis of 1983 and Ethiopia of 1994) seem to recognize such a right of unilateral secession. More than 80 have wording showing that any unilateral attempt to secede should be deemed anti-constitutional, and some of them even provide for the state to adopt concrete measures to combat secessionist activities. The silence of the constitutions of certain countries as to the possibility of unilateral secession is usually construed by the supreme courts or political organs of those states as ruling out any right of secession, as illustrated by the celebrated decision in Texas v. White of 1868 of the US Supreme Court or the opinion of Canada's Supreme Court on Quebec of 20.8.1998'.

[87] Theodore Christikas, 'Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea' (2015) 91. Available at https://www.zaoerv.de/75_2015/75_2015_1_a_75_100.pdf [Accessed 20th April 2023]

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DOI: 10.47963/ucclj.v4i1.1549

CONSTITUTIONALIZING THE RIGHT TO SELF-DETERMINATION IN NIGERIA

There is no question that the state's determination to preserve its territorial integrity is the driving force behind the exclusion of the ability to secede from the constitution or the constitutional silence on secession by any state. Although allowing the constitutional power to secede is a relatively uncommon practice in the world, it is a practice that, when done well and professionally, can prevent secession and advance the geographical integrity and unity of the state[88] or prevent the outbreak of war while demanding secession. According to Tom Ginsburg, secession has been a major subject for constitutional development everywhere from Spain to Tanzania to Ukraine since the first modern constitution was written in the United States in 1789. In the same way that constitutions are adopted as a means of preserving national peace and unity, they may also be adopted as a means of allowing nations to peacefully secede as in the case of Canada[89].

The constitutional designs of all the countries in the world on secession are either to prohibit secession, remain silent on secession, or allow secession[90]. While preventing it or remaining silent on it is the most typical constitutional response worldwide, permitting secession is one of the methods to peacefully address the demand for secession. Undoubtedly, one of the methods an entity may choose to exercise its right to self-determination in international law outside of decolonization is by secession. However, for secession to be legal under international law, both the entity wanting to secede and the state it is trying to withdraw from must give their assent. A constitutional framework may be used to control or determine this consent.

There are debates on the inclusion of the right to secede and its operation in a state's constitution[91]. In a constitutionally democratic state like Nigeria, the

[88] Tsegaye Birhanu, 'The Impact of the Inclusion of Secession Clause in the Federal Democratic Republic of Ethiopian Constitution on the Prospect of Ethiopian Federation' [2017] *International Journal of Scientific and Research* 1(10) 1
[89] Ibid; RM Hanna, 'Right to Self-Determination in In Re Secession of Quebec' [1999] *Mayland Journal of International Law* 23(1) 218-221
[90] Ibid
[91] Cismas Ioana, 'Secession in Theory and Practice: The Case of Kosovo and Beyond' (2010) *Goettingen Journal of International Law* 2(2) 531-587

arguments revolve around the advantages and disadvantages of making the right to secession a constitutional provision. It is uncommon for modern states' constitutions to provide the power to secede. This particular characteristic is present in the Federal Democratic Republic of Ethiopia (FDRE) Constitution from 1994. The FDRE is one of the countries whose Constitution from 1994 contained the right to secede, albeit it also included some procedural conditions for exercising the right[92]. According to Article 39 (1) of the Constitution of the Federal Democratic Republic of Ethiopia, the right to self-determination including secession is unconditionally available to all people[93]. Article 39 (1) provides thus: *"(1) Every nation, nationality, and people have an unconditional right to self-determination including the right to secession".* However, Article 39(4) provides for the procedure for the exercise of this right. The Article states that:

> "(4) The exercise of self-determination, including the secession of every nation, nationality, and people in Ethiopia is governed by the following procedures:
>
> (a) when a demand for secession has been approved by a two-thirds majority of the members of the legislative council of any nation, nationality, or people;
>
> (b) when the Federal Government has organized a referendum which must take place within three years from the time it received the concerned Council's decision to secession;
>
> (c) when the demand for secession is supported by a majority vote in the referendum;

[92] Andrei Kreptul, 'The Constitutional Right of Secession in Political Theory and History' [2004] *Journal of Libertarian Studies* 17 (4) , 39–100 cited in Tsegaye Birhanu (n 86) 2, 3

[93] Ahmednasir M. Abdullahi, 'Article 39 of the Ethiopian Constitution on Secession and Self-determination: A Panacea to the Nationality Question in Africa?' (1998) *Law and Politics in Africa, Asia, and Latin America* 31(4), 440-455, 443

> (d)when the Federal Government will have transferred to the people or their council its powers; and
>
> (e) when the division of assets is effected on the basis of law enacted for that purpose"

Article 39(1) of the FDRE constitution demonstrates with clarity from the contextual usage that there is a difference between self-determination and secession. Contextually, while the former connotes internal self-determination, the latter connotes external self-determination through the exit of a state to create a new one[94]. According to Ahmednasir, the Ethiopian Constitution is laudable for transplanting international law norms into domestic law in the African state[95]. Though Article 1 of the Ethiopian constitution just like the Nigerian constitution provides that Ethiopia is a sovereign and juridic entity, Article 39 provides for the peaceful dissolution or winding up of the country whenever the circumstances so demand[96].

Birhanu argues that the procedural requirement of a simple majority provided by Article 39 is too simple and easy to achieve, unlike the constitutions of few other countries which require a two-thirds majority vote. He states further that the two-thirds majority requirement makes secession difficult and often times fail. An example of a country with a two-thirds majority requirement in its constitution is Saint Kitts and Navis which has hindered successful disintegration of the state. It is noteworthy that scholars do not align on the need to constitutionalize the right to secede. Even among the liberal democrats, this argument persists. This thesis will briefly examine these arguments.

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[94] Jean Salmon, 'Internal aspects of the right to self-determination: Towards a democratic legitimacy principle?', in Christian Tomuschat (ed.), Modern law of self-determination [1993] 253-282 cited in Ahmednasir M. Abdullahi (n 91) 444
[95] Ahmednasir M. Abdullahi (n 91) 444
[96] Ibid

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DOI: 10.47963/ucclj.v4i1.1549

Justification for Constitutionalizing the Right to Self-Determination in Nigeria

On the non-domestication of the right to self-determination in the constitution of a country, Allen Buchanan[97] opines that the right to secede ought to be domesticated in the constitution of a country though with some level of restraint to prevent levels of global instability that are incompatible with the securement of the enjoyment of fundamental rights[98]. According to him, the question of whether the right to secede ought to be incorporated into a constitution is not an abstract political philosophy. He observes that an age of extraordinarily active constitutional development has started. In many areas[99], new constitutions are being drafted, and existing ones are being dramatically altered, frequently as a result of secessionist fights[100].

Buchanan posits that the incorporation of the right to secede poses a danger to the democracy of a country if used as a strategic weapon by a group that views the right to secession as a prohibitive cost to exert the power over the majority decision whereas democracy is about the majority which supports the view of Abraham Lincoln on right to self-determination and democracy[101]. Buchanan, therefore, offered a solution on how to manage the right to secede and democracy. Accordingly, he opined that the constitution to contain some mechanism on how to balance a group's right to secede as well as the majority rule. He states that the constitution may recognise the right to secede under certain circumstances but create constitutional barriers to achieving secession which is though surmountable but inconvenient[102]. He states:

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[97] Allen Buchanan, 'Right to Self-determination and Right to Secede' [1992] *Journal of International Affairs* 45(2) 347-365, 352
[98] Ibid
[99] Allen Buchanan stated that countries in East Central Europe are modifying their constitutions to accommodate and regulate secessionist activities in Ukraine, Georgia, Armenia, etc which he considers as a liberal and democratic aspiration. Also, the Soviet Union constitution recognized the right to secede and it provide the structure for it and control over it though it did not state the conditions under which the right may be utilized because it never desired that the right be utilized.
[100] Allen Buchanan (n 95) 358.
[101] Ibid 361
[102] Ibid

> The most obvious way to achieve this would be to allow secession under certain circumstances but to minimize the danger of strategic bargaining by erecting inconvenient but surmountable constitutional barriers to secession. For example, the constitution might recognize a right to secede, but require a strong majority — say three-quarters — of those in the potentially seceding area to endorse secession by a referendum vote.

Buchanan notes that the essence is to balance two competing interests of flexibility for change and securing stability which are both legitimate. According to him, the constitutional hurdles created are not to prevent or disallow secession but rather to discourage it by making it uneasy[103]. Furthermore, Buchanan provides that the second solution is the imposition of exit cost on a seceding group to compensate those who would be affected by the secession such as people who are not part of the seceding group but suffers some damage due to the secession[104]. Buchanan's suggestion was captures thus:

> A second approach, which might or might not be used in conjunction with the first, would be to impose special exit costs, a secession tax as it were, over and above whatever compensation secessionists are required to pay to the state or private individuals who will lose property as a result of secession. Either of these approaches, or a combination of both, could serve to balance legitimate interests in secession, on the one hand, and equally legitimate interests in political stability and territorial integrity, on the other".

[103] Ibid 262
[104] Ibid

Furthermore, Wayne Norman[105] a liberal democrat argues that the damage usually caused by the lack of constitutional framework on the right to secession and the procedural mechanisms for secession is far worse than the damage that constitutionalizing secession may cause[106]. The major challenge to constitutionalizing secession is the interpretation of the procedural mechanism by the judiciary which is nothing compared with the violence that ensues from the lack of a constitutional framework on secession. Norman argues that it should not matter whether an entity or a group has just cause to secede or not, there should be a legal provision within which an activity such as secession or attempt to secede may be carried out[107]. It is immaterial whether such a group seeking to secure has the right to do so or not. He believes that where the right to secession is constitutionalized especially in the right way it will serve to ground secession in the rule of law and help to reduce the chances of the occurrence of secession or secessionist movement that may lead to violence[108]. On the contrary, the lack of legal procedure for secession will always give room for violence of any kind which will disturb the democratic stability of the state[109]

Norman amplifies the perspective of the "just cause theorists" that secession should be constitutionalized in such a manner that allows those with just cause to secede can secede under mild constitutional procedural mechanisms while those with no just cause can attempt to secede under very harsh and unrealistic conditions[110]. However, he states that the need to constitutionalize the right to secession is not a means to allow people who no longer consent to a government to exit such a government but a way to keep them by making the constitutional procedure difficult[111]. Norman identified such difficult procedural mechanisms thus:

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[105] Wayne Norman, "Domesticating Secession" (2003) *Nomos* 45, 193-237, 216
[106] Ibid 205
[107] Ibid 202
[108] Ibid 205
[109] Ibid
[110] Ibid200
[111] Wayne Norman, 'Secession and (Constitutional) Democracy' in *Democracy and National Pluralism* (ed.) F. Requejo (London: Routledge, 2001) 4 cited in Andrei Kreptul (n 90) 52

> Such mechanisms include rules that would make it difficult for secessionist politicians to capitalize on fleeting sentiments in favor of secession (e.g., requirements to hold a series of référendums over a period of years, or conversely a requirement that no more than one referendum on secession can be called within a twenty-year period). They also typically include qualified or supermajority requirements for secessionist votes, in part to use very strong support for secession as a kind of proxy for whether the group has just cause.[112]

Norman posits that when there is a constitutional procedure for the doing of a thing, no matter how rigorous the procedure may appear to be it will take the force of legitimacy over time[113]. He states further that if a constitution requires a two-thirds majority vote as one of the criteria for the grant of the demand for secession, such a secession clause may not be activated for generations but whenever a group decides to secede, they are already aware of the legal hurdle they have to cross before they can secede[114].

Norman, therefore, concludes that in a multinational state, the benefits of the introduction of a secession clause in the constitution outweigh constitutional silence on the subject[115]. He suggests that in the same way the questions such as the form of government to have, how power will be shared between the central government and subunit government, how subunits will be adequately represented, and so on are deliberated, the question of including or inserting the right to secession in the constitution should also be deliberated

[112] Wayne Norman (n 103) 200
[113] Ibid 228
[114] Ibid
[115] Ibid 229

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DOI: 10.47963/ucclj.v4i1.1549

CONCLUSION AND RECOMMENDATIONS

The right to self-determination is arguably one of the most controversial rights in international law. It is a subject of a serious contest amongst scholars, human rights activists, and even political leaders. Apart from the controversy surrounding its meaning, content, and nature, tremendous conflict exists between the need to protect the territorial integrity of a sovereign state and granting people the right to determine their political, social, cultural, and economic destinies through secession from a sovereign state. International law expressly emphasises the respect for the territorial integrity of the sovereign state but its failure to expressly permit or forbid the secession of a group from a sovereign state deepens the controversies that have plagued this concept. In recent years, there has been a surge in nationalist movements across the globe including in Nigeria. However, the reprisal approach of the Nigerian government to these agitations has caused a loss of lives. The government of Nigeria maintains the stance that self-determination is unconstitutional in Nigeria because it disrupts and challenges the territorial integrity of the country. Therefore, there is a necessity to examine the constitutionality of the right to self-determination under the Nigerian Constitution and the need to adopt constitutionalising self-determination as an approach to the protection of human lives and the incessant demand for secession by ethnic groups.

This research has revealed a complex landscape marked by legal interpretations. The study found that the amalgamation of the southern and northern protectorates in 1914, the legitimacy question surrounding the 1999 Constitution, the failure of federalism, and political and economic marginalization amongst others are the factors responsible for the incessant quest for self-determination in Nigeria. There is neither an express affirmation nor denial of the right to self-determination under the Constitution of the Federal Republic of Nigeria, 1999. Since there is no perfect constitution anywhere, it is the prerogative of the judiciary to fill such a constitutional vacuum which the judiciary has done on several occasions. The Nigerian judiciary in a bid to fill this legislative vacuum considers that the combined interpretation of the preamble to the constitution, Section 2 sub-section 1, and Section 1 sub-section 1 connotes the constitutional silence on self-determination means the non-recognition of the concept because self-

determination will alter the governmental structure of the country in a way that is inconsistent with the current constitutional arrangement.

Unfortunately, notwithstanding this judicial and constitutional stance on self-determination in Nigeria, there is a surge in the agitation for self-determination in Nigeria which has at various times received bloody responses from the Nigerian government in a bid to protect the territorial integrity of Nigeria. Nigeria is a multinational state, and the agitation for the secession of an entity or subunit from the country will have no end. This paper considers that one of the ways to either protect the territorial integrity of Nigeria or to allow a group to peacefully secede from it is to constitutionalise the right to self-determination inclusion of the right to secede in the constitution with the procedural requirements. To this end, any separatist movement for secession from Nigeria to create an independent state is only faced with the burden of crossing the constitutional legal hurdles for the exercise of the right to secede as provided by the constitution. This legislative mechanism will put an end to the use of arms and ammunition in the struggle for secession in Nigeria.

It must be noted that several factors are responsible for the agitation for self-determination in Nigeria. The failure of the federal government to discharge its responsibilities to the people as contained in the constitution of Nigeria remains the chief of these factors. While there are bound to be political approaches to addressing these agitations, constitutionalizing the right to self-determination remains one of the legal reforms by which this incessant demand for self-determination that occasions loss of lives may be controlled. There are concerns that constitutionalizing self-determination may awaken agitations from various ethnic groups with or no grievances. However, the constitutional procedural requirements by which this right may be exercised must sufficiently address this concern. Agitators must be able to establish certain factual situations that must be viable and meet the laid down constitutional requirements. According to Allen Buchanan, the requirement must be stringent so that agitators will only be confronted with the hurdles of meeting the requirement rather than picking guns to fight for the recognition of the right to self-determination.

Based on the findings of this study, the following are recommended solutions to incessant calls for secession in Nigeria:

1. There is a need to draft a new constitution that is people-oriented for Nigeria. This will enable to tackle some of the foundational issues such as inequality in state creation at each region, state autonomy to manage its affairs, equal opportunities for each citizen as well as the eradication of all forms of militarization of certain regions and the use of other state mechanisms to entrench violence and oppression on the innocent citizens
2. Constitutionalising self-determination with clarity on the procedural requirement for secession by any ethnic group.

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.158-189
DOI: 10.47963/ucclj.v4i1.1550

GHANA'S REGULATORY FRAMEWORK AND SUSTAINABILITY IN THE MINING SECTOR

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ABSTRACT

The mining sector in Ghana predates independence and has, over the years, contributed significantly to Ghana's socio-economic development through revenue generation, employment creation and increase in foreign direct investments. This can be attributed largely to the institution of comprehensive and attractive legal, fiscal and institutional frameworks by the Ghanaian Government, which have helped to attract investments into the mining industry. Nonetheless, lack of effective revenue mobilization, generous tax incentives, damaging environmental effects, and destruction of livelihoods of host communities, especially due to illegal mining activities, remain major challenges. Most of the problems associated with mining in Ghana are due mainly to a weak mining regulatory framework. Ghana has enacted the Minerals and Mining Act, 2006 (Act 703) (the Minerals and Mining Act), as amended in 2010, 2015, and 2019, as the basic law that regulates the mining sector, to improve the fiscal regime and to ensure effective regulation and sustainability of the mining industry. Even though Act 703 has been amended twice, and the Government has proposed a third amendment, previous amendments focused on "non-essential" areas, without special focus on the management of the environment for sustainability in the mining sector. Making the mining industry sustainable seems to have been addressed as an incidental. The Minerals and Mining Act has not undergone any major amendments to align it with regional frameworks, reflect international best practices and address sustainability challenges in the mining sector in Ghana. This paper reviews the key provisions of the Minerals and Mining Act, with a special focus on how the same facilitates environmental management for sustainability in the mining sector.

Keywords: Mining, Sustainability, Environmental Management, Minerals and Mining Act, Ghana

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.158-189
DOI: 10.47963/ucclj.v4i1.1550

INTRODUCTION

The mining sector has been an important part of Ghana's economy, with gold accounting for over 95% of the sector. Ghana is now the number one gold producer in Africa, overtaking South Africa in 2018 and 9th largest producer in the world.[4] This is due to pursuing policies that are liberal and macro-economic and, the institution of comprehensive and attractive legal, fiscal, and institutional frameworks by the Ghanaian Government. These measures have helped to attract investments in the mining industry, especially gold.[5]

Ghana has enacted the Minerals and Mining Act[6] as the principal law that regulates the mining industry, supported by several subsidiary legislation, namely, the Minerals and Mining (Compensation and Resettlements) Regulations, 2012,[7] which prescribes procedures for claiming compensation and resettlement of displaced communities; the Minerals and Mining (Support Services) Regulations, 2012,[8] which regulates entities that provide auxiliary services to the mining sector; the Minerals and Mining (General) Regulations, 2012,[9] which prescribes guidelines for the mining industry on matters such as staffing, disposal of minerals, mineral rights and reconnaissance, prospecting and mining operations; the Minerals and Mining (Health, Safety and Technical) Regulations, 2012,[10] which regulates safety, health and technical operation parameters in the industry; the Minerals and Mining (Explosives) Regulations, 2012,[11] which regulates the use of explosives in the sector; and the Minerals and Mining (Licensing) Regulations, 2012,[12] which prescribes the procedures for obtaining, maintaining licences and transferring licences.[13]

The two main institutions with direct supervisory and oversight responsibilities over the mining sector are the Ministry of Lands and Natural Resources (MLNR)

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[4] 'Minerals and Mining Policy, Ministry of Lands and Natural Resources' (Accra 2014) 12 <https:www.mincom.gov.gh> accessed August 2024.
[5] 'A Report by the UN's Commission of Sustainable Development in Ghana's Mining Sector' (May 2010) 1.
[6] Minerals and Mining Act, 2006 (Act 703).
[7] Minerals and Mining (Compensation and Resettlements) Regulations, 2012 (LI 2175).
[8] Minerals and Mining (Support Services) Regulations, 2012 (LI 2174).
[9] Minerals and Mining (General) Regulations, 2012 (LI 2173).
[10] Minerals and Mining (Health, Safety and Technical) Regulations, 2012 (LI 2182).
[11] Minerals and Mining (Explosives) Regulations, 2012 (LI 2177).
[12] Minerals and Mining (Licensing) Regulations, 2012 (LI 2176).
[13] ME Akafia and Kuenyehia, 'Getting the Deal Through, Mining in Ghana (June 2020) 94 <https://www.lexology.com/library> accessed 21 December 2019.

and the Minerals Commission (MC).[14] The MLNR is responsible for all aspects of mineral resource exploration in Ghana. It formulates policies and grants licences for mining and mineral exploration.[15] The MC is the principal institution for providing the regulatory framework and oversight for the mining sector in the country. It administers the Minerals and Mining Act and ensures compliance with the mining and mineral laws and regulations. It operates under the purview of the MLNR.[16]

Act 703 was enacted to revise and consolidate the law relating to minerals and mining in Ghana. It provides rules related to rights regarding minerals and mining operations in Ghana.[17] Act 703 has been amended twice. In 2015, it was amended for the Minister for Land and Natural Resources to make regulations to prescribe a rate for royalty payments, and to provide for the confiscation of equipment used in illegal small-scale mining.[18] In 2019, it was amended to increase the penalties for a person who buys or sells minerals without valid authority, and to increase penalties for a person who engages in mining contrary to Act 703.[19] Despite the enactment of Act 703 and its amendments and institutional frameworks to implement them, issues of sustainability in Ghana's mining sector still remain. These mining laws and institutions which have a direct or indirect impact on development and the environment are neither effectively implemented nor adequately complied with.[20] This has led to water pollution, air pollution, increased deforestation, land degradation, mercury contamination, increased poverty, displacement of communities, and illegal small-scale mining or "galamsey". Illegal miners' activities leave behind unsafe excavations which render high quality arable land unsuitable for cultivation, and destruction of the land, water bodies and degradation of the environment.[21] Environmental impacts of land degradation have resulted in a reduction in soil fertility, crop yield, bio-diversity and food insecurity. The socio-economic impacts led to an increase in

[14] AK Mensah and others, 'Environmental Impacts of Mining: A Study of Mining Communities in Ghana' (2015) 3 Applied Ecology and Environmental Sciences 81-94.
[15] Ministry of Lands and Natural Resources <http://www.mlnr.gov.gh> accessed 10 November 2022.
[16] Mensah (n 14).
[17] Minerals and Mining Act (n 6).
[18] Minerals and Mining (Amendment) Act, 2015 (Act 900).
[19] Minerals and Mining (Amendment) Act, 2019 (Act 995)
[20] GA Sarpong, *Ghanaian Environmental Law: International and National Perspectives* (Wildy, Simmonds & Hill Publishing, 2018) 6.
[21] Ibid.

poor rural households, migration to the cities and urban communities, and increased competition for access to land.[22]

The regulatory institutions lack the necessary logistical, technological and human resource capacity to effectively implement and monitor these laws. They are saddled with poor remuneration and working conditions, and capable personnel being poached by private and non-governmental organisations (NGOs). Most of the regulatory institutions lack the requisite number of personnel and modern equipment to ensure effective supervision, resulting in a loss of motivation and enthusiasm by the few remaining personnel in those agencies.[23]

Against this background, this paper reviews the key provisions of the Minerals and Mining Act, with special focus on how the same facilitates environmental management for sustainability in the mining sector.

