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Table of Contents

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Arbitrability of Administrative Contracts Under Ethiopian Legal System: Critical Appraisal

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Abstract
Disputes or differences between or claims of the parties which may arise from certain legal relationship could be settled outside of ordinary courts through the mechanism called alternative or amicable dispute resolution mechanisms, alternative to the litigation. These extra-judicial mechanisms of resolving disputes or differences or claims of the parties, inter alia, are negotiation, mediation and arbitration. The first two are essentially negotiation mechanisms and the third one is decisional mechanism where parties' appointed judges or experts give decision on the point on which parties are at issue based on the principles of the law. The point of worth consideration is to wonder if all matters are capable of settlement by arbitration. Based on county's public policy consideration, some matters are arbitrable whereas other matters are in arbitrable. The objective of this paper is to analyze whether disputes emanating from administrative contracts are capable of settlement by arbitration or otherwise in Ethiopia under the relevant laws and to survey what the practice looks like in relation to the same. Thus, doctrinal legal research methodology is employed to attain the objective. The findings of the study reveal that there is no uniform practice as to arbitrability of administrative contracts in Ethiopia and there is also no administrative procedure legislation that addresses the problem at hand.
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1. Introduction

Dispute refers to a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other.[1]Alternative dispute resolution mechanisms are mechanisms of resolving disputes in general and commercial disputes in particular extra-judicially. They are, as the name is self-explanatory, alternative to the court litigation in resolving disputes.

Negotiation is one of the alternative dispute resolution mechanisms where the parties themselves try it to settle their dispute without the involvement of the neutral third party. Mediation which is essentially a mechanism of negotiation also is alternative dispute resolution mechanism where the disputants try to settle their disputes with the help of the neutral third-party mediator(s). Arbitration, a form of alternative dispute resolution , is a technique for the resolution of disputes outside the courts where the parties to a dispute refer it to arbitration by one or more persons (the arbitrators, arbiters or arbitral tribunal), and agree to be bound by the arbitration decision (the award). [2]

Arbitration which is not mechanism of negotiation but a decisional process also falls in the species of the alternative dispute resolution mechanisms. The latter in majority of cases is consensual i.e. arises from the contracts unless it arises from the mandatory provisions of the law like the case of compulsory or mandatory arbitration. That is to say, disputant parties may consensually agree to settle their dispute through arbitration unless otherwise provided by the mandatory provision(s) of the law.

2. The Notion of Arbitrability: What is it?

The notion of arbitrability is a concept that implies the existence of matter(s) that can be adjudicated by arbitration and that cannot be adjudicated by arbitration. In literature matter(s) amenable to arbitration are called arbitrable matter(s) and matter(s) not amenable to arbitration are called non-arbitrable matter(s).[3] Thus, the notion of arbitrability is bi-dimensional such that it directly deals with the appraisal of which matter(s) are amenable to arbitration and which are not amenable to arbitration. The basic justification for this notion of arbitrability in effect is public policy consideration in order to limit the scope of arbitration as a mechanism of resolving disputes.[4]

As the public policy of countries may vary, each country may thus decide which matter(s) may be settled by arbitration and which matter(s) may not in accordance with its own public policy consideration. Therefore, countries may, under their domestic laws considering their public policy, envisage disputes that emanate from certain matter(s) arbitrable and disputes that emanate from certain matter(s) in arbitrable. The latter is where the law prohibits arbitration of certain matter(s). The public policy consideration of a country thus reflected in its law

[1] dispute, accessed on 16, February, 2019.
[2] https://en.wikipedia.org/wiki/Arbitration, accessed on 16, February, 2019
[3] Wondwossen Wakene, Law of Administrative contracts material for Study ,2009, p.113
[4] Ibid.

determines whether dispute arise from certain matter(s) is/are capable of settlement by arbitration or otherwise. The commercial realities of a country can also be another possible factor that may determine the arbitrability of matters.[1]

The inferable point from these explanations is that matter(s) capable of settlement by arbitration in some states may constitute in arbitrable matter(s) in other states. And this has an effect on the recognition and enforcement of foreign awards.