The paper adopted a review approach method by reviewing relevant literature including statutes and regulations on mining and the environment, policies and legal documents, reports, journal articles, newspaper articles and interviews.

A HISTORICAL SURVEY OF MINING LAW IN GHANA

Mining activities in Ghana, particularly, gold, can be traced to the 7th and 8th Centuries A.D., when deposits of gold attracted Arab traders into the country,[24] and continued throughout the 15th century, when Ghana was known as the Gold Coast. Artisanal mining of gold by the local population antedates the first recorded contact with Europeans in 1471.[25] The more capital intensive and large-scale mining by British and other foreign investors began in the late 19th century, after the formal imposition of British rule on most of the territory that is now Ghana. Gold, however, was and is still, the principal mineral extracted and accounts for 90% of extracted minerals in Ghana.[26]

In 1905, the Gold Mining Protection Ordinance[27] was passed in the colonial era to prevent indigenes from dealing in gold and any other ventures associated with

[22] Ibid.
[23] Ibid.
[24] G Hilson, 'A Contextual Review of Ghanaian Small-Scale Mining Industry' (IIED, London 2001) <http://www.pubs.iied.org/pdfs/G00722.pdf> accessed 10 November 2022.
[25] TE Anin, *Gold in Ghana* (4th edn Selwyn Publishers, Accra 1994).
[26] K Bentsi-Enchill, 'Colonial Land Policy in Ghana, 1874-1962 with Specific Reference to the Mining Sector of the economy' (1986) Unpublished Manuscript.
[27] Gold Mining Protection Ordinance (Cap. 149).

gold. This was followed by the passage of the Mercury Ordinance,[28] which made it illegal for indigenes to own mercury. These unfair ordinances were replaced by the Mining and Minerals Act, 1962.[29]

After independence in 1957, the Government passed, a series of statutes relating to land and minerals in 1962. The first was the Minerals Act, 1962.[30] It vested the ownership of minerals in "the President on behalf of the Republic and in trust for the People of Ghana",[31] tightened the area and duration provisions relating to mineral rights,[32] and gave the President the power to demand the sale to a state agency of minerals produced in Ghana at a negotiated price determined by the High Court.[33] The second was the Administration of Lands Act.[34] It required that payments in respect of stool land be made, not directly to the representatives of the owning community, but to the Minister who would allocate portions for the maintenance of the traditional authority, projects for the benefit of the people of the area, and the local government bodies in the area.[35] The last was the Concessions Act, 1962[36] which provided for the establishment of a tribunal and gave the Minister in charge power to determine a concession where the holder unreasonably refused to vary a term which had become oppressive due to a change in economic conditions,[37] the holder had lost the financial ability to develop it,[38] or the land specified had not been developed or used in accordance with the object for which the concession was granted during the eight years preceding the application of the Minister.[39]

The mining sector stagnated and up to the early 1980s, there were no significant new investments in Ghana's mining sector.[40] Output in almost all the mines declined and the sector contributed relatively little to gross national earnings because production of Ghana's flagship mineral, gold, had declined to about

[28] Mercury Ordinance 1932.
[29] Mining and Minerals Act, 1962 (Act 126).
[30] Ibid.
[31] Ibid, s 1.
[32] FS Tsikata, 'The Vicissitudes of Mineral policy in Ghana' (1997) 2 Resources Policy 9-14.
[33] Ibid.
[34] Administration of Lands Act, 1962 (Act 123).
[35] Ibid, s 20.
[36] Concessions Act, 1962 (Act 124).
[37] Ibid., s 3(1)(c).
[38] Ibid., s 3(1)(d).
[39] Ibid., s 3(1)(e).
[40] Tsikata (n 32).

283,000 ounces per annum.[41] A Structural Adjustment Programme introduced in 1983 led to various reforms, including modifications to the mining sector legislation to make the sector more conducive to foreign investors as well as the enactment of environmental laws and other mining sector legislative changes. Consequently, the Minerals and Mining Act[42] was enacted in 1986 to promote and regulate the orderly development of the mining sector. The Small-Scale Gold Mining Law,[43] the Mercury Act,[44] and the Precious Minerals Marketing Corporation Act[45] were enacted in 1989 to regularize and streamline small-scale gold mining, regulate the use of mercury by small-scale gold miners, and provide official marketing channels for gold produced by small scale miners.[46] The MC was given the responsibility of providing technical assistance to prospective and registered small-scale miners in Ghana and promoting their activities. These measures led to a significant investment and revival of activities in the mining sector and a substantial increase in the production of gold in the country.[47] The current law that regulates mining in Ghana is the Minerals and Mining Act, 2006 (Act 703).

MINERALS AND MINING ACT, 2006 (ACT 703)

The Minerals and Mining Act,[48] is the principal law that regulates the mining industry in Ghana, together with its accompanying regulations. The principal regulatory body that administers the Act is the MC. The Act applies equally to local and foreign investors, except for provisions relating to small-scale mining of minerals, which is exclusively reserved for Ghanaians.[49]

Grant of Mining Rights

The acquisition of title to mineral rights is covered under the Minerals and Mining Act.[50] It provides that title or ownership of all minerals, including metallic minerals, is vested in the President of the Republic of Ghana in trust and on behalf

[41] Ibid., p 8.
[42] Minerals and Mining Act, 1986 (PNDCL 153).
[43] Small Scale Gold Mining Act, 1989 (PNDCL 218).
[44] Mercury Act, 1989 (PNDCL 217).
[45] Precious Minerals Marketing Corporation Act, 1989 (PNDCL 219).
[46] Ibid.
[47] Ibid.
[48] Minerals and Mining Act (n 6).
[49] Ibid.
[50] Ibid (n 6) s 1.

of the people of Ghana.[51] This is, however, subject to any privately owned mineral rights, those that have been or are being granted, or recognized as being vested in any other person.[52] Thus, by Act 703, a person shall not conduct activities in Ghana for the search, reconnaissance, prospecting, exploration, or mining for a mineral unless the person has been granted a mineral right.[53] The Act provides for three types of mineral rights, that is, reconnaissance licences, prospecting licences, and mining leases.[54] Generally, by section 10 of Act 703,[55] a mineral right can only be granted to a body incorporated under the Companies Act[56] or a partnership under the Incorporated Partnership Act.[57] By contrast, a small-scale mining licence can only be granted to a Ghanaian citizen over the age of 18.[58] An applicant interested in obtaining a mineral right or a small-scale mining licence must submit an application in the proper form to the MC.[59]

Mineral rights applications must contain supporting documents which detail particulars of the financial and technical resources available to the applicant for the mining operations, an estimate of the amount of money likely to be spent on the mining operations, particulars of the programme for the proposed mineral operations (be they reconnaissance, prospecting or mining), particulars of the applicant's proposal with respect to employment and training of Ghanaians in the mining industry.[60] It is noteworthy that even though the Act defines what a "mineral" is, it remains unclear whether any substance that is naturally present in the earth and is formed from animal or vegetable matter is a "mineral". It is also unclear whether "mineral" encompasses, and the statute applies to, both metallic and non-metallic substances. It is also noteworthy that a statement or plan on environmental management is not one of the supporting documents that must accompany a mineral rights application!

To ensure transparency in the grant of mineral rights, the law provides that once an application is duly submitted to the MC, the Commission has up to ninety days

[51] Ibid.
[52] Ibid., s 72.
[53] Ibid., s 9.
[54] Ibid., s 111. The Act also provides for a restricted version of each of these types of mineral right, under which the right-holder can only take 'industrial minerals' such basalt, clay, granite, gravel, gypsum, laterite, limestone, marble, rock, sand, sandstone, and the like.
[55] Ibid.
[56] The Companies Act 1963, (Act 179).
[57] The Incorporated Private Partnership Act, 1962 (Act 152).
[58] Minerals and Mining Act (n 6) s 83.
[59] Minerals Commission Act, 1993 (Act 450).
[60] Minerals and Mining Act (n 6) s 11.

to submit its recommendations on the application to the sector minister. On receipt of the application from the MC, the minister has sixty days to make a decision on the application and notify the applicant in writing accordingly.[61] To ensure openness based on consultation during the licensing phase, including participation of government agencies and effective consultation of communities that are likely to be affected by the mining activities, the minister shall, at least forty-five days before making a decision on the application, give notice in writing in respect of the land subject to the application for a mineral right to the local chief or the allodial title holder of the land and the relevant District Assembly. The notice shall state the proposed boundaries of the mineral right and be published in "a manner customarily acceptable to the areas concerned" and in the Gazette as well as exhibited in the offices of the relevant District Assembly.[62]

If the Minister approves the mineral rights application, the applicant then has a further 60 days to notify the minister of the acceptance of the offer of a mineral right.[63] However, Act 703, does not appear to provide for value addition to minerals as an additional consideration for granting mineral rights. The grant of mineral rights should give priority to applicants who commit to pursuing actions to add value to the minerals produced to the satisfaction of the Minister, where there are competing applications for a concession.[64]

Before an applicant for a mineral right will be granted a licence, the applicant must provide a satisfactory environmental protection programme,[65] and mining companies must comply with environmental regulations requirements, including requirements relating to Environmental Impact Assessment (EIA), for environmental permitting.[66] As already pointed out above, the requirement for an environmental protection plan should be one of the requirements to accompany the application, rather than being required after the application has been approved, coming like an afterthought.

The holder of a mineral right must obtain approvals from the Environmental Protection Agency (EPA) and the Forestry Commission (FC) for the protection of

[61] Ibid., s 13.
[62] Ibid.
[63] Ibid.
[64] B Boakye and Others, 'Gap Analysis of the Minerals and mining Act, 2006 (Act 703) and Draft Amendment, Africa Centre for Energy Policy' (2021) <https://www.jstor.org/stable/resrep33518.1> accessed 15 November 2023.
[65] Minerals and Mining Act (n 6) s 11(c).
[66] Environmental Assessment Regulations, 1999 (L.I. 1652) reg 3.

natural resources, public health and the environment.[67] It is submitted, however, that since mining has a number of direct and indirect costs on the environment and communities, management of these costs should be addressed before and not when an applicant has been granted and becomes a mineral rights holder.

The Environmental Assessment Regulations, 1999,[68] specify various reporting requirements from mining companies to address water pollution, nature and ecological conservation, air pollution, noise and vibration, soil contamination, changes in social, cultural and economic patterns and reclamation bond.[69] Guidelines like the Mining and Environmental Guidelines, Guidelines for Mining Operations and Sector Specific Environmental Impact Assessment Guidelines manage the mining industry.[70]

There are various mechanisms to ensure environmental sanity in the mining sector and these include effluent and emission standards, ambient quality standards, economic instruments, Environmental Performance Rating and Disclosure (EPRD) called "Akoben", command and control mechanisms and co-regulation.[71]

Having prepared mine closure and decommissioning plans, posting of reclamation bonds by the investor is used as a mechanism to ensure that, among others, environmental liabilities are not left behind after mining. The EPA and the Inspectorate Division of the Minerals Commission (IDMC) undertake environmental monitoring of the sector.[72]

Despite the apparent comprehensive provisions of the law, illegal mining is a challenge that compromises sustainability in the sector! This is a significant issue for the industry, not only in Ghana, but internationally. Illegal mining, referred to as "galamsey", often takes place on properties not suited for large-scale mining, that is, small-scale sites that have no regard for regulations that seek to reduce environmental impact. Such illegal mining operations do not follow the requirements for careful use of the resources and, hence, leave in their wake unsafe excavations which render land unsuitable for agriculture, degradation of water bodies, and stripping the topsoil layer for plant growth. Quite often, such mines use traditional less environment-friendly equipment in their operations in order to

[67] Minerals and Mining Act (n 6) s 18(1).
[68] Environmental Assessment Regulations (n 66).
[69] Ibid.
[70] 'A Report by the United Nations Commission on Sustainable Development on Ghana's Mining Sector' (n 5) 23.
[71] Ibid.
[72] Environmental Assessment Regulations (n 66) reg 23.

minimize the costs involved. They are also less likely to engage in the rehabilitation of the mines through, say, large-scale reforestation schemes. Only ensuring that all mining operations follow and comply with the same environmental rules and standards can help prevent illegal mining operations!

Royalties

Minerals royalties have played a pivotal role in driving economic growth in Ghana. They have contributed significantly to GDP, and have supported infrastructure development and investment in social services.[73] Investments in road networks, energy systems, water supply, and telecommunications infrastructure have been funded, in part, by mining royalties.[74] Furthermore, mineral royalties have been allocated to social programs aimed at improving education, healthcare, and social welfare. Investments in these sectors help address social disparities and promote inclusive development in communities.[75] They have also generated employment opportunities benefiting both the individuals directly involved in mining operations and those employed in various support services.[76]

The fiscal regime for investments in the mining sector is partly provided for under Act 703 and partly under the Internal Revenue Act, 2000[77] as amended. The main component of the minerals and mining sectors fiscal policy is the royalty regime.[78] The mineral royalties are payable by any operator who extracts minerals from the territory of Ghana. It is payable on the total gross revenue from minerals extracted.[79]

Currently, a holder of a mining lease, restricted mining lease or small-scale mining licence must pay royalty in respect of minerals obtained from its mining operations to the state at the rate to be prescribed by the Minister.[80] Payments are based solely

[73] World Bank. Ghana Economic Update: COVID-19, Storms, and Oil Price Shocks: Policy Options and Actions to Support a Resilient Recovery' (2020).
[74] World Bank. Ghana Mining Sector Development and Environment Project (2020) < https://projects.worldbank.org/en/projects-operations/project-detail/P147862>accessed 11 July 2023.
[75] Ghana Extractive Industries Transparency Initiative (2021), 2019 Mining Sector Report <https://gheiti.gov.gh/>accessed 11 July 2023.
[76] Ghana Chamber of Mines, *Annual Report* (2020) <https://www.ghanachamberofmines.org/> accessed 11 July 2023.
[77] Internal Revenue Act, 2000 (Act 592).
[78] A Report by the United Nations Commission on Sustainable Development on Ghana's mining Sector (n 5) 13.
[79] From December 16, 1986 under LI 1340 to March 19, 2010 when a fixed rate was introduced under Act 794, the rate was variable.
[80] Minerals and Mining Act (n 6) s 25.

on mining operations and not on environmental considerations. Also, Act 703, does not consider different royalties for different mineral types.[81]

Effective fiscal management and fair distribution of minerals royalties remain ongoing challenges. There are inadequate transparent and accountable mechanisms to track the collection and allocation of mineral royalties. There is a need to strengthen governance frameworks, enhance revenue management systems, and promote fiscal responsibility, all of which are crucial to ensure that royalties obtained from mining are effectively and equitably utilized for the benefit of the entire population.[82]

Public and Stakeholders Consultation and Participation in Decision-Making

Stakeholder consultation and participation in the mining sector involves getting mining communities involved or being allowed to become involved in the decision making or evaluation of a service, even simply to be among the number of people consulted on an issue or matter.[83] Engaging communities helps to balance economic development considerations with social and environmental considerations, leading to decisions that are sustainable and politically viable and socially.[84] The Rio Declaration 1992 emphasizes that "[E]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level".[85] Making decisions about mining projects affects the lives of people in mining communities. Therefore, the engagement should start before exploration and continue throughout all phases in the life of the mining project.

Consultation in the processing of mineral rights and management of mining operations is required under Act 703.[86] During the processing of initial mineral rights, the public is consulted through a provision which requires a 21-day publication at the relevant District where the project will be sited.[87] Subsequently, before any work begins, all stakeholders are engaged to negotiate for payments of compensation. Additionally, in the case of a mining lease, various public hearings are

[81] Boakye (n 64).
[82] World Bank (n 74).
[83] JM Bryson, 'What to do When Stakeholders Matter' Public Management Review' (2004) 6, 21-53.
[84] A Buxton and E Wilson, 'FPIC and the Extractive Industry: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects.' International Institute for Environment and Development (IIED) (2013).
[85] Rio Declaration on Environment and Development, UN DOC A/CONF. 15/5 (1992) Principle 10.
[86] Minerals and Mining Act (n 6) s 13.
[87] Ibid., s 13(3).

held in and with the project affected communities, by the EPA, required under L.I. 1652, to address envisaged impacts of the mining operations on the environment, in order to reduce air, land and water pollution; land degradation; the provision of better working and living conditions for mine workers; and corporate social responsibility projects for the host communities.[88] Some important consultative processes include consultations during mineral rights acquisition, multi-stakeholder workshops to discuss the draft national mineral policy, and regulations to give effect to Act 703.[89]

Act 703 is silent on the need for an applicant for a mineral right to obtain the free, prior, and informed consent of the host community before the grant of the mineral right by the Minister. This would enhance social legitimacy and reduce social conflicts in mineral operations. Additionally, it would offer community stakeholders an opportunity to contribute to decision making regarding mineral operations and the impacts.[90] Cases of land degradation and the consequential disputes between the mining companies and local communities would, probably, be less common.

Effective stakeholder consultation and participation build trust and openness, both of which are key to the implementation and compliance of environmental laws and regulations, which in turn, creates better working and living conditions for both mining workers and mining communities. Overall, stakeholder participation ensures incorporation of local knowledge into plans and therefore could contribute to learning and better plans as ideas flow back and forth between planners and affected interests.[91] Also, participation provides planners with opportunity to educate stakeholders, especially those affected by policy, about poorly understood problems and policy issues, which builds incentives and understanding and collaboration.[92]

Equitable Benefit Sharing

Benefit sharing is reflected in the Minerals and Mining Act, which provides for a localization policy, whereby the holder of the mining lease must give preference in employment to the members of the local community, by training and recruiting Ghanaians.[93] An applicant for a mineral right is also required to include, in his

[88] Environmental Assessment Regulations (n 66) reg 17.
[89] Ibid.
[90] Boakye (n 64).
[91] Ibid.
[92] Ibid.
[93] Minerals and Mining Act (n 6) s 50.

application, proposals with respect to the employment and training of Ghanaians in the mining industry.[94] These provisions are designed to transfer technical knowledge and skills to ensure that all the aspects of the local community benefit from mining projects.

The other form of benefit sharing contemplated by the law is the payment of royalties to the State by the mineral right holder. Under the current system, mining companies pay royalties of 90 per cent to the central government, but only 10 per cent go to the local communities.[95] The main challenge, then, is how the 10 per cent of royalty payments is used and managed for the benefit of all community members. The law does not provide a formula. It would depend, therefore, on how the District Assemblies and the Chiefs in the local communities apply those funds.[96]

To facilitate more equitable distribution of accruing benefits among locals, often amongst subsistence, and mining communities, the Minerals and Mining Act requires that in respect of artisanal small-scale mining, Small Scale Mining Committees be established in every designated mining area.[97] The Committee is composed of six members, appointed by the Minister of Mines, who shall assist the District Office of the MC, to effectively monitor, promote and develop mining operations in the designated area.[98] There are no express provisions in Act 703 requiring mineral right holders to continuously consult and negotiate on issues and decisions affecting host communities throughout the mining operations, to enhance social legitimacy and reduce social conflicts in the mining operations.[99]

Failure to equitably share the benefits of the mining project has seen host communities continue to live in poverty, with dire food insecurity, land degradation having imposed huge costs on agriculture. It has also resulted in health problems. Mining communities experience increased diseases as a result of mining operations. These include malaria due to dams that breed mosquitos, skin and

[94] Ibid., s 11(d).
[95] Ibid, s 183.
[96] Ibid.
[97] Ibid., s 92 (1).
[98] Ibid., s 92 (2) – (4).
[99] Boakye (n 64).

respiratory diseases from dust in the mines, diarrhea and typhoid from contaminated river water, and eye problems from dust.[100]

The failure has also caused severe socio-economic impacts on local mining communities and workers. Relocation schemes have led to loss of land and resources, chronic impoverishment, social disruption, and decreased access to basic social and public services.[101] For instance, in Teberebie, the gold mining operations by the American – Ghanaian Teberebie Goldfields Ltd. displaced inhabitants of Teberebie. In the early 1990s, the community's illiterate chief signed an agreement with the mining company to provide 168 housing units, a school complex, community centre, electricity, a medical clinic, and potable drinking water within 12 months, but after 7 years, the agreement had still not been fulfilled.[102] In addition, relocation schemes in Ghana have often excluded women from compensation payments. Compensation payments go to heads of families (men), who often abandon their wives and children thereafter![103]

Mining Contracts

The enactment of the Minerals and Mining Act,[104] ushered in an era where the Minister responsible for mining was authorized to enter into two types of agreements, namely, Stability Agreement[105] and Development Agreement,[106] to provide stabilization for the holder of a mining lease, especially of fiscal terms.[107] The MLNR, as a part of a mining lease, may enter into a stability agreement with the holder of the mining lease (subject to the ratification of Parliament), to ensure that the holder will not, for a period not exceeding 15 years from the date of the agreement, be adversely affected by a new enactment, order, instrument or other

[100] Economic and Social Rights Centre (Hakijamii), 'Titanium Mining Benefit Sharing in Kwale County: A Comprehensive Analysis of the Law and practice in the Context of Nguluku and Bwiti' (2017) 17 <https:/www.business-humanrights.org> accessed 27 November 2023.
[101] A Kumah, 'Sustainability and Gold mining in the Developing World' (2006) 14 Journal of Cleaner Production 315-323.
[102] DM Brande, 'Mourning the Future' (1998) <https://www.newint.org/issue299/mourning.htm> accessed 21 November 2023).
[103] T Akabzaa and D Abdulai 'Impact of Mining Sector Investment in Ghana: A Study of the Tarkwa Mining Region.' Report Prepared for SAPRI, Third World network, Accra (2001).
[104] Minerals and mining Act (n 6).
[105] Ibid., s 48.
[106] Ibid., s 49.
[107] J Aryee and Others, 'The Political Economy of the Mining Sector in Ghana. Policy Research Working Paper 5730 World Bank' (Washington DC 2011) 167 <https://www.cmi.no/publications/file/4091-political-economy-of-the-mining-sector-in-ghana.pdf> accessed 9 December 2022.

instrument that existed at the time of the stability agreement and, subsequently, be adversely affected by changes to the level of and payment of royalties, taxes, fees and other fiscal imports, as well as laws relating to exchange control, transfer of capital and dividend remittance.[108]

The Minister responsible for natural resources, on the advice of the MC, may enter into a development agreement under a mining lease with a person where the proposed investment by the person will exceed US$500 million. A development agreement may contain provisions relating to the mineral right or operations to be conducted under the mining lease, the circumstance or manner in which the Minister will exercise a discretion conferred by the Minerals and Mining Act on tax stabilization as indicated above, and environmental issues and obligations of the holder to safeguard the environment in accordance with any enactment, and dealing with the settlement of disputes. A development agreement is subject to ratification by Parliament.[109]

Although existing provisions in Act 703 speak to the renewal of mineral rights and tenure of stability agreements, no provisions exist for renegotiation of terms upon changes in project economics. Such an inclusion would provide an opportunity for the government to renegotiate contracts of mining leases when there are significant changes to economic conditions that may not have been reasonably contemplated at the time of signing of the original contract. Also, granting a renewal for up to 25 years is too long for any renegotiation as may not have been contemplated initially.[110]

In addition, there are no provisions in Act 703 to mandate or obligate beneficial owners of minerals rights to publicly disclose contracts, as obligated in the Companies Act, 2019 (Act 992). The inclusion of disclosure on beneficial ownership information would serve to reduce the risk of corruption, illicit financial flows, and other rent-seeking behaviours that deny the State some rightful revenues.[111]

In addition to protecting the physical environment, mining companies are required to adopt practices, such as occupational health and safety practices, to protect workers and their families and the general public. Companies are to comply with applicable environmental, health and safety laws and regulations, and are to

[108] Minerals and Mining Act (n 6) s 48.
[109] Ibid., s 49.
[110] Boakye (n 64).
[111] Ibid.

develop and implement comprehensive monitoring and auditing programmes.[112] Mining companies are required to put in place adequate and effective measures to ensure the achievement of established standards.[113] They are to conduct risk assessments to identify the various dangers inherent in their operations, rank these risks and ensure that effective controls are put in place to ameliorate the risks,[114] provide training and re-training of employees in safety matters,[115] implement appropriate health and safety programmes,[116] and ensure that all employees exercise leadership and commitment to continual improvement in environmental, occupational, health and safety awareness.[117]

Environmental Management

Act 703 requires and ensures that environmental legislation and guidelines of the country are complied with by mining investors. It requires the holder of a mineral right who wants to undertake any activity to obtain approvals and permits from the EPA and FC for the protection of natural resources, public health, and the environment.[118] For instance, the Act provides that mineral rights may not be granted to an applicant unless that applicant has provided a satisfactory programme of environmental protection measures and how these would be funded;[119] applications for mineral rights must be accompanied by information relevant to all activities requiring approval under environmental legislation;[120] and, mining companies must comply with the requirements of the environmental regulations, including requirements relating to environmental impact assessment, for environmental permitting.[121]

The main environmental laws applicable to the mining industry are the Environmental Protection Agency Act, 1994 (Act 490)[122] and the Environmental Assessment Regulations 1999 (LI 652).[123] The Environmental Protection Agency is

[112] Minerals and Mining Policy (n 4) 35.
[113] Ibid.
[114] Minerals and Mining (Health, Safety and Technical) Regulations (n 10) reg 474(1)(a).
[115] Ibid., reg 474(1)(b).
[116] Ibid., reg 474(1).
[117] Ibid., reg 474(1)(c).
[118] Minerals and Mining Act (n 6) s 18(1).
[119] Ibid., s 11(c).
[120] Environmental Assessment Regulations (n 66) reg 4(3).
[121] Ibid., reg 3.
[122] Environmental Protection Agency Act, 1994 (Act 490).
[123] Environmental Assessment Regulations (n 66).

the regulatory body that oversees environmental protection and sustainability in the mining sector by administering these laws.[124]

Mining companies are required to be registered with the EPA and obtain an environmental permit prior to commencement of their operations or project.[125] The applicant is required to submit an application and pay the requisite fees after[126] which the EPA will carry out an initial assessment[127] and issue a screening report to be able determine whether the application should be approved, objected to, or requires submission of a preliminary environmental report (PER), or an environmental impact statement (EIS).[128]

Where the EPA thinks that a significant adverse environmental impact is likely to result from the activities of any undertaking, the applicant is then asked to submit an EIS for an assessment of the environmental impact of the undertaking.[129] Where an EIS is acceptable to the EPA, it will issue the applicant an environmental permit.[130] The EPA has 90 days to make a decision from the date of receipt of the application form, except where a hearing is conducted or a PER is required. [131] The environmental permit is valid for 18 months.[132] A mining company is then issued with an environmental certificate within 24 months of the date of the commencement of operations after the EPA has approved a PER or an EIS and issued an environmental permit.[133] Companies that have received approval for either their PER or an EIS are required to obtain an environmental management plan (EMP) within 18 months of commencement of operations and thereafter every three years.[134] The EMP is required to set out steps that are intended to be taken to manage any significant environmental impact that may result from the operation of the project or undertaking.[135]

Reclamation is just one of the methods of trying to redeem mine damaged land, and ensures rehabilitation and long-term care and maintenance of the mine site, when mineral production ceases. Further, it is a means by which steps are taken to

[124] M Akafia and K Kuenyehia, 'Getting the Deal Through, Mining in Ghana' (n 13).
[125] Environmental Assessment Regulations (n 66) reg 1-2.
[126] Ibid., reg 4.
[127] Ibid., reg 5.
[128] Ibid., reg 6.
[129] Ibid., reg 9-10.
[130] Ibid., reg 19.
[131] Ibid., reg 20.
[132] Ibid., reg 21.
[133] Ibid.
[134] Ibid., reg 24.
[135] Ibid.

alleviate impacts of mining by trying to restore its beauty and productivity in other ways. Mining companies are required to submit reclamation plans to the EPA and are further obliged to post reclamation bonds regarding their reclamation plans, based on approved work plan for reclamation, to cover the costs associated with the implementation of environmental restoration and rehabilitation in the event the mining company does not do it all or does not do it to the satisfaction of the EPA.[136]

The EPA faces institutional weaknesses in ensuring effective environmental management. They include: a weak policy environment; declining budget and resources for programme implementation; limited decentralization and low budget allocations to local levels; poor staff remuneration and performance management; poor accountability of resources by departments and field officers among others.[137] These weaknesses have led to inadequate service delivery, underperformance of the permitting and certification system, low levels of main streaming environment across sectors, low staff moral and high turnover, among others.[138] Although, the EPA has made efforts through strategic plans to reduce the magnitude of the challenges, it has not fully alleviate them.

Regulations LI 2182 provide that before closing a mine site, the holder of the mining lease is required to satisfy the Chief Inspector of Mines that all sources of potential pollution and residual component of the mining project upon closure are designed to be stable for the long term.[139] The holder is required to ensure there is no emission of polluted water, air, or dust will occur from the closed mining area.[140] The holder of a mining lease is required to submit a mine closure plan which should include a description of the closure and rehabilitation of a mine to the Inspectorate Division for approval.[141] The mine closure plan must be submitted, as soon as is reasonably practicable, not later than sixty days before the beginning of the process of closing or abandoning the mine or major part of the mine.[142] The prospector is supposed to take such steps to prevent any person or stock, inadvertently entering there. The holder must fill up or secure to the Commissioner's satisfaction, removal of old shafts, pits, holes and excavations,

[136] Ibid., reg 13.
[137] 'Ghana Country Environmental Analysis' (2020) 124 <https:www.documents1.worldbank.org> accessed 20 August 2024.
[138] 'Ghana Environmental Sector Study' (2008).
[139] Minerals and Mining (Health, Safety and Technical Regulations) (n 10) reg 274(1).
[140] Ibid., reg 274(2).
[141] Ibid., reg 275.
[142] Ibid., s 275(1)

notices, beacons, and boundary posts.[143] In default of so doing, he shall be guilty of an offence.[144] However, the obligation is only up to some limited extent beyond which the land may still be derelict land, especially in the surrounding areas not directly connected with the site.

The main tools for managing the environmental fallouts of natural resources exploitation are the Strategic Environmental Assessments and Social Assessment Requirements (SEASA), and the Environmental and Social Impact Assessment (ESIA) requirements. Arising out of the ESIA processes are EMPs, which are often not publicly disclosed.[145] Opportunities for citizen participation in the ESIA processes come in the form of public hearings, where host and fringe communities are invited to discuss the project's potential impacts, proposed remedial measures, and socio-economic benefits to the state and the communities.[146] However, given the highly technical nature of the ESIA reports, the public hearings are often reduced to discussions on just the job opportunities and economic benefits the project promises.[147] As a result of the poor quality of ESIA consultations, land use contestations have become commonplace in most mining communities after concessions and environmental permits have been granted.[148]

Water pollution is one of the many direct and indirect costs of mining on the environment and local communities. Mining companies are also required to obtain a water permit before starting mining operations. They may obtain the requisite approvals or licences from the Water Resources Commission (WRC), under the Water Resources Commission Act 1996,[149] for purposes of mineral operations, to divert, impound, convey and use water from a river, stream, underground reservoir, or watercourse within the land to be used for mining operations.[150] The application is made in writing to the WRC for the grant of water rights.[151] The WRC then conducts the necessary investigations, including consultations with the mining community, before taking a decision.[152] Any person who claims that his or her interest will be affected by the grant may notify the WRC within three months,

[143] Ibid., s 277.
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Water Resources Commission Act, 1996 (Act 522).
[150] Minerals and Mining Act (n 6) s 17.
[151] Water Resources Commission Act (n 156) s 16.
[152] Sarpong (n 20) 266.

and such objections may be considered in determining whether the water rights should be granted.[153]

Where the mineral rights holder diverts, dams, stores, abstracts, or uses water resources without a valid permit, the holder commits an offence.[154] If convicted, the penalty may be a fine or imprisonment for a period of three years.[155] The WRC is silent on the remedies available for persons dissatisfied with its decisions. However, the mineral right holder could invoke the supervisory jurisdiction of the High Court or rely on the constitutional guarantees of property rights to ventilate their grievances.[156]

The WRC reserves the right to suspend or vary water rights granted in any area where the water resource is insufficient or is likely to become insufficient as a result of the grant.[157] Also, the WRC has the power to terminate or limit holdings of water rights on grounds that the water is required for public purposes.[158] The owner of such a right is entitled to compensation based on agreement with the WRC or, failing that, by a determination of the courts.[159] Holders of water rights may be divested of the right if they fail to comply with any condition of the grant, use water resources for a purpose not authorized by the grant, or where the owner has not, during the preceding two years, made full beneficial use of the right.[160] In all these instances, the mineral right holders of water rights are entitled to notice requiring them to remedy the breach before the imposition of the sanction.[161]

The principal Act and the subsidiary legislation, the Minerals and Mining (Health, Safety, and Technical) Regulations, 2012,[162] addresses mine related pollution.[163] The Regulations lay down the least stringent conditions against pollution. The Regulations make it an offence for any person to discharge any poison, toxic, noxious or obstructing matter or other pollutants, or to permit another person to do

[153] Ibid.
[154] Water Resources Commission Act (n 156) s 13.
[155] Ibid., s 34.
[156] Sarpong (20) 266.
[157] Water Resources Commission Act (n 156) s 19.
[158] Ibid., s 20 (1).
[159] Ibid., s 21.
[160] Ibid., s 23.
[161] Ibid., s 22(1).
[162] LI 2182.
[163] Minerals and Mining Act (n 6).

so. The offender is liable to a fine not exceeding ten thousand United States dollars for both individuals and companies.[164]

The Minerals and Mining Act, on the other hand, does not have comprehensive provisions on mine related pollution. It is fashioned in a preventive rather than a reactive style. Thus, it provides in section 74[165] that the license holder is obliged to pay compensation to owners and occupiers of land, for any resistance or damage caused to any crops, trees, buildings, stock or works during a mining operation.[166]There have been cases of cyanide spills and toxic seepage reported in several mining sites in places, such as Wassa West Region, Teberebie, and Obuasi, that have left local communities with nothing or little recompense. The use of mercury in gold mining is still a controversial issue. The law has no provision on the management of radioactive minerals for the protection of human health and the environment, other than the requirement for the reporting of its discovery to the MC and the GSD.[167]

The Minerals and Mining (Explosives) Regulations[168] provide standards to be followed on use of explosives during mining operations to ensure safety of workers and the environment. Blasting causes massive vibrations which, if not kept within the World Health Organisation (WHO) recommended levels, can lead to adverse health effects to the mine workers and local communities. The Regulations provide standards for storage,[169] transport, use of explosives,[170] and disposal of such explosives on closure of the mine.[171] The Regulations also set blasting standards by providing for a blasting certificate for any blasting operations in or on a mine at a depth of ten metres or more.[172]

Enforcement

The sector Ministry responsible for enforcement of mining in Ghana is the MLNR.[173] The MLNR oversees the implementation of the Minerals and Mining Act through the MC. The MC is supported by its Inspectorate Division (ID). The ID is responsible for inspections, auditing, monitoring and enforcement of the

[164] Minerals and Mining (Health, Safety and Technical) Regulations (n 10) reg 249.
[165] Minerals and Mining Act (n 6).
[166] Ibid., s 74.
[167] Ibid., s. 62 (2 – 3).
[168] Minerals and Mining (Explosives) Regulations (n 11) reg 130.
[169] Ibid.
[170] Ibid., s 95.
[171] Ibid., s 204.
[172] Ibid., s 28.
[173] Sarpong (n 20) 222.

Minerals and Mining Act.[174] Unless the IDMC is satisfied with a proposed mining project and issues an operating permit, a mineral right holder cannot begin any mineral activity.[175] The head of the IDMC, the Chief Inspector of Mines, is mandated under Act 703 to inspect all aspects of any mining operations for compliance, including whether nuisance is being created and handling it to ensure that the proposed mineral operations would be or are being carried out safely.[176]

Where the MC through the head of the ID or an officer authorized by the head, inspects an area of mineral operations and ascertains that there is the likelihood of environmental degradation,[177] the MC can bring a suit in the Circuit Court or High Court against the mineral right holder. The mineral right holder would be liable on summary conviction to a fine of not more than US$ five thousand.[178]

An Inspector can order a mineral right holder to cease mining operations or discontinue the use of machinery that the inspector considers unsafe for mining.[179] A mineral right holder who does not comply with such an order commits an offence and is liable on summary conviction to a fine or term of imprisonment or both.[180]

The Minister, on the recommendation of the MC, can suspend or cancel a mineral right if the holder fails to make a payment on the due date, becomes insolvent or bankrupt, makes a false statement about the mineral right to the Minister, for any reason, becomes ineligible to apply for a mineral right.[181] However, the Minister must first give the mineral right holder the opportunity to remedy the breach within a reasonable period, and where the breach cannot be remedied, to show cause why the mineral right should not be suspended or cancelled.[182]

The Attorney General may bring an action in either the Circuit Court or High Court, against a mineral right holder who violates provisions of the Minerals and Mining Act and its regulations, or environmental law and its regulations. The Minerals and Mining Act, however, has made provision for alternative dispute resolution (ADR).[183] Where, a dispute arises between a mineral right holder and

[174] Minerals and Mining Act (n 6) s 102(2).
[175] Ibid.
[176] Ibid., s 102(1).
[177] Ibid., s 102.
[178] Ibid., s 106.
[179] Minerals and Mining (Health, Safety and Technical) (n 10) s 2(5).
[180] Ibid., s 2(7).
[181] Minerals and Mining Act (n 6) s 68 (a-d).
[182] Ibid., s 68(2).
[183] Ibid., s 27.

the state, the matter can be referred to ADR, and the parties are to do all they can to reach an amicable settlement.[184]

On the other hand, The EPA is responsible for inspecting, reporting, monitoring and enforcement of environmental regulations and laws.[185] The EPA has powers to inspect and issue enforcement notices. EPA's Environmental Protection Inspectors (EPIs) are authorized, at any reasonable time, to enter any premises to ensure compliance with the EPA Act and any law on the protection of the environment. Any person who assaults or obstructs an EPI in the execution of his duty commits an offence and is liable, on summary conviction, to a fine or imprisonment or to both.[186]

Also, where it appears to the EPA that the activities of any undertaking pose a serious threat to the environment or to public health, the EPA may serve on the person responsible for the undertaking an enforcement notice requiring him to take such steps as the Agency thinks necessary to prevent or stop the activities. The Agency may, in an enforcement notice, direct the immediate cessation of the offending activity where it considers that the circumstances so demand.[187]

Non-compliance with enforcement notices carry grave consequences. Non-compliance with the enforcement notice is an offence which, on summary conviction, is punishable by a fine, and in default, a term of imprisonment.[188] Further, the Minister, without prejudice to a prosecution, may take such steps as he considers appropriate to ensure compliance with the notice. In this regard, a police officer, an officer of the Agency or any public officer, may be authorised by the Minister to use force as may be necessary for ensuring compliance with the enforcement notice.[189]

The main challenge with enforcement of Act 703 by the MC is lack of adequate human resource capacity. Most of the technical staff of the MC have solid academic backgrounds and significant industry experience and are generally highly competent,[190] however, most of the MCs technical staff are in their fifties, posing potential challenges for succession.[191] Also, the MC has fewer staff, at the

[184] Ibid., s 27(1).
[185] Environmental Protection Act (n 129).
[186] Ibid., s 15.
[187] Ibid., s 13.
[188] Ibid.
[189] Ibid., s 14.
[190] Ghana Country Environmental Analysis (n 144) 123-124.
[191] The statutory retirement age in Ghana is 60 years old.

district level, to fully and effectively monitor, inspect and accomplish tasks that are required, which has meant insufficient inspection and monitoring of the operating mines.[192]

Penalties for Small-Scale Mining Offences

The current legal framework for regulating small-scale mining activities is provided in sections 81 to 99 of the Minerals and Mining Act and its accompanying regulations. However, the prevailing governance regime appears weak and unable to optimise the potential of the sector.

The Minerals and Mining (Amendment) Act, 2019[193] amends Act 703 to prescribe severe penalties for both foreigners and Ghanaians involved in illegal mining (galamsey); and to increase the penalties for a person who buys or sells minerals without a licence or without a valid authority; and increases the penalties for a person who engages in mining contrary to Act 703.[194] Act 703 makes it an offence for a Ghanaian to permit a non-Ghanaian to undertake or participate or facilitates the participation of a non-Ghanaian in small scale-mining activities. A non-Ghanaian who undertakes mining operations or facilitates the participation of any person in mining contrary to Act 703 commits an offence.[195]

Another drastic consequence of violation of Act 703 is that a person who provides or is involved in the provision of an excavator or any other equipment for mining operations contrary to this Act commits an offence and is liable to a fine or to a term of imprisonment or to both;[196] and any equipment used in or associated with the commission of the offence and any product derived from the commission of the offence shall, without regard to the ownership or the equipment or product, be seized and kept in the custody of the Police[197] for sixty days after which the Minister can allocate the equipment or product to the appropriate state institution and publish in the *Gazette* the name of the state institution to which the equipment or product is allocated.[198]

A court which convicts an offender under the aforementioned provisions of the Act, shall in addition to the penalty imposed, order the forfeiture to the state of any

[192] T Aubynn, 'Mining and Sustainable Development, The Case of Ghana' (2014) 21.
[193] Minerals and Mining (Amendment) Act (n 19).
[194] Ibid.
[195] Ibid, s 99(5)(a)(b).
[196] Ibid, s 99(7).
[197] Ibid, s 99(8).
[198] Ibid, s 99(10).

equipment, product or mineral seized to the state.[199] Yet, s.99 of Act 703 sets only upper limits for offences in dealing with minerals. Which means, a judge sitting on such a case could give a more lenient sentence.[200]

Further, Act 703 contains no penalties for conflict of interest by public officials in allocating mineral rights and managing contracts. Such penalties will reduce the risks of corruption and other rent seeking behaviours in the mineral title administration system and contracting.[201]

Other gaps identified in ss. 81-99 of Act 703 include: lack of a legal definition of artisanal mining to distinguish artisanal from small-scale mining; lack of provisions in the Act on artisanal mining; no provision on licensing requirements for buyers and exporters of artisanal and small-scale mining outputs; no provisions expressly prohibiting child labour in artisanal and small-scale mining; no requirement of training as a condition precedent for acquiring artisanal and small-scale mining rights; no dedicated financing mechanisms to support artisanal and small scale mining; no targeted provisions to make information (including geoscientific data) accessible to artisanal and small-scale mining operators; no provision on technology development and transfer to the artisanal small-scale mining subsector.[202]

Furthermore, there is no regime to provide traditional authorities with clear responsibilities and workable mechanisms in the regulation and management of mineral resources in their respective jurisdictions. This should be singled out as a very critical issue for legislative review or reform. However, this matter should be reviewed with caution. The Constitution vests in the President all mineral resources in trust for the people of Ghana. Any measure that would give Chiefs a regulatory role must be carefully examined to avoid a situation where traditional authorities would lay claim to mineral rights.[203]

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[199] Ibid, s 99(9).
[200] Boakye (n 57).
[201] Ibid.
[202] Ibid.
[203] Ghana News Agency, 'Involve Chiefs in the Issuance of Mining Licences' UNDP Policy Dialogue in Accra Under the Theme:'Artisanal and Small-Scale Mining Legal Regime in Ghana: Policy Options for Addressing Gaps and Challenges' (2017) <https://www.ghananewsagency.org> accessed 10 December 2022.

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DOI: 10.47963/ucclj.v4i1.1550

CONCLUSION

The mining sector laws around the world continue to evolve with changes in governance realities, changing country level expectations, developments in mining technology, and changing international standards, and best practices. The Minerals and Mining Act has served the mining sector in Ghana very well in the past, but not at a time when the mining sector governance was as expansive as it is today. It is apparent that environmental sustainability of the mining sector is not the major import of the Act. It has to rely on other statutes, such as those on the environment, forestry, and water resources. To contribute to sustainable development, a mine must minimize environmental impacts throughout its lifecycle, from exploration, through extraction and refining, to reclamation. This is best accomplished through effective environmental management. Mine exploration, construction, operation. And maintenance may result, and has resulted, in land use changes, leading to deforestation, erosion, contamination and alteration of soil profiles, contamination of local streams and wetlands, and an increase in noise level, dust, and emissions. The Act is short on this. Even though the Act has been amended twice, it has not undergone major amendments to align adequately with regional frameworks, reflect international best practices and address sustainability challenges in the mining sector. It is fitting and timely that the government has proposed a third amendment to strengthen mining sector governance in Ghana.

This article found out that any mining company that applies to the MC for a mineral right, must provide a satisfactory environmental protection programme; comply with environmental laws and regulations, including requirements relating to EIA; comply with environmental guidelines; obtain approvals and permits from the EPA and FC if the proposed mining activity is to take place in a forest; before it may be granted a licence. However, the mining companies comply with these conditions prior to obtaining a licence, but after that fail to keep up with the same laws and regulations, particularly because of weak enforcement. This does not promote sustainability in the mining sector.

Royalties are one of the pillars of sustainable mining and have economic impact. Royalties have been applied to infrastructure development and investment in social services. To achieve adequate community development, hence, sustainable mining, minerals royalties need to be distributed equitably.

To ensure sustainability in the mining sector, continuous stakeholder consultation and participation in decision making is very critical. It ensures that mining companies take their environmental commitments seriously. It helps to reduce

water pollution, air pollution, land degradation and other environmental impacts on mining communities, and creates better working conditions for mine workers.

Proceeds from mining, if shared equitably, have enormous economic impact on mine workers and local communities. They create employment opportunities for local communities. Local communities are trained and recruited by the mining companies. However, benefit sharing in the form of royalty payments, currently at 10 per cent to local communities for development, out of the 90 per cent that the government receives from the mining companies, is not always properly applied by either the chiefs or District Assemblies to benefit the local communities.

The main tools used to manage environmental fallouts in Ghana are the SEASA and the ESIA. Mining communities participate in the ESIA processes only through public hearings, where host and fringe communities are invited to discuss the project's potential impacts, proposed remedial measures, and socio-economic benefits to the state and communities.[204] However, given the highly technical nature of the ESIA reports, the public hearings are often reduced to discussions on just the job opportunities and economic benefits the project promises.[205] As a result of the poor quality of ESIA consultations, land use contestations have become commonplace in most mining communities after concessions and environmental permits have been granted.[206]

The legislation covering mining related pollution is the Minerals and Mining (Health, Safety and Technical) Regulations 2012[207] and the Minerals and Mining Act.[208] The Regulations are less ambitious and lay down the least stringent conditions against pollution.[209] The principal legislation, too, does not have much to say about mine related pollution. It is fashioned in a preventive rather than a reactive style, as in section 74,[210] that the license holder is obliged to pay compensation to owners and occupiers of land, for any resistance or damage caused to any crops, trees, buildings, stock or works thereon during a mining operation.[211] This is because the Minerals and Mining Act is not so

[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] LI 2182.
[208] Minerals and Mining Act (n 6).
[209] Minerals and Mining (Health, Safety and Technical) Regulations (n 10) reg 249.
[210] Minerals and Mining Act (n 6).
[211] Ibid., s 74.

environmentally oriented; it is mostly concerned with the operations at the mines and how to effectively carry them out.

The EPA is responsible for, inspecting, reporting and monitoring and enforcement of environmental regulations and laws.[212] The EPA has powers to inspect and issue enforcement notices. The EPA's Environmental Protection Inspectors (EPIs) can enter any premises at any reasonable time, to ensure compliance with the EPA Act and any law on the protection of the environment.[213] Also, where the activities of any mining company pose a threat to the environment or public health, the EPA can serve the mining company with an enforcement notice requiring the company to take steps to prevent or stop the activities. The EPA can direct the mining company to immediately stop operations, where the circumstances so demand.[214]

The fact that there are cases of non-compliance with the applicable law on sustainability in the mining industry in Ghana is an indictment on the institutions that have the mandate to enforce the law, rather than, apparently, organic weaknesses in the law.

This article has reviewed some key provisions of the Minerals and Mining Act and found out that it does not adequately address some of the sustainability challenges, particularly in the areas of grant of mineral rights, benefit sharing, contracting, royalties, environmental protection and penalties for small scale mining offences.

RECOMMENDATIONS

The grant of mineral rights should give priority to applicants who commit to pursuing actions to add value to the minerals produced to the satisfaction of the Minister, where there are competing applications for a concession; payment of royalties should take into account environmental considerations, and the rate of mineral royalty payment should depend on the type of mineral mined; and an applicant should obtain free, prior, and informed consent of the host community prior to the grant of the mineral right by the Minister, to enhance social legitimacy, reduce social conflicts in mineral operations, and offer community stakeholders an opportunity to contribute to decision making regarding mineral operations and the impacts.[215]

[212] Environmental Protection Act (n 129).
[213] Ibid., s 15.
[214] Ibid., s 13.
[215] Boakye (n 64).

In addition, express provisions should be included in the Act to obligate mineral right holders to consult and negotiate continuously on issues and decisions affecting host communities throughout the mineral operations; provisions exist for renegotiation of terms upon changes in project economics to provide opportunity for government to renegotiate contracts of mining leases when there is significant changes to economic conditions that may not have been reasonably contemplated at the time of signing of the original contract;[216] review of stability agreements and cessation in the grant of developments as well as modalities for funding community development projects.[217]

Furthermore, beneficial owners of minerals rights should be mandated to publicly disclose contracts, to reduce the risk of corruption, illicit financial flows and other rent-seeking behaviours that deny the state of the right revenues; localization should be broadened to include research and development; technology transfer;[218] and progressive and affirmative action towards increasing opportunities for women and citizens of affected communities.[219] Express provisions on sustainable development should be included in Act 703 as a binding policy for mining companies, to ensure the effective implementation of sustainable development.

On Artisanal and Small-Scale Mining, Act 703 should be amended to include: a legal definition of artisanal mining to distinguish artisanal from small-scale mining; provisions on artisanal mining; provisions on licensing requirements for buyers and exporters of artisanal and small-scale mining outputs; provisions expressly prohibiting child labour in artisanal and small-scale mining; requirement of training as a condition precedent for acquiring artisanal and small-scale mining rights; a dedicated financing mechanisms to support artisanal and small scale mining; targeted provisions to make information (including geoscientific data) accessible to artisanal and small-scale mining operators; provisions on technology development and transfer to the artisanal small-scale mining subsector.[220]

[216] Ibid.
[217] 'Minerals Commission, Chamber of Mines Discuss proposals on Mining Law Amendments' (2021) <https://www.ghanachamberofmines.org> accessed 9 December 2022.
[218] Boakye (n 64).
[219] Ibid.
[220] Ibid.

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.190-224
DOI: 10.47963/ucclj.v4i1.1551

CONSTRAINTS TO THE RIGHTS AND PROTECTION OF PERSONS WITH DISABILITIES IN NIGERIA

Enobong Mbang Akpambang[1]& Kemisola Busayo Akanle[2]

ABSTRACT

Persons with disabilities (PWDs) have been known to suffer various attitudinal and environmental barriers which hinder them from fully participating in their communities on equal terms with others. To address this predicament, Nigeria signed, ratified, and domesticated a number of global and regional instruments on disability rights, including the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol. The essence of these instruments recognised by Nigeria are restatements of the centrality, inseparability, and correlation of all human rights and the necessity for PWDs to be assured of their full protection and enjoyment of fundamental liberties on an equal basis with others without prejudices. Unfortunately, discrimination and marginalisation against PWDs in Nigeria still persist. The crux of this article is to identify the constraints faced by PWDs in the pursuit of their guaranteed rights in Nigeria. This issue is vital because it is not enough for the Nigerian government to put in place normative framework endorsing the rights and protection of PWDs; such laws must indeed be implemented. The article adopted the normative legal research and analytical methods by examining various legal instruments on the protection of the rights of PWDs in Nigeria. The findings revealed that the inability of PWDs to access physical structures, social, economic, academic, and healthcare facilities are some of the constraints faced by PWDs. It is recommended, *inter alia*, that all laws and governmental policies must align with the endorsement of the rights and protection of PWDs and violators should be sanctioned appropriately.

Keywords: Constraints, Discrimination, Fundamental rights and protection, Healthcare facilities, Nigeria, Persons with disabilities

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.190-224
DOI: 10.47963/ucclj.v4i1.1551

INTRODUCTION

The Charter of the United Nations 1945[3] recognised the inherent dignity, value, equality and inalienable rights of every member of the human race as the bedrock of liberty, justice and peace in the world.[4] Similarly, human rights instruments like the Universal Declaration on Human Rights (UDHR) 1948,[5] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[6] the International Covenant on Civil and Political Rights (ICCPR),[7] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[8] among others, made broad clauses for civil, political, economic and cultural rights without distinction of any kind.

Regardless the positive clauses in these human rights instruments, PWDs remained among the most vulnerable in the society and were considered as imperceptible in the global human rights community.[9] They were subjected to all kinds of discriminations, exclusion and segregation, inhuman and degrading treatments by reason of their disabilities. Deprivation of chances of being empowered to be self-dependent or self-sufficient as "equal members of society" was commonplace.[10] As a matter of fact, PWDs were considered "objects" of welfare and charity or medical treatment instead of being viewed as individuals with rights on equal basis with others in society. The subsequent adoption of some resolutions on the rights of PWDs by the United Nations General Assembly (UNGA), such as Declaration

[3] The UN Charter was signed on 26 June 1945 at San Francisco, United States of America at the end of the UN Conference on International Organisation; came into force on 24 October 1945 <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed23 August 2022.
[4]UN Charter, Preambular para. 1, Articles 1(3) and 2(2).
[5] Adopted by the United Nations General Assembly (UNGA) Resolution 217A (III) of 10 December 1948.
[6] Adopted by the UNGA Resolution 2200A (XXI) of 16 December 1966; entered into force on 3 January 1976.
[7] Adopted by the UNGA Resolution 2200A (XXI) of 16 December 1966; entered into force on 23 March 1976.
[8] Adopted by the UNGA on 18 December 1979; entered into force on 3 September 1981.
[9] G Quinn, 'The United Nations Convention on the Rights of Persons with Disabilities: Towards a New International Politics of Disability' (2009) 15(1) Texas Journal of Civil Liberties and Civil Rights33; A Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, Abingdon and New York 2015) 26.
[10] CRPD, Preambular para. (k).

on the Rights of Mentally Retarded Persons 1971,[11] the Declaration on the Rights of Disabled Persons 1975,[12] and the Protection of Persons with Mental Illness and Improvement of Mental Health Care ("IM Principles"),[13]among others, marked significant turning points towards the protection of PWDs. However, these UN Declarations were not only non-binding instruments but also adopted the medical approach definitions of disability and identified equal rights only to "the maximum degree of feasibility".[14]

Further global cooperation and agitations by PWDs for a more binding legal instrument towards the improvement of the living conditions of PWDs in every country, especially in developing countries,[15] of which Nigeria is a part, resulted in the adoption of the extant Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol (OPCRPD) in 2006. Nigeria has signed and ratified both instruments along with a number of other similar regional instruments, some of which are examined in the work, as well as domesticated their provisions as national and sub-national laws to safeguard the rights of disabled persons as constitutionally mandated.[16]

The CRPD, in its preambular paragraph, considers "disability" as an adaptive progressive concept that occurs from the attitudinal and unwelcoming or inaccessible environment[17]which limits PWDs' involvement in society[18] on equal terms with other individuals without impairments. The Convention identifies persons with long or short-term physical, mental, intellectual, and sensory

[11]UNGA Resolution 2856 (XXVI) of 20 December 1971; <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-mentally-retarded-persons> accessed 28 August 2022.
[12] UNGA Resolution 3447 (XXX) of 9 December 1975; <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/united-nations-un.pdf> accessed28 August 2022.
[13] UNGA Resolution 46/119, adopted on 17 December 1991.
[14] Declaration on the Rights of Mentally Retarded Persons., para. 1; Lucy Series, 'Disability and Human Rights' in Nick Watson and Simo Vehmas (eds),*Routledge Handbook of Disability Studies*, (2nd edn, Routledge, Taylor & Francis Group, London 2020), 72-88 <https://doi.org/10.4324/9780429430817-6>.
[15] CRPD, Preambular para. (l).
[16] Constitution of the Federal Republic of Nigeria 1999 (as amended), section 12.
[17] CRPD, Preambular para. (e).
[18] Joanna Bodio, 'Guardian Appointed for Disabled Person and Guardian Appointed for a Partially Incapacitated Person*'* (2021) 30(4)Studia Iuridica Lublinensia 53 <https://doi.org/10.17951/sil.2021.30.4.49-75>.

impairments as beneficiaries of the substantive rights spelt out in its Articles 5-30, including the specified rights of women and girls with disabilities.[19] The far-reaching definition or description of "disability" under the CRPD was illustrated by the findings of the Court of Justice of the European Union when it held that morbid obesity can amount to a "disability" within the contemplation of the EU Employment Equality Directive and therefore, qualifies the claimant to seek for protection against discrimination under the EU discrimination law.[20]

Even with the existence of extant instruments on disability rights, Nigerians living with disabilities still complain of discrimination.[21] This implies that there are still gaps between the existing disability instruments and their implementations in Nigeria. Actually, the standard for measuring the successful implementation of the examined normative frameworks in Nigeria is the degree to which PWDs have really enjoyed equality of rights on the same basis as others in the society without express or implied barriers as canvassed in the frameworks.

This definitive benchmark is very crucial because even though Nigeria pledges various statutory protections and rights for PWDs, the laws alone are not enough to assure PWDs equal rights and protection for involvement in society on an equal basis as other citizens without the proper removal of impediments by all relevant stakeholders for the full implementation, actualisation, and enjoyment of the rights. PWDs should be accorded effective accessibility to any physical environment, means of transportation, and information or communication without undue restraints, like others without disabilities. Effective accessibility that is devoid of any constraint will enable PWDs to be fully integrated into society.

Against this background, the question arises whether constraints are inhibiting the effective implementation and enjoyment of the protected rights by PWDs in Nigeria on the basis of their disabilities. The article, therefore, seeks to identify the wide-ranging constraints to the actual enjoyment of the protected rights of PWDs

[19] CRPD, Article 1, para. 1; Articles 6 and 7.
[20] *Karsten Kaltoft v The Municipality of Billund*, C-354/13 ECJ decided on 18 December 2014.
[21] Evelyn Okakwu, 'Despite New Law, Nigerians Living with Disabilities Lament Discrimination' *PremiumTimes* (Lagos, 1 November 2019) <https://www.premiumtimesng.com/features-and-interviews/360509-despite-new-law-nigerians-living-with-disabilities-lament-discrimination.html> accessed 10 September 2022.

in Nigeria and to make recommendations for their outright removal or elimination by all relevant stakeholders.

The article is divided basically into six sections. Section one is the introductory part that provides the foundation of the paper and introduces the milieu to the subject under discussion. Section two discusses the research methods adopted in the paper. In section three, the authors examined some global and regional instruments on the rights and protection of PWDs. Section four examines national instruments that have been put in place to enhance the rights and protection of PWDs in Nigeria; the loopholes in the relevant normative frameworks examined are identified. The fifth section is the central theme or thrust of the article and discusses some of the identified constrictions that have limited the full realisation of the rights and protection of PWDs in Nigeria. The work ended in section six with a conclusion and recommendations.

RESEARCH METHODS

The article adopts normative legal research and analytical approaches by exploring applicable global, regional, and municipal legal instruments on the protection of the rights of PWDs in Nigeria. The global and regional instruments examined in the article are the Declaration on the Rights of Mentally Retarded Persons 1971; the Declaration on the Rights of Disabled Persons 1975; the Convention on the Rights of Persons with Disabilities 2006 and its Optional Protocol; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities. Concurrently, at the national level, the main issue raised in the article is addressed by the 1999 Nigerian Constitution; the Discrimination against Persons with Disabilities (Prohibition) Act 2019; and the Electoral Act 2022. These legal frameworks assisted in identifying the national stakeholders responsible for minimising and/or ending the varied constraints or barriers so as to enhance the protection and rights of PWDs. Also, the article relies on a library-based doctrinal approach by using secondary sources like textbooks, articles in journals, newspapers, governmental or global agencies' reports and internet materials, among others. The adopted research methods aided in supporting the study and the arguments it is established.

UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.190-224
DOI: 10.47963/ucclj.v4i1.1551

SOME INTERNATIONAL AND REGIONAL STANDARDS ON DISABILITY RIGHTS

A number of international and regional instruments have been put in place to protect the rights of persons with disabilities. This section of the study will, therefore, make an attempt at analysing some of the vital provisions of such global and regional standards.

Declaration on the Rights of Mentally Retarded Persons 1971[22]

Considerably, this Declaration asserts that mentally retarded individuals enjoy equal rights as other human beings.[23] Such rights include but are not limited to proper medical care and physical therapy, education, training, rehabilitation and guidance;[24] economic security and a decent standard of living, performance of productive work, or engagement in any other meaningful occupation;[25] as well as protection from exploitation, abuse, and degrading treatment.[26] Where curtailment or restriction becomes imperative, it must be with due regard to proper legal procedures.[27]

Declaration on the Rights of Disabled Persons 1975[28]

The instrument recognises the rights of disabled persons as set out in the Declaration without discrimination or distinction,[29] including the inherent right to respect for their human dignity;[30]civil and political rights as other human beings;[31] economic and social rights that are vital for the growth of their capabilities and skills towards social integration;[32] along with the right to private and family

[22] UNGA Resolution 2856 (XXVI) of 20 December 1971.
[23]Ibid, Para. 1.
[24]Ibid,Para. 2.
[25]Ibid,Para. 3.
[26]Ibid,Para. 6.
[27]Ibid,Para. 7.
[28] UNGA Resolution 3447 (XXX) of 9 December 1975.
[29]Ibid,Para. 2.
[30]Ibid,Para. 3.
[31]Ibid,Para. 4.
[32]Ibid,Para. 6.

life.[33]Special needs of PWDs are to be taken into account at every level of economic and social planning.[34]

Convention on the Rights of Persons with Disabilities (CRPD) 2006[35]

The Convention is the foremost all-embracing and enforceable worldwide treaty regulating the rights and protection of PWDs.[36]It radically alters the attitude and notion of PWDs from being perceived as mere "targets" of charity who require medical treatments and social protection to considering them as "subjects" with rights, who are competent to claim those rights and make decisions for their lives on the basis of their free and informed consents as well as being active participants in the society they live in.[37] "Discrimination on the basis of disability", which is expressly outlawed by the Convention,[38] is defined as any discrimination, segregation, or exclusion as a result of a disability that can restrict, invalidate or prevent PWDs from enjoying the recognised rights and freedoms on equal terms with others in every spectrum of life.[39] The non-discriminatory clause also implies that appropriate steps must be taken to combat possible potential discrimination or covert prejudices in order to enhance equality of opportunity and accessibility.[40]

The eight guiding principles of the Convention provide the trajectory for understanding and realising the protected rights;[41] while the duties' clauses

[33]Ibid,Para. 9.
[34]Ibid,Para. 8.
[35] United Nations Convention on the Rights of Persons with Disabilities (A/RES/61/106), adopted by United Nations General Assembly (UNGA) on 13 December 2006; entered into force on 3 May 2008. Nigeria became a signatory to the Convention on 30 March 2007 and ratified same on 24 September 2010, <https://bit.ly/UNCRPD-Status> accessed 26 August 2022.
[36] J Kothari, 'The UN Convention on Rights of Persons with Disabilities: An Engine for Law Reform in India'(2010) 45 (18) Economic and Political Weekly65.
[37] UN Department of Economic and Social Affairs, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*<https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilitiess.html> accessed 19 August 2022; Theresia Degener, 'International Disability Law: A New Legal Subject on the Rise' in Peter Blanck (ed) *Disability Rights: International Library of Essays on Rights* (Routledge 2005).
[38] CRPD, Article 5(2).
[39]Ibid, Article 2.
[40]Ibid, Article 3.
[41] CRPD.

recognise the "obligation-holders" on whom the responsibilities for meeting the guaranteed rights lies[42]as well as the required mechanisms to be used in order to attain such obligations.[43] Consequently, the CRPD adopts the human rights-based model to disability navigated by respecting the dignity of PWDs and their fundamental freedoms as the model encourages PWDs to *inter alia*, get involved in their respective communities, and seek proper redress for their violated rights through a legal procedure.[44]

The CRPD does not establish new human rights but clearly describes the existing rights in a manner that makes them relevant to PWDs.[45] The explicit rights enumerated in the Convention are equality before the law;[46] right to life;[47] access to justice;[48]freedom from torture, inhuman, degrading treatment or punishment, including the freedom not to be forced into undergoing medical or scientific experimentation;[49] right against exploitation, violence or abuse;[50] rights to dignity[51] as well as freedom of movement and nationality.[52]

[42]Ibid, Article 4(1)(e); Article 9(2)(b); Articles 12 and 19; Article 20(d); Article 21(c); Article 24; Article 25(d); and Article 27(1)(h).
[43] The monitoring mechanisms are at the domestic and international levels- CRPD, Articles 33(1) and (2); Articles 32, 34-40.
[44] United Nations Human Rights Office of the High Commissioner, *The Convention on the Rights of Persons with Disabilities: Training Guide*, Professional Training Series No. 19, HR/P/PT/19 (New York 2014) 10.
[45] For instance, the right to education contained in earlier human rights instruments: UDHR- Article 26, ICESCR-Article 13, Convention on the Rights of the Child (CRC)-Article 23; and right to home and family life- UDHR- Article 12, ICCPR- Article 17 and CRC-Article 16. See also United Nations Office of the High Commissioner for Human Rights and the Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention on the Eights of Persons with Disabilities and its Optional Protocol* (United Nations, Geneva 2007) 20.
[46] CRPD, Article 5(1).
[47]Ibid, Article 10.
[48]Ibid, Article 13.
[49]Ibid, Article 15.
[50]Ibid, Article 16.
[51]Ibid, Article 17.
[52]Ibid, Article 18.

State parties to the Convention are to recognise the rights of PWDs to privacy, home and family life;[53]freedom of expression and access to information;[54] right to an inclusive education;[55]and right to health, along with the aspect of sexual and reproductive health and population-based public health programmes.[56]Moreover, the right to employment, equal pay for work of equal value in a job-friendly environment that is open and accessible to PWDs, in addition to protection from workplace harassment is preserved;[57] but the Convention prohibits coerced or mandatory labour.[58]While the right to an adequate standard of living is identified under Article 28, the rights to partake in political, public and cultural life are protected under Articles 29 and 30.

The principle of equality preached by the CRPD also extends to gender equality of PWDs. In this wise, the Convention appreciates the fact that women and girls with disabilities (WGWDs) are susceptible to manifold kinds of prejudices because of disability and sex, among others.[59] Thus, State parties are enjoined to adopt appropriate channels to safeguard the equal enjoyment of the protected rights by WGWDs. In order to monitor and supervise the Convention, a Committee on the Rights of Persons with Disabilities (the CRPD Committee) was created with several stipulated responsibilities.[60]

Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities (OPCRPD) 2006[61]

The OPCRPD is a separate instrument, although it was adopted at the same time as the CRPD. It recognises the competence of the CRPD Committee created under the CRPD to receive and consider communications and the criteria that must be

[53]Ibid, Articles 22 and 23.
[54]Ibid, Article 21.
[55]Ibid, Article 24.
[56]Ibid, Article 25(a).
[57]Ibid, Article 27.
[58]Ibid, Article 27(2).
[59]Ibid, Articles 6, 7 and preambular para. (q).
[60]Ibid, Article 34.
[61] The Optional Protocol (A/RES/61/106) was adopted UNGA on 13 December 2006; entered into force on 3 May 2008. Nigeria became a signatory on 30 March 2007 and ratified same on 24 September 2010<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilitiesa.html> accessed 26 August 2022.

fulfilled before such communication can be registered or admissible.[62] OPCRPD is beneficial to both victims of human rights infractions and State parties as it embodies a significant means of defending PWDs and rejuvenating domestic protection mechanisms. For example, the Protocol's procedures clearly elucidate how to apply the Convention to particular cases and this can aid in successfully integrating the Convention into national laws. Thus, the Committee's opinions and recommendations can activate law reforms in a way that would make State parties to comply with the Convention provisions. Decisions made by the Committee in entertaining communications brought before it can also enrich national legal jurisprudence as well as give direction to national courts and other human rights agencies in the interpretation of the guaranteed rights of PWDs.[63]

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), 2003[64]

The adoption of the African Women's Protocol was necessitated by lapses and inadequacies in CEDAW and its Protocol, which failed or neglected to effectively contain clauses that had "consideration to the traditional cultural roles women played in African societies".[65] With specific reference to disability rights, the African Women's Protocol expressly recognised the rights of women with disabilities (WWDs) and required State parties' undertaking to:

> (a) ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making; and

[62] OPCRPD, Articles 1 and 2.
[63] United Nations Human Rights Office of the High Commissioner (n42)at 148-149.
[64]Adopted at Maputo, Mozambique by the African Union in 2003; entered into force in 2005<https://www.ohchr.org/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf> accessed 12 July 2022.
[65] Louis O. Oyaro, 'Africa at Crossroads: The United Nations Convention on the Rights of Persons with Disabilities'(2015) 30(2) American University International Law Review 347-377 at 354; Johanna E. Bond, 'Gender, Discourse, and Customary Law in Africa' (2010) 83(3) Southern California Law Review 519-520.

(b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.[66]

Violations of the rights of WWDs entitle them to seek appropriate remedy.[67]

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (The African Disability Protocol)[68]

Failure of the CRPD 2006 to address a number of sensitive African issues confronting PWDs, such as poverty, risk of violence, exploitation, neglect, systematic discrimination, and harmful practices against albinism, most of which are deeply entrenched in "tradition, culture, religion, superstition or other reasons" in various parts of the continent necessitated the adoption of the Protocol.[69]

Reminiscent of the CRPD, the African Disabilities Protocol also contains specific rights of PWDs concerning equality before the law;[70] freedom from degrading treatment and harmful practices;[71] access to justice;[72] accessibility;[73] education;[74] healthcare;[75]participation in political and public life; access to information; family life, including access to family planning, sexual and reproductive health education and service,[76] among others. The non-discrimination right of PWDs extends to their family members, caregivers, or intermediaries who may possibly be subjected to discrimination by reason of their association with PWDs.[77] Forced sterilisation

[66] African Women's Protocol, Article 23(a) and (b).
[67]Ibid, Article 25.
[68] Adopted at the 30th Ordinary Session of the Assembly of Heads of State and Government held in Addis Ababa, Ethiopia on 29 January 2018 <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> accessed 2 April 2022.
[69] African Disabilities Protocol, Preambular paras. 16, 17, 18, 19 and Article 1, para.10. See also, Sharon Peake, 'Meeting Report of the International Policy Dialogue on HIV/AIDS and Disability' (2009) 12 Journal of the International AIDS Society27-28 <https://doi.org/10.1186/1758-2652-12-27>.
[70] African Disabilities Protocol, Articles 6 and 7.
[71]Ibid, Articles 10 and 11.
[72]Ibid, Article 13.
[73]Ibid, Article 15.
[74]Ibid, Article 16.
[75]Ibid, Article 17.
[76]Ibid, Articles 18-26.
[77]Ibid, Article 5(2)(c).

or any form of invasive procedure without the free, prior and informed consent of a PWD is considered as a degrading treatment under the Protocol.[78]

RELEVANT NIGERIAN LAWS ON DISABILITY RIGHTS

In addition to a few of the universal and regional instruments mentioned above, the research, in this segment of the work, will endeavour to examine some of the relevant legislative measures that are implemented in Nigeria to protect and guarantee the rights of PWDs.

Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended)

Chapter 2 of the Constitution admits that national integration shall be dynamically promoted while all kinds of bigotry shall be banned.[79] Citizens are entitled to human dignity[80] and to secure sufficient means of livelihood and suitable employment devoid of any form of prejudices.[81] Unfortunately, the provisions of Chapter 2 are non-justiciable because of section 6(6)(c) of the 1999 CFRN.[82] The non-justiciability of Chapter 2 clauses is neither absolute nor inviolate as the subsection provides flexibility by using the phrase, "except as otherwise provided by this Constitution". This entails that where the justiciability of any of the clauses of Chapter 2 is guaranteed elsewhere in the Constitution (or any other legislation), such provisions will become enforceable rights.[83]

On the other hand, the enforceable rights contained in Chapter 4 of the Constitution are recognised in general terms;[84] with no direct reference to PWDs[85] in the corpus

[78]Ibid, Article 10(2)(c).
[79] CFRN 1999, section 15(2).
[80]Ibid, section 17(2)(b).
[81]Ibid, section 17(2)(a) and (3)(a) & (e).
[82]*Okogie v. Attorney- General, Lagos State* (1981) 2 NCLR 337 at 350.
[83]*Re: Chief Adebiyi Olafisoye* (2004) All FWLR (Pt. 198) 1106 at 1153, a decision of the Nigerian Supreme Court; *Socio Economic Rights and Accountability Project (SERAP) v Federal Government of Nigeria and Universal Basic Education Commission* Suit No. ECW/CCJ/APP/08/08, decided by the ECOWAS Court of Justice on 27 October 2009 (Unreported) <https://ihrda.uwazi.io/en/entity/7gagjpfq9a?page=>accessed 29 August 2022.
[84] See sections 33-45 of the CFRN 1999 for a detailed justiciable rights protected under the Constitution.
[85] Ibrahim Imam, and M. A. Abdulraheem-Mustapha, 'Rights of People with Disability in Nigeria: Attitude and Commitment' (2016) 24(3) African Journal of International and Comparative Law 439-459 at 440.

of the Nigerian "supreme law".[86]For example, section 42(1) of the 1999 CFRN guarantees freedom against discrimination. Perhaps, a person with a congenital birth condition may rely on sub-section (2) of section 42 which declares that no Nigerian citizen "shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth".[87]

Discrimination against Persons with Disabilities (Prohibition) Act 2019(DPDP Act 2019)[88]

This is the leading legislation that regulates the rights and protection of PWDs in Nigeria. It was conceivably promulgated in satisfaction of Nigeria's obligation under the CRPD and other allied universal and/or regional treaties.[89] Besides, since Nigeria operates a dualist legal system, a ratified treaty cannot become legally enforceable unless it has been domesticated by the national parliament as constitutionally required,[90] though it may have persuasive force in domestic courts of law where municipal laws are uncertain or lacking in the area.[91]The law permits the full integration of PWDs into Nigerian society; but frowns at any

[86] CFRN1999, section 1; Kayode. Eso, *Nigerian Grundnorm*, (Lagos: Law Publications Ltd 1986) 1-92.

[87]**Query**: Since disability can occur at any time in an individual's life and by reason of various circumstances such as sickness/disease, old age, indoor or outdoor accident, armed conflicts etc, can a person with disability whose impairment or disability was not congenitally originated rely on this constitutional clause to enforce his/her right against discrimination?

[88]Act No. 2 of 2019; available from <https://gazettes.africa/archive/ng/2019/ng-government-gazette-supplement-dated-2019-01-21-no-10.pdf> accessed 2 September 2022). Sub-national laws enacted by some States on the subject include: Special People's Law 2010, Cap. S9, Vol. 10, *Laws of Lagos State of Nigeria, 2015*, sections26-38; Discrimination against Persons with Disabilities (Prohibition) Law No. 3 of 2020 (Ekiti State); Disability Rights Law of Plateau State 2005; Disability Rights Commission Law 2018 (Nasarawa State); People with Disabilities (Amendment) Law 2017 (Kwara State); Disability Rights Law 2010 (Bauchi State); and Disability Rights Law 2018 (Anambra State). Governmental policy frameworks include: National Policy on Disabilities 2018; National Policy and Implementation Guidelines on Albinism in Nigeria 2013, among others.

[89] J Onyekwere, 'Passage of Disability Bill is Fulfilment of Nigeria's Obligation to International Treaties' *The Guardian* (Lagos, 1 May 2018) <https://m.guardian.ng/features/passage-of-disability-bill-is-fulfillment-of-nigerians-obligation-to-international-treaties/> accessed 6 April 2022.

[90] CFRN 1999, section 12.

[91] Lucy Series (n 12).

discrimination directed by individuals or institutions towards PWDs by reasons of their disabilities.[92]

An Individual with impairment has the right to accessibility to the physical environment and buildings like others without disability. Public buildings are to be constructed with relevant accessibility aids to enable PWDs to gain access to them.[93] Failure to remove environmental constraints after due notification by a PWD gives the latter a right of action.[94] Providers of goods, services and facilities, including varied transportation operations are to make such accessible to PWDs.[95] Where necessary, functional audible and visual displays of their destinations as well as other essential accessibility aids are to be fixed.[96] A duty of care is on a driver to make sure that the vehicle comes to a total halt before a PWD board or alights from it.[97]

Other enforceable rights recognised under the Nigerian disability law include the right to education;[98]unhindered access to health care;[99] equality of work with public employers mandated to reserve at least five percent of employment vacancies for PWDs.[100] The right to participation in politics and public life by PWDs is recognised, with an obligation placed on the government to provide the enabling environment for their active involvement.[101] In order to properly cater to the welfare of PWDs, the statute creates the National Commission for Persons with Disabilities (NCPWDs) and saddles it with various functions.[102]

[92] DPDP Act 2019, section 1.
[93]Ibid, sections 3-5. For detailed list of accessibility aids or special facilities to be provided, see the First Schedule to the Act.
[94]Ibid, section 8(1)(2).
Ibid, sections 9, 10 and 13-15.
[96]Ibid, sections 10(2) and 13(3).
[97]Ibid, sections 11(4) (5).
[98]Ibid, sections 17 and 18.
[99]Ibid, section 21.
[100]Ibid, section 16.
[101]Ibid, section 30.
[102]Ibid, section 38.

Electoral Act 2022[103]

The legislation encourages more inclusivity of PWDs in the Nigerian electoral process. A voter with visual impairment, who has difficulty in differentiating signs or suffers from other kinds of physical disability, may be accompanied into the polling centre by a trusted individual of his/her choice for necessary assistance at the polling booth, including assisting him/her to indicate the preferred candidate on the voting paper. However, for this to happen, the chosen aide or physically challenged voter is statutorily required to inform the relevant polling unit's presiding officer of the disability of the intended disabled voter.[104] The electoral body, Independent National Electoral Commission (INEC), is mandated to provide at the polling stations relevant means of communication like braille signs, large embossed print, electronic devices, sign language or in appropriate situations, off-site voting to enable PWDs to perform their civic responsibilities.[105]

CONSTRAINTS TO THE RIGHTS AND PROTECTION OF PWDsIN NIGERIA

The section addresses the substantive issue raised in the introductory part of the article. An attempt would, therefore, be made to scrutinise some of the constrictions suffered by PWDs in Nigerian society.

Absence of Accurate Data

Article 31 of the CRPD requires State parties to obtain appropriate information, including statistical and research data, to assist them to formulate and implement policies to give effect to the Convention's provisions. However, Nigeria, like most countries of the world, lacks such accurate, comprehensive and disaggregated data on PWDs.[106] Bearing in mind these inadequacies, can the Nigerian government effectively plan and execute policies towards the protection of the rights of PWDs? The fact remains that in the absence of accurate data, there will be a problem of

[103] Electoral Act No. 13 of 2022.
[104]Ibid, section 154(1).
[105]Ibid, section 54(2).
[106] G Ewepu, 'Institute Initiates Moves to Gather Accurate Data for PWDs in Nigeria' *Vanguard*(Lagos, 17 June 2021) <https://www.vanguardngr.com/2021/06/institute-initiates-moves-to-gather-accurate-data-for-pwds-in-nigeria/> accessed 31 August 2022.

sufficient planning and formulating policies for PWDs by the government and other relevant stakeholders.[107] Statistical data has been identified as a vital instrument for undertaking comparative investigations of unfair treatments under discriminatory enactments.[108] Hence, there is a need for improvement in the capacity to generate, analyse and evaluate data on disabilities for the formulation of policies and programmes on disabilities in Nigeria.

Healthcare Constraints

The CRPD,[109] Nigeria's DPDP Act 2019,[110] and the African Disability Protocol[111] elaborately recognise the rights of PWDs to receive the highest standard of health without prejudice. PWDs are frequently confronted with considerable constraints in accessing healthcare services and facilities which can seriously affect their enjoyment of the right to healthcare. Thus, in reality, the right to health appears like a mirage to PWDs due to a number of reasons like attitudinal,[112] physical,[113]communication[114] and financial[115] constraints which hinder them from accessing healthcare services.[116] Research findings have indicated that a combination of these barriers and other systemic environmental constraints

[107] International Labour Organisation, *Inclusion of people with disabilities in Indonesia*<http://www.ilo.org/wcmsp5/group/public/@ed_emp/@ifp_skills/documents/publication/wcms_210477.pdf> accessed 12 June 2022.
[108] S Freeman, *Discrimination Law*, (2nd edn, Clarendon Press, Oxford 2011) 183.
[109] CRPD, Article 25.
[110] DPDP Act 2019, section 26.
[111] African Disability Protocol, Article 17.
[112] This could take the form of stereotypes, prejudices, stigmatisation and discriminatory practices by health service providers.
[113] For example, having tall hospital buildings and staircases at the entrance of healthcare facilities without functional elevator may constitute serious mobility challenges to PWDs.
[114] For instance, failure to make provisions for special communication in hospital facilities where patients with communicational disabilities are medically attended violates the provision of section 24 of DPDP Act 2019.
[115] To address financial and affordability problem, the government can increase its healthcare budgetary allocations to enable it provide free medical services to PWDs. Also financial incentives can be used to motivate healthcare service providers to make their services accessible to PWDs. Another option is by way of providing affordable health insurance schemes by the government, private sector and/ or partnership between the government and the private sector for the benefit of PWDs.
[116] World Health Organisation and The World Bank, *World Report on Disability* (World Health Organisation 2011) 57-83.

portend serious risks for patients with disabilities and that the resultant effects were more devastating in hospitals.[117] For instance, patients diagnosed with intellectual disabilities have been discovered to find it difficult to convince their doctors to accept complaints about their state of health.[118]Such attitude by medical professionals is an attack on the right to dignity and mental integrity of a PWD as preserved under the CRPD.[119]

D. Habrat asserts that human dignity is intrinsically connected with the entire mechanism of civil freedoms and devoid of any human attribute, including disability or intellectual fitness.[120] The right to human dignity also embraces the right to make informed decisions regarding the state of one's health, including that of PWDs,[121] and without undue intrusion.[122]

Moreover, there are some abuses in the form of standard clinical practices such as conducting medical examinations on the bodies of PWDs without their prior informed consent or in utter disregard of their right to privacy and dignity.[123] Significantly, the CRPD Committee has interpreted the Convention as banning all kinds of mental health detention, forced treatment, limitations on legal capacity, and proxy decision-making;[124]though this interpretation is still a subject of

[117] Akeem Olalekan Ayub and Anifowose Jimoh Rasaki, 'Barriers in Accessing Healthcare Services by Patients with Disabilities in Nigerian Hospitals' (2021) 4(1)Gusau International Journal of Management and Social Sciences 280-296.
[118] David M. Perry, 'How Hospitals Mistreat Disabled Patients' *Pacific Standard* (California, 29 June 2018), <https://psmag.com/social-justice/how-hospitals-mistreat-disabled-patients> accessed 18 June 2022.
[119] CRPD 2006, Article 17.
[120] Dorota Habrat, 'Protections of Human Dignity as a Basis for Penalization of Hate Speech against People with Disabilities in Polish Criminal Law'(2021) 30(4) Studia Iuridica Lublinensia259, 262 <https://doi.org/10. 17951/sil.2021.30.4.259-279>.
[121] Ibid at 276.
[122] CRPD, Article 2.
[123] Pargan Sanghera, 'Abuse of Children with Disabilities in Hospitals: Issues and Implications' (2007) 19(6) Paediatric Nursing29-32 <https://doi.org/10.7748/paed.19.6.29.s28>.
[124]See Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities; adopted during the Committee's 14th session held in September 2015, <https://www.ohchr.org/Documents/HRBodies/CRPD/14thsession/GuidelinesOnArticle14.doc> accessed 31 August 2022). See also General comments No. 1 (2014) Article 12: Equal recognition before the law, adopted on 19 May 2014, UN Doc CRPD/C/GC/1 <https://daccess-ods.un.org/tmp/1877808.71987343.html> accessed 31 August 2022.

continuing discussions and arguments as some individuals consider this peremptory stance debatable.[125]

At this point, it is pertinent to ask: how best can the identified healthcare problems be tackled if the PWDs must enjoy their rights to health and healthcare services? Addressing these associated challenges would require a multi-dimensional approach including the improvement of physical accessibility to healthcare facilities, provision of financial support to indigent PWDs, combating discriminatory practices by healthcare providers, expanding specialised training and services in disability-allied healthcare matters in addition to promoting healthcare information and communication methods for easy accessibility by PWDs, among others.

Stigmatisation and Socio-Cultural Barriers

Social and cultural obstacles still affect changes in the mindsets of individuals on disability issues despite the existence of the examined normative frameworks. A disabled Nigerian female senior magistrate recently alleged that her fiancée jilted her on the wedding day because of her physical deformity.[126] Such discriminatory attitude and stigmatisation is a grave concern to the enjoyment of the rights of PWDs relating to issues of "marriage, family, parenthood, and relationships on an equal basis with others".[127]

[125] See for example: Paul S. Appelbaum, 'Protecting the Rights of Persons with Disabilities: An International Convention and Its Problems' (2016) 67(4) Law & Psychiatry366<https://doi.org/10.1176/appi.ps.2016600050>; Melvyn C. Freeman *et. al*., 'Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) 2(9) Lancet Psychiatry844; N Jones& M Shattell, 'Beyond Easy Answers: Facing the Entanglements of Violence and Psychosis' (2014) 35(10) Issues in Mental Health Nursing809.

[126] B Edokwe, "Magistrate Narrates How Her Fiancée Abandoned Her on Wedding Day [Video],"*BarristerNG.Com*, (Nigeria, 1 February 2022) <https://barristerng.com/magistrate-narrates-how-her-fiancee-abandoned-her-on-wedding-day/> accessed 18 June 2022.

[127] CRPD Article 23(1); African Disability Protocol, Article 26.

Sexual and Reproductive Health Exclusionary Barriers

PWDs, like other individuals without disabilities, have sexual and reproductive health (SRH) needs;[128] though they encounter difficulties in meeting those needs[129] despite their rights of access to sexual and reproductive health.[130] A study revealed that Nigeria's national health policies and plans often neglect to mainstream issues of disability or make provisions for PWDs, even when they may be mentioned among the target groups.[131] One possible reason for this is because of the assumption that PWDs are not sexually active.[132] The misconception has rendered PWDs more vulnerable to abuses[133] as professional healthcare service practitioners, and even disability rights' groups, have frequently overlooked the need of providing sexual health information and support to individuals with disabilities.[134]

On the contrary, research findings indicate that PWDs are not sexually inactive, and thus, their ability to have access to sex education and enjoy SRH rights will considerably enhance their sexual health and relationships.[135] Studies have also

[128] World Health Organisation and The World Bank (n 114) at 61. See also Federal Ministry of Health, *National Policy on Sexual and Reproductive Health and Rights of Persons with Disabilities with Emphasis on Women and Girls*, June 2018, p. i <http://health.gov.ng/doc/NATIONAL_POLICY_ON_SRH_OF_PWD_GWD.pdf> (accessed31 August 2022.

[129] World Health Organisation, United Nations Population Fund, *Promoting Sexual and Reproductive Health for Persons with Disabilities* (World Health Organisation, Geneva 2009) 5-8.

[130] CRPD, Article 12(3), 23(1)(b) and 25; CEDAW, Article 12; African Disability Protocol, Article 17(2) & 26(2)(a).

[131] Federal Ministry of Health (n 126)at 3-4.

[132] GD Giulio, 'Sexuality and People Living with Physical or Developmental Disabilities: A Review of Key Issues'(2003) 12 The Canadian Journal of Human Sexuality53-69; CM Tilley, 'Sexuality in Women with Physical Disabilities: A Social Justice or Health Issue?'(1996) 14 Sexuality and Disability139-151.

[133]United Nations Committee on the Rights of the Child, *General Comment No. 9 of 2006: The Right of Children with Disabilities*, CRC/C/GC/9 of 27 February 2007,at para. 42(e).Adopted by the Committee at its 43rd Session in Geneva held on 11-29 September 2006 <https://www.refworld.org/docid/461b93f72.html> accessed 25 March 2022.

[134] Sharon Peake (n 67) at27-28.

[135] S Maart and J Jelsma, 'The Sexual Behaviour of Physically Disabled Adolescents'(2010) 32 *Disability and Rehabilitation*438-443 <https://doi.org/10.3109/09638280902846368>; X Hunt and others, 'The Sexual and Reproductive Rights and Benefits Derived from Sexual and Reproductive Health Services of People with Physical Disabilities in South Africa: Beliefs of Non-Disabled

noted that there are cases of involuntary sterilisation being employed to limit the fertility of PWDs, particularly women and girls with mental impairments[136] along with sexual abuse and rape because of their defenceless conditions.[137] Coerced or involuntary sterilisation infringes on the fundamental rights of PWDs to rights to health, information, privacy, freedom to found a family and to determine the figure and spacing of children, freedom from discrimination, and freedom from torture, cruelty and inhuman or debasing treatment.[138]

With respect to involuntary sterilisation, it is suggested that reporting, enforcement and professional sanctions[139] could be put in place to make sure that on every occasion where sterilisation is required, the rights of PWDs are always respected and their decisions override other rival interests. Also, in addressing the challenges associated with SRH exclusionary barriers, there is a need to train healthcare providers and encourage all-inclusive sex education programmes that takes account of information applicable to PWDs. This is because the dearth of inclusive sex education can cause gaps in knowledge and proper understanding of the sexual health and rights of PWDs.

People'(2017) 25(50) Reproductive Health Matters66-79<https://doi.org/10.1080/09688080.2017.1332949>.

[136] CERMI Women's Foundation, European Disability Forum, *Ending Forced Sterilisation of Women and Girls with Disabilities*, May 2017 <https://www.edf-feph.org/content/uploads/2020/12/edf_forced-sterilisation_8-accessible_6.pdf> accessed 18 June 2022); Alison J. Stansfield, Anthony J. Holland, and Isabel C. H. Clare, 'The Sterilisation of People with Intellectual Disabilities in England and Wales during the Period 1988-1999' (2007) 51(8) Journal of Intellectual Disability Research569-579 <https://doi.org/10.1111/j.1365-2788.2006.00920.x>.

[137] NE Groce and R Trasi, 'Rape of Individuals with Disability: AIDS and the Folk Belief of Virgin Cleansing,'(2004) 363 (9422) Lancet1663-1664 <https://doi.org/10.1016/S0140-6736(04)16288-0>;D Sobsey, *Violence and Abuse in the Lives of People with Disabilities: The End of Silence Acceptance?* (Paul H. Brookes Publishers, Baltimore 1994).

[138] African Disability Protocol, Article 10(2)(c); CRPD, Articles 3,5, 12, 23 and 25. See alsoWorld Health Organisation, *Eliminating Forced, Coerced and Otherwise Involuntary Sterilisation: An Interagency Statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO* (World Health Organisation, Geneva 2014) 1, 5-7.

[139] O Dyer, 'Gynaecologist is Struck out for Sterilising Women without Their Consent'(2002) 325(7375) British Medical Journal1260 <https://doi.ng/10.1136/bmj.325.7375.1260>.

Educational Constraints

G. Devenish has posited that education is of great significance in relation to human rights because it sets individuals free from the oppression of ignorance, superstition and fear. It provides them self-worth and confidence and is a fundamental right on which the fulfilment of countless other rights depends.[140] Education is also an empowering instrument for participating in employment and other spheres of social activity. In some cultures in Nigeria, attending school is part of becoming a complete individual.[141]B. Akinbola estimates that about 140 million children globally do not attend school because of disability;[142] with about three million CWDs in Nigeria locked out of schools because "school environments are not inclusive and accessible" to them.[143] Nigerian disability law requires that all public schools should be inclusive of and accessible to PWDs.[144]

Inclusive education has been shown to be a useful means of educating CWDs as it results in improved social interactions and enhanced academic performances.[145] However inclusive education has some setbacks, such as inadequate trained personnel to cater to the needs of CWDs/PWDs and the reluctance of some schools' administrators to admit students with special needs into their schools because of their disabilities.[146] Besides, architectural drawings of most Nigerian

[140] GE Devenish, 'Aspects of the Right to Education in the Constitution (1998) 31 De Jure 224-225.
[141] World Health Organisation and The World Bank (n 114) at205.
[142] Bukola R. Akinbola, 'The Right to Inclusive Education in Nigeria: Meeting the Needs and Challenges of Children with Disabilities, (2010) 10 African Human Rights Law Journal 457-477 at 458.
[143] Edwin Etieyibo, 'Rights of Persons with Disabilities in Nigeria' (2020) 33(1) Afrika Focus 69.
[144] DPDP Act 2019, sections 18-19. **Query**: Since section 18 of the Act expressly failed to mention the applicability of inclusive and accessible educational system to cover private schools, can PWDs/CWDs seek for the enforcement of that right in private educational institutions of learning?
[145] P Hunt and others, 'Evaluating the Effects of Placement of Students with Severe Disabilities in General Education Versus Special Classes' (1994) 19(3)Journal of the Association for Persons with Severe Handicaps 200-214.
[146] FB Obi, 'Institutionalization, Mainstreaming or Inclusion: Challenges for Special Education in Nigeria'(2007)3(2) International Journal of Educational Research267-273 at 268; IO Iyioha, 'Exclusion as Problem of Children with Disabilities *The Guardian* (Lagos, 7 December 2015) <https://guardian.ng/opinion/exclusion-as-problem-of-children-with-disabilities/> accessed 31 August 2022.

schools do not take into consideration the difficulties PWDs encounter in accessing them.[147]

Buildings and physical structures that are not accessible to PWDs are mandated to be altered in a way that makes them functional to PWDs.[148] Three years after the DPDP Act2019 came into existence, most public schools in Nigeria have not complied with this statutory obligation despite the fact that the five-years transitory period granted under the said law terminates in 2024. Such subtle discriminatory practices in the form of physical and social barriers deprive PWDs or CWDs of the right to education.[149]

Employment Exclusionary Barriers

It bears repeating that the Nigerian disability law guarantees a PWD the right to work and earn a living in the labour market and work environment bereft of impediments to employment.[150] Employers of labour in public organisations are to retain 5% of employment slots in their establishments for PWDs[151] and any violator, including a corporate entity and principal officers of the organisation, are liable to criminal prosecution and payment of prescribed nominal damages to the affected PWD upon conviction.[152] However, there is no reported case where any individual or organisation has been held accountable for such violation despite employment marginalisation faced by PWDs in the Nigerian labour market. A recent protest by some visually impaired persons for the implementation of the 5% job allocation to PWDs by a government department, the Federal Civil Service Commission, bears credence to this discriminatory tendency.[153]

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[147] Edwin Etieyibo (n 141) at 70; Ibrahim Imam, MA Abdulraheem-Mustapha (n 83) at 451.
[148] DPDP Act 2019, sections 3-8.
[149] Bukola R. Akinbola (n 140) at 458-459; Richard Rieser, 'Disability Equality: Confronting the Oppression of the Past' in Mike Cole (ed) *Education, Equality and Human Rights: Issues of Gender, 'Race', Sexuality, Disability and Social Class*, (Routledge, 2006) 118 <https://doi.org/10.4324/9780203002698-15>.
[150] DPDP Act 2019, section 28(1).
[151]Ibid, section 29.
[152]Ibid, section 28(2).
[153] T Babatunde, 'Federal Commission Guards Brutalised Blind Jobseekers, Several Hospitalised' *Punch* (Lagos, 21 June2022) <https://punchng.com/federal-commission-guards-brutalise-blind-jobseekers-several-hospitalised/?amp> accessed 21 June 2022.

Job exclusionary barriers have compelled most PWDs to resort to self-employment because personal businesses pose fewer challenges to them as they can fashion out their work schedules and suitable environments that would not subject them to prejudiced practices prevalent in the public sector.[154]Women with disabilities (WWDs) are also at greater risk as they have lower participation in the labour market and are saddled with heavy domestic chores than their male counterparts.[155]

Accessibility to Public Space and Transportation Barriers

As earlier stated, public spaces, vehicles, parks, bus stops, seaports, railways, and airports are to be made accessible to PWDs.[156]Airline operators are to make available functional and presentable wheelchairs, as well as assist PWDs to go on and off-board in safety and comfort.[157] In realism, this is hardly the case in Nigeria. A case in point is a newspaper account of a disabled Nigerian woman, Gloria Nwogbo, who was denied entry into a plane because she was disabled and could not board the plane unaccompanied with a helper, even though she had bought her air ticket and was given her boarding pass.[158]

The aggrieved passenger subsequently instituted a lawsuit to challenge the discriminatory action of the airline operator, Dana Air Limited.[159] To address this legal dilemma, it is vital to understand the position of the Nigerian disability statute in the given situation. In other words, does the national legislation impose an obligation on the part of a PWD to travel with an aide? It is instructive to note that

[154] S Mizunoya and S Mitra, 'Is There a Disability Gap in Employment Rates in Developing Countries?' (2012) 42(1)World Development28-43 <https://doi.org/10.1016/j.worlddev.2012.05.037>.
[155] MA Hidayahtulloh, 'Making Real the Rights of Persons with Disabilities In Indonesia: Issues, Policies and Future Policy Recommendations'(International Conference of Indonesian Students, Australia, 17-18 April 2020) <https://www.researchgate.net/publication/350104245-Making_Real_the-Rights_of_Persons-with_Disabilities_in-Indonesia_Issues-Policies_and-Future_Policy-Recomendations> accessed16 June 2022, p. 67.
[156] DPDP Act 2019, sections 3-5.
[157]Ibid, sections 9-14.
[158] F Olokor, 'CSO Sues Dana for Barring Wheelchair-Board Passenger from Boarding, Demands N550m' *ThePunch* (Lagos, 8 February2022) <https://punchng.com/cso-sues-dana-for-barring-wheelchair-bound-passenger-from-boarding-demands-n550m/> (accessed 15 June 2022).
[159]*The Registered Trustees of Disability Rights Protection Initiative v Dana Air Limited*, Suit No. FHC/EN/CS/181/2021. Federal High Court, Enugu, before Hon. Justice F. O. Giwa-Ogunbanjo. As at the time of writing this article, the suit had not been determined.

Nigerian law does not require the claimant or any physically challenged person to travel with an accompanied aide. It is, on the contrary, the duty of the airline operators to render assistive services to PWDs by ensuring that a PWD is assisted to get on and off board in safety and reasonable comfort as well as ensuring that PWDs are accorded priority while boarding and disembarking from the aircraft.[160] Given the positive stance of the law, the present authors foresee a possible settlement of the case out of court or in the alternative if the case goes into a full trial and is ably conducted by the claimant's learned counsel, the trial court would likely sanction the airline operators for their discrimination against the claimants.

Two decided cases on the need for accessibility of a transport system are worth mentioning. First is the decision in *Robert Ross v Ryanair Ltd., & Anor*.[161]The claimant suffered from restricted mobility caused by cerebral palsy and arthritis which prevented him from walking long distances and standing. This created a problem for him when queuing to pass through the airport's security check-points; he did not own a wheelchair but had to hire one from the defendants' agents as that was required by the defendants' policy. The court ruled that the defendants' action in requiring the claimant to pay for a hired wheelchair amounted to unlawful discrimination outlawed under the UK Disability Discrimination Act (DDA) 1995. It was further held by the appellate court that it was the responsibility of the airline and the airport authority to offer reasonable substitute methods or auxiliary aid by providing the use of a free wheelchair to enable disabled passengers to get to the plane.

The second case is in relation to *Roads v Central Trains Ltd*.[162]The claimant was a disabled person and relied on an electric wheelchair for mobility. This prevented him from having access to the railway station through the footbridge. It was the argument of the claimant that the defendant company owed him the statutory duty

[160] DPDP Act 2019, section 14.
[161] [2005] 1 WLR 2447, https://www.casemine.com/judgement/uk/5a8ff71a60d03e757ea78cd/amp (retrieved: July 12, 2022).
[162][2004] EWCA Civ. 1541; (2005) 21 Const L. J. 456, <https://www.casemine.com/judgement/uk/5a8ff7af60d03e7f57eb1328/amp#aoh=16574830503384&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s> accessed 12 July 2022.

of providing a suitably wheelchair-accessible vehicle, as an alternative way or assisting aid to convey him by the station lane route in his wheelchair. Failure of the parties to reach a consensus resulted in the claimant instituting an action under the UK DDA 1995. The court held the company liable and awarded damages in favour of the claimant. It was held that the service provider was under obligation to take practicable steps towards the provision of alternative means of making the required services accessible to a disabled individual; and that in situation of competing solutions, the availability of the one solution when assessing the practicability of the others would be the better option.

Non-domestication Constraint

It is worrisome that only a few sub-national governments have domesticated the national disability law in their respective areas. As of December 2022, only about 19 out of the 36 States of the Nigerian federation replicated the national law as a State legislation. The implication of this is that the national law becomes inoperative in 17 States and the rights of PWDs cannot be guaranteed in such non-domesticating States.[163] This is a tacit endorsement by the non-domesticating States that discriminatory and other forms of oppressive harmful practices against PWDs are acceptable or encouraged in their jurisdiction.

Financial Exclusionary Barriers

This could be manifested in various ways. Like in the educational sector, the physical structures of most banking buildings in Nigeria are constructed in a manner that makes them inaccessible to PWDs. This is further compounded by the erection of metal detectors and mantrap or access control vestibule doors at bank

[163]The sub-national governments that have passed disability legislation include: Abia, Anambra, Bauchi, Cross River, Edo, Ekiti, Jigawa, Kaduna, Kano, Kogi, Kwara, Lagos, Nasarawa, Niger, Ondo, Oyo, Plateau, Sokoto, and Zamfara States. The States that are yet to adopt the disability legislation include: Akwa Ibom, Adamawa, Bayelsa, Benue, Borno, Delta, Ebonyi, Enugu, Imo, Ogun, Osun, Katsina, Kebbi, Gombe, Rivers, Taraba and Yobe States – see, Nancy Okenwa, 'Group Rallies 16 States to Domesticate Disability Inclusion Laws' *The Guardian* (Lagos, 25 August 2023) <https://guardian.ng/news/group-rallies-16-states-to-domesticatre-disability-inclusion-laws/> (accessed 6 February 2024). See also W Musa, '31 Million PLWDs Suffer as 23 States Neglect Disability Rights' *The Guardian* (Lagos, 3 December2021) <https://guardian.ng/news/31-million-plwds-suffer-as-23-states-neglect-disability-rights/> accessed 21 June 2022.

halls' entrances for security reasons. Such security doors do not permit wheelchair or crutches users or other means of mobility assistance to gain access to the banking halls. Most times, PWDs have to spend long hours waiting outside to be attended to by bank officials, who often feel that they are doing favours to PWDs rather than rendering normal banking services to them.[164]

Alternative banking amenities like automated teller machines (ATMs) and online banking facilities are also problematic to PWDs. Most ATMs are constructed in a way that users of wheelchairs cannot easily access them because of their height and location. There is also a problem of how visually impaired customers can personally use the machine without Braille signage and other assistive devices. The possible option would be to seek the assistance of other persons, thereby compromising their personal identification numbers (PINs) which they may have to disclose to such third parties.[165] PWDs are also denied access to credit facilities like loans for a number of reasons, including the fear that they may not be able to repay and the lack of requisite collateral security to access the credit facilities.[166] This is common among PWDs who are not employed by the government.[167]

We recommend that for purposes of financial inclusion, a bank should deem it vital to make its physical structures, facilities, and services readily accessible to PWDs by providing such essential devices like installation of ATMs with Braille display/keyboards, and sign language, automatic security doors openers to give access to PWDs on wheelchairs and crutches, assistive technological devices like text and image magnification for blind customers, audio and tactile devices for blind and deaf customers, screen magnifiers and speech synthesisers, among others. PWDs can also seek the enforcement of the right to financial inclusion by notifying their bankers to remove every existence of a state of inaccessibility or

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[164] K Adebajo, 'How Banks in Nigeria, Ghana Deny People with Disabilities Services' *Premium Times* (Lagos, 23 April2022) <https://www.premiumtimesng.com/news/headlines/525180-how-banks-in-nigeria-ghana-deny-people-with-disabilities-services.html> accessed 28 June 2022.

[165] K Imandojemu, AN Toyosi, and OJ Ndidi, 'Financial Inclusion and People Living with Disabilities (PLWDs) in Nigeria: A Disaggregated Analysis' (2018) 42(4) Bullion59-82; O Tade, 'Solving Financial Exclusion of People Living with Disabilities' *Vanguard* (Lagos, 28 April2021) <https://www.vanguardngr.com/2021/04/solving-financial-exclusion-of-people-living-with-disabilities/> accessed 28 June 2022.

[166] K Imandojemu, AN Toyosi and OJ Ndidi (n 163) at 61.

[167] O Tade (n 163).

barriers to accessing the bank's services or risk court litigation as required by law.[168]

CONCLUSION

The significance of accessing physical structures, social, economic, and cultural environment, educational and healthcare facilities as well as information and communications, among others, in a manner that will allow PWDs to completely enjoy all human rights and basic liberties on equal terms with individuals without disabilities, cannot be overemphasised. The CRPD and the other examined regional and national instruments are important milestones for disability and human rights protection. These instruments offer the undercurrent and rhythm for a complete comprehension of what the rights entail in relation to PWDs as "right-bearers" and the obligations imposed on the Nigerian government, relevant private enterprises along the global community in order to promote, protect, and guarantee those rights.

The article has demonstrated that the CRPD has generally been identified as representing a paradigm shift from the old "welfare/medical" approach to a human rights-based attitude towards disability, though this new approach is far from being achieved in the Nigerian context. Certainly, despite the legal and institutional mechanisms created in the examined normative frameworks to protect the rights of PWDs against discriminatory and oppressive actions, there are still a number of practical constraints and environmental barriers. Existence of such constraints serves as clogs to the full and valuable potential involvement of PWDs in their communities on equal foundation with others.

The Nigerian government has taken the right stride by having normative frameworks on disability rights and protection. The national, sub-national governments and relevant stakeholders must go a step further by demonstrating strong commitments towards the implementation of the legal instruments. Such a proactive approach will help in bridging the existing gaps in discrimination and marginalisation as well as the removal of exclusionary barriers often encountered by PWDs in every spectrum of Nigerian society. New and existing laws and policies must be consistent with the advancement of the rights and protection of

[168] DPDP Act 2019, section 8.

PWDs as enjoined by the CRPD. One of the ways to achieve legislative consistency is by dynamically engaging PWDs in the legislative processes at the national and sub-national levels.

The examined primary Nigerian disability law tends to focus more on public institutions, like schools, public transport systems, and public workplaces. The non-discrimination provisions purview in this law should be made applicable to private enterprises, particularly as the CRPD mandates State parties to regulate the private sectors. Hence, such private establishments that provide facilities and services that are accessible to members of the public must ensure that they are made easily open to PWDs without constraints. Similarly, PWDs as "rights-bearers" under the extant laws must take bold steps to enforce their guaranteed rights each time they are violated by either individuals and/or the government. This will entail effective access to justice by PWDs, including accessibility to the physical structures of the courtrooms and means of information/communication. Finally, effective education and/or awareness campaigns for PWDs, officials associated with access to justice, employers of labour, relevant agencies, and the larger society on disability protection and rights must constantly be carried out. If the recommendations made in the article are executed by the Nigerian government and other relevant stakeholders, the recognised rights and protection of PWDs will not remain as mere rhetoric decorating our statute books but will be fully implemented and enjoyed by PWDs in Nigeria.

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.225-248
DOI: 10.47963/ucclj.v4i1.1552

COLLECTIVE INVESTMENT SCHEME AS A TOOL FOR ECONOMIC INCLUSION AND DEVELOPMENT IN NIGERIA

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ABSTRACT

There are two major challenges to doing business in Nigeria: lack of capital and managerial expertise. With the large population of Nigeria, and by implication, the size of her market, Collective Investment Scheme (CIS), as regulated under the Investment and Securities Act (ISA) 2007, provides the necessary platform to overcome the two challenges above. Where the two challenges are overcome, the CIS can be a tool for economic inclusion and development in Nigeria. This study, therefore, examines the Collective Investment Scheme (CIS) in Nigeria, a business package aimed at economic inclusion and development. CIS, regulated by the Securities and Exchange Commission, offers three types of schemes with potential benefits for investors and addressing housing deficits. The CIS is a vital tool for economic inclusion and development of Nigeria. Its domicile in the Nigerian Capital Market (NCM) is to ensure its success as the funds are only invested in securities of choice for profits. The regulatory expertise and wide powers of the Securities and Exchange Commission (SEC) in the regulation of CIS are for the success and sustenance of the scheme *via* systemic scrutiny of the CIS managers and their operations. However, a comparison with Mauritius reveals some shortcomings. The doctrinal research method is adopted in this study. This doctrinal research adopts a comparative analysis to identify areas for improvement. The study finds that while CIS has advantages, it also has demerits. Recommendations are proffered to enhance the Nigerian CIS scheme, including addressing regulatory gaps and improving investor benefits.

Keywords: Collective investment scheme, Economic inclusion, Portfolio manager, Custodian, Unit trust scheme

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UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.225-248
DOI: 10.47963/ucclj.v4i1.1552

INTRODUCTION

This study aims to examine the utility of Collective Investment Scheme (CIS) as a tool for economic inclusion and development in Nigeria. This will be done through the assessment of the legal and institutional frameworks for the regulation of CIS towards attaining economic inclusion and development. A comparative analysis of the CIS in Nigeria is carried out with that in Mauritius so as to determine the strengths and/or weaknesses so as to proffer solutions in Nigeria.

This study deploys the doctrinal research method[3] which is normative in nature and is basically library-based.[4] This study analyses primary sources of domestic laws on the subject, and secondary sources which include scholarly works written by experts in the field and other publications by institutional bodies like the Securities and Exchange Commission (SEC). The examination of the primary sources of law is aimed at evaluating the adequacy or otherwise of the laws and the institutions, with emphasis on the effectiveness of CIS as tool for economic inclusion and development in Nigeria. Furthermore, in order to evaluate the efficient regulation of CIS in Nigeria, this study adopts a comparative analysis[5] of legislative and institutional frameworks on CIS in Mauritius with that in Nigeria.

Collective Investment Scheme (CIS) is one of the methods of raising capital by authorized schemes or corporate bodies duly registered with the Securities and Exchange Commission (SEC) under the CIS. In addition, the CIS also provides investment opportunities to members of the public to invest in any of the schemes by acquiring participatory interests, for profits or income accruals, in a unit trust

[3] Khadijah Mohamed, 'Combining Methods in Legal Research,' *The Social Sciences Journal* [2016] 11 (21) 5191-5194; Catherine Dawson, *Introduction to Research Methods: A Practical Guide for Anyone Undertaking a Research Project* (4th edn. How to Content, 2009), 1-158; Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds.) *Advanced Research Methods in the Built Environment* (3rd edn. Blackwell Publishing Ltd., 2008), 28-38; Khushal Vibhute and Filipos Aynalem, *Legal Research Methods: Teaching Materials* (Chilot Wordpress.com, 2009), 68-100; M. Pickton, 'Writing Your Research Plan,' in M. J. Grant, B. Sen and H. Spring (eds.) *Research, Evaluation and Audit: Key Steps in Demonstrating Your Value* (Facet Publishing, 2013); Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited, 2007), 31-118.

[4] Ibid.

[5] John C. Reitz, 'How to Do Comparative Law,' *The American Journal of Comparative Law* [1998] 46 (4) 617-636.

scheme, open-ended or real estate investments or trust scheme. The CIS is, however, an economic investment package that has not been fully explored in Nigeria but it is an area where the needs of investors and duly registered authorized operators, under the scheme, may put in their money for profits and raise scarce funds or capital with ease respectively. One of the vital signs of a viable society is in the area of engagement in businesses in order to raise the standard of living and contribute meaningfully to the development of society. Society is, however, largely abstract which can only be realized in the interaction and association of human beings including dealing in businesses.

Most businesses are regulated through the instrumentality of the law. Collective Investment Scheme in Nigeria is regulated by the government under the Securities and Exchange Commission (SEC),[6] which is the apex regulatory authority for the Nigerian Capital Market and foremost regulator of the Nigerian Stock Exchange (NSE).[7] The Nigerian Stock Exchange (NSE) is the floor where trading in securities takes place. It is also the marketplace where government and quoted corporate bodies in the NSE raise long-term capital, for development, in Nigeria. The capital market has been described as a financial market for long-term maturity financial assets such as government bonds, corporate bonds and equity.[8]

Collective Investment Scheme (CIS) is an investment package, regulated by the Securities and Exchange Commission (SEC) whereby authorized corporate entities invite members of the public through a prospectus to participate, as holders, by investing money and other assets in a portfolio under certain conditions. According to the Investments and Securities Act (ISA), CIS means:

> [a] scheme in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which:

[6] Investments and Securities Act (ISA) 2007 (as amended), Cap. I24, Laws of the Federation of Nigeria (LFN), 2004 (as Revised), s. I (1).
[7] Ibid, s. 13.
[8] J. O. Orojo, *Company Law and Practice in Nigeria* (5th edn., LexisNexis, 2008).

(a) two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest;
(b) the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined by the deed, but not a collective investment scheme authorized by any other Act.[9]

From the definition above, the investors do not only hold participatory interest in the portfolio or the scheme but also share in the risks and the benefits of investment in proportion to their participatory interests in the portfolio or the scheme. It is in the area of sharing the risks and benefits of the investment that the scheme has the capacity as a tool for economic inclusion and development. Persons of low-income bracket may pool their financial resources together and invest in the scheme thereby increasing their chances of earning additional income. This engenders economic inclusion which results in economic growth in the short run and economic development over time.

A member of the public who has invested in the CIS is a holder of participatory interest in the scheme. A holder, therefore, means any investor or beneficiary who has acquired units of a collective investment scheme and is entitled to a *pro rata* share of dividends, in trust or other income of the securities comprised in the unit.[10] Participatory interest, on the other hand, means any interest, undivided share or shares, whether called participator interest, unit or by any other name, and whether the value of such interest, unit, undivided share or shares remain constant or varies from time to time, which may be acquired by an investor in a portfolio.[11] Portfolio investment is an investment in shares or other securities traded on a securities exchange or capital trade point while portfolio means a group of assets including any amount of cash.[12] Portfolios have also been defined as the various securities

[9] ISA, s. 153 (1).
[10] Ibid, s.152.
[11] Ibid.
[12] Ibid, s. 315.

or other investments held by an investor at any given time.[13] The best explanation of the term 'portfolio' is that the holders of the participatory interests do not have daily participatory and physical control over the management of the property or investment in question notwithstanding their rights to be consulted or for them to give directions in respect of the management of the property or investment thereof. An investor will often hold several different types of investments to diversify risks.[14]

The study is divided into nine sections. The introduction clarifies the fundamental issues relating to the research problem, the objectives, the research method deployed and other preliminary matters. The section on CIS as a tool for economic inclusion and development highlights the advantages and benefits of the CIS and distinguishes CIS and Ponzi schemes in Nigeria. The CIS is a legally authorized business scheme while the Ponzi schemes are illegal and fraudulent manipulations of ignorant Nigerians in the guise of quick returns on investment. Sections three and four analyze the legal framework and the forms of CIS in Nigeria. In every business venture, there are merits and demerits. This is also true of the CIS and is much acknowledged in the Act.[15] Section five deals with the comparative assessment of the two areas where the CIS in Mauritius has advantages over that in Nigeria. Sections six and seven discuss the advantages and challenges of CIS while sections eight and nine take up the recommendations and conclusion. The recommendations are offered for overcoming some of the identified challenges of the scheme in Nigeria. This study examines the CIS as a tool for economic inclusion and development in Nigeria.

[13] Bryan A, Garner (ed.), *Black's Law Dictionary* (8th edn., West Publishing Company, 2004), 1199; G. Bannock, R. E. Baxter and R. Rees, *The Penguin Dictionary of Economics* (2nd edn., Penguin Books Limited, 1978), 350.
[14] Garner, *Black's Law Dictionary*, 1199.
[15] ISA, s. 153 (1) (b).

UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.225-248
DOI: 10.47963/ucclj.v4i1.1552

CIS AS A TOOL FOR ECONOMIC INCLUSION AND DEVELOPMENT IN NIGERIA

Funds for investment and expert managers in development have always been a challenge in Nigeria. This is so because the interest rates from banks are high in Nigeria. Many investors seeking loans from banks do not have the requisite collateral to secure such loans. The timeframe for repayment of loans from banks are rather short while real investors require long-term capital as loans for their investments. Furthermore, many private investors do not have the expertise to manage businesses especially those businesses that they do not have comparative advantage to manage. The enactment of an Act for the regulatory and institutional frameworks for CIS in 2007 changed the paradigm for economic inclusion and development in Nigeria. CIS had been in existence in Nigeria before 2007 but was only regulated, through the instrumentality of the law, in 2007 *via* the Investments and Securities Act (ISA)[16] and placed under the institutional enforcement of the Securities and Exchange Commission (SEC),[17] the regulator of the Nigerian Stock Exchange (NSE).

Furthermore, the rise in Ponzi schemes in Nigeria made it a necessity to regulate the collective investment climate in the country. The Ponzi schemes defrauded many Nigerians and, instead of taking them above the poverty line, dropped them far below the poverty line. Proshare Research explains Ponzi scheme and its drivers thus:

> In recent times, the Nigerian investment market has seen a huge rise in Ponzi schemes that threaten the growth and essence of the capital market. Some analysts believe Ponzi schemes are growing faster than the growth of the Nigerian capital market. Four factors have primarily contributed to the surge in the Ponzi scheme: (1) the enticement of the promised quick and guaranteed returns, (2) poor market information, (3) high risks in the formal capital market, and (4) the absence of regulatory sanctions for market defaulters. Data

[16] Investments and Securities Act (ISA) 2007, Part XIIIs, ss. 152-196. It is an Act of the national Assembly, made up of the Senate and the House of Representatives. The Act is applicable in all the States of the Federation.
[17] Ibid, ss. 1 (1) and 13-14.

> cited by the Nigeria Deposit Insurance Company (NDIC) estimated that Nigeria's investment market has lost about N911.45 billion to different Ponzi schemes and other related frauds in the last 23 years as of December 2022. Another report by the Norrenberger Financial Investments Scheme also estimated that as of 2022, Nigerians have lost over N300 billion to Ponzi schemes in five years.[18]

The above figures can dampen the investment climate and erode investors' confidence in the country. Ponzi schemes are illegal and unlawful especially as the ISA 2007 makes it mandatory for every corporate entity that intends to carry out any business under the CIS to be registered with the SEC.[19] The investment climate in Nigeria is, however, improving *via* the CIS despite the emergence of Ponzi schemes in the country.

Alan Boswell Group identifies, and we agree totally with them, the benefits and advantages of CIS in Nigeria as follows:

> Diversification: By pooling investments with others, you can invest in a broader range of asset types than you could as a single investor.
>
> Opportunity: With large amounts of pooled capital, you can invest in markets that are hard to access directly.
>
> Lower risk: A broader portfolio is generally lower risk than investing in a small number of assets. If one part of the portfolio goes down in value, it may be offset by increases in other parts. However, do remember some ETFs track narrow market segments, making them likely to be more volatile.
>
> Lower cost: Costs are spread among all investors, meaning large transactions, in particular, will cost you less than an individual investor would pay.

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[18] Proshare Research, *NCM Outlook Report – State of Ponzi in the Market: Growth of Ponzi Vs Growth of the Market,* 10 March, 2024. Available at https://proshare.co/articles/ncm-2024-outlook-report-state-of-ponzi-in-the-market-growth-of-ponzi-vs-growth-of-the-market/…
[19] ISA 2007, s. 38.

> Expertise: If you choose a scheme such as a unit trust or OEIC with dedicated fund managers, you'll benefit from their experience and expertise. This can lower the risk of your investment.
>
> Simplicity: Whether you choose a scheme with a fund manager or one that passively tracks a market segment, you don't have to spend time on the day-to-day administration of your investments.
>
> Tax efficiency: With the right advice, you can build a tax-efficient investment portfolio.[20]

The above benefits and advantages of CIS in Nigeria can bring in many Nigerians into the investment net thereby engendering economic inclusion and development in the country. Where the above is attained and institutionalized over time, the CIS can become a tool for economic inclusion and development in the long run. Lamido Yuguda, the Director-General of the Securities and Exchange Commission (SEC) is said to have reported that the collective investment fund has hit over two trillion-naira mark as of November 2023.[21] A presentation by United Capital shows that the growth of CIS in Nigeria has been substantial, with assets under management increasing from N73.8 billion to N2.2 trillion over the past 12 years.[22]

LEGAL FRAMEWORK OF COLLECTIVE INVESTMENT SCHEME IN NIGERIA

The CIS under discussion is a creation of the statute of the National Assembly and is regulated by that Act. Furthermore, it is domiciled in the Nigerian Capital Market for greater scrutiny and integrity of operations. The success of the capital market in any country is a pointer to the level of business development and confidence that investors have in that country's economy. Every country that has

[20] Alan Boswell Group, *Understanding Collective Investment Schemes*, 26 May, 2023. Available at https://www.alanboswell.com/news/collective-investment-schemes/...
[21] *Collective Investment Funds Hit N2.1 tr. on 15 November, 2023*. Available at punchng.com/collective-investment-fund-hits-N2.1tr/… Accessed on 25 February, 2024.
[22] Olamide_Ologunagbe, 'How Mutual Funds can Boost Financial Inclusion in Nigeria – Stakeholders,' *Businessday Newspaper* of February 29, 2024. Available at https://businessday.ng/news/article/how-mutual-funds-can-boost-financial-inclusion-in-nigeria-stakeholders. Accessed on 15 August, 2024.

a capital market regulates the activities of that market through the Securities and Exchange Commission (SEC) and there is now an international organization known as the International Organization of Securities Commissions (IOSCO) which the Nigerian SEC joined in June 1985[23] and has, since then, been an active participant both at the domestic and global spheres.

The scheme is regulated in Part XIII of the Investments and Securities Act.[24] As a general rule, all corporate bodies that the SEC regulates must have been incorporated by the Corporate Affairs Commission (CAC) under the Companies and Allied Matters Act (CAMA)[25] and subsequently apply to the SEC for registration in accordance with ISA.[26] In the case of the CIS, the SEC registers the manager who is also the issuer of the trust deed or other agreement under which the units or securities are issued. There is an additional provision by which the trust deed or the custodial agreement must be drawn up between the trustees or the custodian and the manager for regulating the operation of the scheme. The trust deed or the custodial agreement must be duly submitted to and registered by the SEC.

The scheme has principles of administration which are aimed at promoting transparency and enhancing the integrity of the scheme which are to the effect that:

A manager shall administer a collective investment scheme:

(a) honestly and fairly;
(b) with skill, care and diligence; and
(c) in the interest of investors and the securities industry.

Every authorized scheme shall adhere to the principle of segregation and identification, as may be prescribed by the Commission from time to time.[27]

[23] Akaninyene Billy Orok, Enya Gabriel Emori and Itoro Moses Ikoh, 'Collective Investment Fund: An Imperative for Growth in the Nigerian Capital Market,' [2019] (4) (4) *Noble International Journal of Economics and Financial Research*, 36.
[24] Part XIII of ISA runs from section 152 to 197.
[25] Companies and Allied Matters Act (CAMA), Cap. C2o, LFN, 2004 (as amended).
[26] ISA, ss. 158 and 160.
[27] Ibid, s. 155.

Another innovation by the Act in aid of the scheme is the duty of disclosure by the managers to investors before the transaction is entered into. The scheme is not shrouded in secrecy. This is in order to give any investor the opportunity to make an informed choice whether or not to acquire a participatory interest in the scheme.

The Act states that:

> Before the manager of a scheme enters into a transaction with an investor:
> (a) information about the investment objectives of the scheme, the calculation of the net asset value and dealing price, charge, risk factor and distribution of income accruals shall be disclosed to the investor; and
> (b) information that is necessary to enable the investor to make an informed decision shall be given to the investor timeously and in a comprehensible manner.[28]

In addition to the duty to disclose, the Act also imposes other duties on the manager of the scheme thus:

> The manager of the scheme shall:
> (a) avoid conflict between the interests of the manager and the interests of an investor;
> (b) disclose the interests of its directors and management to the investor;
> (c) maintain adequate financial resources to meet its commitment and to manage the risks to which its collective investment scheme is exposed;
> (d) organize and control the scheme in a responsible manner;
> (e) keep proper records;
> (f) employ adequately trained staff and ensure that they are properly supervised;
> (g) have well-defined compliance procedures; and
> (h) promote investor education.[29]

[28] Ibid, s. 156.
[29] Ibid, s. 157.

There is the additional obligation of registration, by the manager, of the units or securities of the scheme and the approval, by the Commission, of the prospectus and other offer documents on the scheme.[30] There is civil liability for any false information on the prospectus as to its material fact and misleading statements. This is very important because it is the information on the prospectus that makes the investor make the choice whether or not to invest in the scheme.

Furthermore, the Act gives the holder the right to request the manager of the scheme for the redemption of units or securities held by him or her (that is, the investor). The manager cannot suspend or postpone the date of the redemption of such units or securities except during public holidays, emergencies, when the stock exchange is closed or whenever the Commission permits it.[31] The right of redemption is peculiar only to CIS and it guarantees confidence in the investor that he or she can have access to funds anytime that he or she desires.

To ensure adequate returns on investment, the funds of the scheme can only be invested by the manager in accordance with the trust deed or the custodian agreement with the objectives of safety and maintenance of fair returns on amounts invested.[32] In addition, the funds and assets of the scheme can only be invested in the specified areas as issued *via* the guidelines by the Commission though the manager has the power to invest such funds and assets in units of any investment fund provided such investment is within the categories of investments as specified by the Commission and in real estate.[33] The specified areas mandated by the Act are as follows:

> Subject to guidelines issued by the Commission, from time to time, the funds and assets of a scheme shall be invested in any of the following:
>
> (a) bonds, bills and other securities issued or guaranteed by the Federal Government and the Central Bank of Nigeria;

[30] Ibid, ss. 161 and 164.
[31] Ibid, s. 166.
[32] Ibid, s. 171.
[33] Ibid, s. 171 (3).

(b) bond, debentures, redeemable preference shares and other debt instruments issued by corporate entities listed on a securities exchange and registered under this Act;
(c) ordinary shares of public limited companies listed on a securities exchange and registered under this Act with good track records, having declared and paid dividends in the preceding five years;
(d) bank deposits and bank securities of which the banks shall be rated by rating agencies registered by the Commission;
(e) investment certificates of closed-end investment funds or hybrid investment funds listed on a securities exchange and registered under this Act with good track records of earning;
(f) units sold by open-end investment funds or specialist-open end investment funds listed on the securities exchange and recognized by the Commission;
(g) real estate investment; and
(h) such other instruments as the Commission may, from time to time, prescribe.[34]

The above is not a conclusive list as the Commission can impose additional restrictions aimed at protecting the interest of a scheme or its beneficiaries.[35] A closer scrutiny of the above specified areas for investing the funds of the scheme reveals that each area is a high yield investment instrument and they collectively form a preferred investment choice.

Most importantly, the status of assets of the scheme is that the money or other assets received from an investor; and assets of a portfolio are regarded as trust property for the purposes of the Trustee Investments Act.[36]

The Commission has great powers in supervising the operations of the scheme to ensure its success and the beneficial interests of investors. Apart from the power to register the scheme and regulate its operations, the Commission also has other powers including revocation of authorization of the scheme;[37] approval of the

[34] Ibid, s. 171 (2).
[35] Ibid, s. 171 (4).
[36] Ibid, s. 182. Trustee Investments Act, Cap. T22, LFN, 2004 (as amended).
[37] Ibid, s. 163.

prospectus and other offer documents on the scheme;[38] inspection and investigation;[39] cancellation or suspension of the registration of a manager;[40] objection to the publication or distribution of misleading and objectionable documents;[41] request for audit;[42] suspension or revocation of the registration of a trustee or custodian;[43] power to make regulations on the constitution and management of the scheme;[44] and power to appoint competent inspectors to investigate and report under the supplemental investigations provisions.[45]

There are other crucial provisions in the Act which are geared towards engendering confidence in the scheme, encouraging the Nigerian public to invest in the scheme thereby building a culture of investment and promoting economic inclusion, and assuring economic development in Nigeria. The legal framework that regulates the CIS is good and aimed at protecting every investment in the scheme, the investors and the society. Apart from the ISA, the Commission regulates the CIS through the Securities and Exchange Commission Rules 2013 and the Rules on CIS (Amendment) 2019.[46] By effectively regulating the scheme through the SEC in Nigeria, the scheme encourages economic inclusion and economic development in Nigeria.

FORMS OF COLLECTIVE INVESTMENT SCHEME

The Act expressly lists three types of CIS but the Commission has the power to designate any other scheme as constituting a CIS by notice published in the gazette[47] and can also approve foreign investment schemes to solicit investments in such schemes from investors in Nigeria.[48] The three types of CIS expressly

[38] Ibid, s. 164.
[39] Ibid, s. 172.
[40] Ibid, s. 174.
[41] Ibid, s. 175.
[42] Ibid, s. 176.
[43] Ibid, s. 180.
[44] Ibid, s. 186.
[45] Ibid, s. 196.
[46] Aderonke Alex-Adedipe and Omotola Abudu, 'Regulation of Collective Investment Schemes (CIS) in Nigeria, 2020.' Available at pavestoneslegal.com/… Accessed on 25 February, 2024.
[47] ISA, s. 154 (2).
[48] Ibid, s. 195.

mentioned in the Act, which the Commission may approve, may be administered as:

(a) unit trust scheme;
(b) open-ended investment company; or
(c) real estate investment company or trust.[49]

1. The unit trust scheme is any arrangement made for the purpose, or having the effect, of providing facilities for the participation of the public as beneficiaries under a trust in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatsoever.[50]

2. The open-ended investment company is a company with an authorized share capital whose articles of association authorize the acquisition of its own shares, structured in such a manner that it provides for the issuing of different classes of shares to investors, each class of share representing a separate portfolio with a distinct investment policy.[51] The Act further provides that:

> An open-ended investment company shall be registered by the Commission if:
> (a) it is a body corporate in accordance with the Companies and Allied Matters Act;
> (b) it has a capital and reserve as prescribed by the Commission from time to time;
> (c) its articles of association provide that it may acquire its own shares; and
> (d) it satisfies all other conditions which may be prescribed by the Commission from time to time.[52]

The assets and investments of an open-ended investment company are in the custody of a registered custodian or trustee.[53] For the purposes of the CIS, a custodian is a person who has custody as a bailee of securities or certificate issued in the investor's name with the investor's name appearing in the issuer's register

[49] Ibid, s. 154.
[50] Ibid, s. 153.
[51] Ibid, s. 153.
[52] Ibid, s. 192 (1).
[53] Ibid, s. 192 (2).

as the beneficial owner of the securities.[54] On the other hand, trustee, under a unit trust scheme or such other arrangement, means the person in whom the property for the time being, subject to any trust created in pursuance of the scheme, is or may be vested in accordance with the terms of the trust.[55]

3. Generally, real estate has to do with real property, that is, tangible real property that can be seen and touched as against property that cannot be seen and touched like chose in action. A real estate investment company or trust is, therefore, a company that invests in and manages a portfolio of real estate, with the majority of the trust's income distributed to its shareholders.[56] A real estate investment company or trust, for the purpose of CIS, is:

> A body corporate incorporated for the sole purpose of acquiring intermediate or long-term interests in real estate or property development, may raise funds from the capital market through the issuance of securities which shall have the following characteristics:
>
> (a) An income certificate giving the investor a right to a share in the income of any property or property development; and
> (b) An ordinary share in the body corporate giving the investor voting rights in the management of that body corporate.[57]

Furthermore, a 'trust for sale' may be constituted as a trust for the sole purpose of acquiring property for the benefit of the investors. The trust referred to must have the following characteristics:

> (a) The investors shall acquire units in the trust through which they shall be entitled to receive periodic distribution of income and participate in any capital appreciation of the property concerned; and

[54] Ibid, s. 153.
[55] Ibid.
[56] Garner, 1292.
[57] ISA, s. 193 (1).

(b) The investors shall also be entitled to retain control over their investments by investing directly in a property rather than in a portfolio.[58]

As we stated earlier, the types of CIS listed in the Act are not a conclusive listing of available options in Nigeria. The Act empowers the SEC to designate any other type of CIS by publication in the gazette. In practice, there are five types of CIS that operate in Nigeria: Unit Trust Scheme; Venture Capital Funds; Open-Ended Investment Companies; Real Estate Investment Schemes; And Specialized Funds.[59]

The three types of CIS analyzed above sustain our position that the CIS are operated for the benefit of all stakeholders especially that of the investors. This encourages investments, engenders economic inclusion and accelerates economic development in Nigeria.

COMPARATIVE ASSESSMENT OF THE CIS IN NIGERIA AND MAURITIUS

The comparison is related to two aspects, namely: the definition of CIS in the principal Acts and the linking of CIS to the global business environment. The Securities Act of Mauritius 2017 defines CIS in almost the same manner as that in the ISA 2007 in Nigeria but two provisions make that of Mauritius peculiar. They are the definition of CIS and the requirement of obtaining Category 1 Global Business License (GBL1).

The Securities Act of Mauritius 2017 specifically provides that the CIS operation is based on the principle of diversification of risk; and the participants do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions in respect of such management.[60] The

[58] Ibid, s. 193 (2) and (3).
[59] SEC, *Collective Investment Schemes Explained*. Available at sec.gov.ng/collective-investment-scheme/… Accessed on 25 February, 2024.
[60] Securities Act 2017 (as amended), s. 2

Securities Act 2005 also made provisions for Category 1 Global Business Licensing for qualified CIS corporate entities.[61]

Furthermore, the Minister of Finance of Mauritius, acting under section 154 of the Securities Act 2005, made the Securities (Collective Investment Schemes and Closed-end Funds) Regulations 2008 to make certain the requirements and the procedures for registration and operations of corporate entities under the CIS. The procedures for registration in Mauritius can be summarized thus:

> Any CIS or closed-end fund (individually a scheme or collectively schemes) wishing to be approved, registered with, recognized and/or licensed by the Commission under the Securities Act must first apply to the Commission for the authorization as a CIS or closed-end fund in the manner set out in the Securities (Collective Investment Schemes and Closed-end Funds) Regulations 2008 (the CIS Regulations) and obtain a Category 1 Global Business Licence (GBL1) under the FSA.[62]

The requirement for obtaining GBL1 in Mauritius is for foreign investors to have confidence in the CIS in Mauritius and invest appropriately. This raises the volume and quality of investment and the benefits for the investors.

These two areas discussed above make the CIS in Mauritius have a comparative advantage over the CIS in Nigeria. Global confidence in the CIS is an advantage that should be tapped into in Nigeria because of the global benefits for the investors and the country at large.

ADVANTAGES OF COLLECTIVE INVESTMENT SCHEME

The CIS has many advantages which are for the benefit of the individual investors, the managers, and the Nigerian society as a whole, some of which include: funds diversification and spread of investment risks; easy to raise capital by pooling investments with other investors; lower investment risks; lower production cost; tax efficiency; managerial expertise; and good investment opportunities.

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[61] Ibid.

[62] Appleby, *Guide to CIS and Closed-end Funds in Mauritius*, 2015, 2. Available at www.applebyglobal.com/ Accessed 5 February, 2024.

Due to these numerous advantages, the CIS is a specialized investment package domiciled in the Nigerian Capital Market (NCM) for the benefit of all stakeholders especially the investors in the scheme. The NCM is the market for raising long-term finances for investment and development in Nigeria. The institutional regulator is the Securities and Exchange Commission (SEC) which is also the regulator of the NCM. The CIS benefits from its nature as a special purpose vehicle (SPV) for economic inclusion and development in Nigeria.

The designation of all the property in the CIS as trust property is better than any other business property. This means that all the business property in the CIS must be administered for the benefit of the investors as the beneficiaries. This engenders economic inclusion and development in Nigeria especially for the investors and other stakeholders in the CIS.

The mandatory prospectus is a very important document. This is because the prospectus, aside the articles of association, assists the investor to make an informed choice on whether or not to invest in the scheme.

The trust deed or the custodial agreement is another crucial document which is drawn up between the trustees or custodians and the manager for regulating the operations of the scheme. The CIS is not a one-man show where a lot of irregularities occur. It is actually a business package whose success cannot be compromised because of the transparency in operations and the trust concept in property holdings.

The investor's right of redemption is a step in the right direction and is aimed at further assurances that the investor can have access to his or her assets at any time and that the investment is safe. This engenders investors' confidence in the scheme.

The wide regulatory powers granted by the Act to the Commission also engender the investors' confidence in the scheme. Nobody or corporation can carry on the business of CIS outside the regulatory supervision of SEC and without registration with SEC.

The duties and obligations of the managers, trustees, custodians and the auditors, including their modes of appointment and qualifications for appointment, are

aimed at building confidence and making the scheme a success for the benefit of all the stakeholders.

The Investments and Securities Tribunal (IST), established under the Act, has jurisdiction, to the exclusion of every other court in Nigeria, to hear and determine any question of law or dispute arising from the administration, management and operation of the CIS. This provision removes the contentious legal issues of the CIS from the umbrella of the regular courts to a special court for speedy, specialized and satisfactory judicial administration.

The CIS has the potential, when fully operational, to engage the general public especially low-income Nigerians to be economically included by acquiring participatory interests in the scheme.

The scheme also has the long-term potential of enhancing the economic development and expanding the investment frontiers of many Nigerians in the country.

The capital-intensive nature of the scheme is further boosted by domiciling the scheme in the Nigerian Capital Market whereby needed capital can be raised easily compared to corporate bodies outside the capital market.

Domiciling the scheme in the capital market where the SEC has greater regulatory powers is an assurance to the general public and other stakeholders that the scheme is meant only for serious-minded businessmen and corporations.

The mandatory designation of specialized areas to invest the funds of the scheme is commendable as there is zero tolerance for failure. This also enhances the chances for success of the scheme.

The obligation of the manager to convene the Annual General Meeting (AGM) for the business activities of the previous business year, not later than four months into the current year, is commendable. This is so in the sense that where the manager fails to hold such a meeting at the appropriate time, the SEC can initiate investigations to protect the interests of the investors.

UCC Law Journal. Volume 4 Issue 1, July, 2024, pp.225-248
DOI: 10.47963/ucclj.v4i1.1552

CHALLENGES TO THE COLLECTIVE INVESTMENT SCHEME

There is no business package or scheme that has advantages that will not also experience some challenges. This is also true of the CIS. The challenges identified in the CIS include the following:

The triple registration requirements, under the Corporate Affairs Commission (CAC), the SEC and registration of the scheme itself with the SEC may become cumbersome thereby discouraging some managers from participating in the scheme.

The definition of the CIS in the Act is very unclear for ordinary investors. This is capable of dissuading potential investors from acquiring participatory interests in the scheme and thereby being excluded from the benefits of the scheme.

There is an urgent need for the SEC to be most effective in the regulation of the scheme especially with the rise in Ponzi schemes in Nigeria to protect the interests of the investors and their investments in CIS.

CONCLUSION

The scarcity of investment funds and the difficulty in obtaining loans for investment, make the CIS a preferred investment option in Nigeria. Furthermore, the flexibility of the CIS in pooling together investment funds and its ability to bring in small stakeholders into the big investment pool make the CIS a veritable platform for economic inclusion and development in Nigeria.

The domicile of the CIS in the capital market is to ensure its success as the funds are only invested in securities of choice for profits. The regulatory acumen and wide powers of the Securities and Exchange Commission (SEC) in the regulation of CIS are for the success and sustenance of the scheme. The three types of the scheme as listed in the Act, and the others that has been approved by the Commission, have the potential to develop individual investors and different sectors of the Nigerian economy. The scheme is strategic for the realization of the diversification of the Nigerian economy which is the economic mantra of the current political administration. This is even more pertinent as the scheme also has the potential to increase the gross domestic product and attract Foreign Direct Investments (FDI) into the country.

A few comparisons with the scheme in Mauritius reveal some *lacunae* in the Nigerian system of the scheme. The Nigerian scheme can be improved *via* an Act of the National Assembly since the scheme is also a creation of an Act of the national legislature. Nigeria can actually be the sub-regional economic hub of the scheme especially where neighboring countries in the West African sub-region are factored into the scheme. In addition, the scheme is, however, not well known among the populace in Nigeria due to lack of the requisite awareness.

Recommendations have been offered for improvements in the scheme in Nigeria for the overall benefits of the individual investors, the managers and other stakeholders within the operational ambience of the scheme. It is our strong economic opinion, based on our legal analyses of the Act, that the scheme is good for Nigerians and Nigeria; and that improvements in the current operations of the scheme can make it better and further the development of the country.

RECOMMENDATIONS

The smooth operations of the scheme are anchored on a number of innovations aimed at placing the scheme at the centre of economic inclusion and development. To achieve the purpose of the scheme, especially in economic inclusion and development, we hereby make the following recommendations for further improvement in the operation of the scheme in Nigeria:

1. Public education on the existence and benefits of the scheme should be carried out by the SEC. This will introduce people who are eager to invest but are yet to find the right option to opt into the scheme, invest in it and share in the benefits.

2. There is the necessity to amend the Act in order to accommodate current global realities in the area of CIS. For example, an all-inclusive definition of CIS is necessary as there is confusion in the current definition contained in the Act. For example, the definition of CIS in Mauritius is very clear and easy to understand as it is defined as follows:

   A Collective Investment Scheme:

> (a) means a scheme constituted as a company, a trust, or any other legal entity prescribed or approved by the Commission:
> (i) whose sole purpose is the collective investment of funds in a portfolio of securities, or other financial assets, real property or non-financial assets as may be approved by the Commission;
> (ii) whose operation is based on the principle of diversification of risk;
> (iii) that has the obligation, on request of the holder of the securities, to redeem them at their net assets value, less commission or fees; and
> (iv) where the participants do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions in respect of such management; and
> (b) includes closed-end funds whose shares or units are listed on a securities exchange.[63]

A mere glance at the above definition makes it very clear to ordinary people the import of its intent which is quite unlike the current definition of CIS in the Nigerian Act.

3. The type of CIS should be revisited so as to capture current global trends within the industry. The 2008 amendment of the CIS law in Mauritius has accommodated other forms of CIS which include Global Schemes, professional CIS, specialized CIS, expert funds, closed-end funds, and other types of specialized CISs.[64] The inclusion of the new funds further expands the CIS business environment and factors in the expertise of professionals as investors; and all these enhance the market.
4. Nigeria can perform a leading role in CIS in the West African sub-region especially under the Economic Community of West African States (ECOWAS) by listing global schemes as has been achieved in the Southern

[63] Appleby, *Guide to CIS and Closed-end Funds in Mauritius*, 2015, 7-11. Available at www.applebyglobal.com/ Accessed 5 February, 2024.
[64] The Securities (CISs and Closed-end Funds) Regulations 2008 (Mauritius), chapter 16.

African sub-region by Mauritius under the South African Development Commission (SADC). This is because Nigeria has the population and the market, especially in the real sector of the economy. SEC should, therefore, expand the reach of CIS to neighbouring countries, especially in the West African sub-region.

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