2.1 What are administrative contracts under Ethiopian law?

As defined under the Ethiopian civil code, contract is an agreement whereby two or more persons as between themselves create, vary or extinguish obligation of a proprietary nature.[2] The point is that since administrative contracts are also contracts, they do share all of the elements of the above definition of contract. Needless to say, administrative contracts also are required to comply with the requirements of consent, capacity, object and form, if any, like other contracts.[3]

However, what qualifies administrative contracts is that its requirements go beyond the requirements envisaged hereinabove as it is observed from the provisions of civil code specifically dealing with the administrative contracts as we will see below. The Ethiopian Civil Code clearly provides the yardsticks that help us to ascertain whether certain contract is administrative contract or otherwise, requirements that qualifies a contract as administrative contracts and there by differentiate it from ordinary civil contracts.

Accordingly, a contract shall be deemed to be an administrative contract where: it is expressly qualified as such by law or by the parties; or it is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such services; or it contains one or more provisions which could only have been inspired by urgent consideration of the general interest extraneous to relations between private individuals.[4] According to the first yardstick, a contract as defined hereinabove under article 1675 of Civil Code will be an administrative contract if the law qualifies it as administrative contract.

The instance of contracts which the law qualifies as administrative contracts are in the case of concession of public services[5], public supply contracts[6] and contracts of public services.[7]

The other requirement provided by the code to ascertain whether certain contract is administrative contract is that where the parties qualify it as administrative contract. But an issue of worth rising at this juncture will be to wonder if all contracts are administrative contracts merely because qualified by the parties as administrative contracts. Superficially, the requirement is saying that the contract qualified by parties as an administrative contract can be the same but a contract qualified as such by the parties on face value can't be considered as an administrative contract unless one of the parties is an administrative authority provided that the object of the contract such as activity of public service as we can understand from article 3207(b) of Civil Code.

Here my argument is that a contract could not be an administrative contract for the mere fact that it is qualified as such by the parties unless one of the parties is an administrative authority or agency (as we can see from article 3132(b)) which still should be identified in reference to the object of the administrative contract such as the public service under concession of public service which is one instance of administrative contract.

The point is that object of administrative contract is also one factor that helps us to distinguish administrative contracts from ordinary contracts and contract with administrative authority become administrative contract where it is concluded to, for instance, carry out public service activities.

The other criterion employed by the code to ascertain whether a contract is administrative contract or not is that the connection of the contract with an activity of the public service and implies permanent participation of the party contracting with administrative authorities in the execution of such service. The examination of this element of definition in the way of ascertaining what constitutes administrative contract reveals that for a contract to be administrative contract it should have connection with an activity of public service and a party who conclude the contract with administrative authority is to execute or accomplish activities of the public service.

Thus, it is tenable to argue that administrative contracts are contracts that a party may conclude with administrative authorities to execute the activity of public service. What one may wonder at this point is who administrative authorities or agencies are. Due to the absence of the administrative procedure proclamation or law in Ethiopia, there is no comprehensive definition of administrative authority. But in literature some parameters are employed to differentiate what government organs can be considered as administrative authority or agency or

[1] Zakarias Kaneaa, Arbitrability in Ethiopia: posing problem, Journal Ethiopian Law, vol.17, 1994, p. 117
[2] The Ethiopian Civil Code, article 1675
[3] Id, article 1678
[4] Id, article 3132
[5] Id, article 3207-3243
[6] Id, articles 3297-3306
[7] Id, article 3244-3296

otherwise.

The following parameters should be used to determine whether certain government entity is administrative authority/agency or otherwise.[1]

> *The nomenclature used to describe the entity such as ministry, authority, agency, bureau, office, commission, board or similar terms, that it has legislative and/or adjudicative power granted by the legislatures and That the head of agency/authority is appointed by the executive or the house of peoples' representatives.*

Therefore, the foregoing analysis reveals that administrative contracts are contracts that are expressly qualified as administrative contracts by the law as in the case of concession of public service, public supply contracts and contract of public works, or where the contract is concluded between parties in which one of the parties is administrative authority to carry out the activities of public services.

The query one may raise in connection to administrative authority or administrative agency is that does it also include public enterprises? To answer this, we may get hint from the federal government determining the procedures of public procurement and establishing its supervisory agency proclamation.[2] Procuring entity is public body which is partly or wholly financed by federal government budget, higher education institutions and public institutions of the like nature.[3]

The inference from this is that what makes an entity administrative authority is the source from which it derives income and the purpose of the organ. Accordingly, if an entity derives wholly or partly its income from the government, there is a possibility to consider it as administrative authority. This also takes to the argument that the mere fact that certain entity is a government entity doesn't make it administrative authority.

In the case between Tewodros Abera construction works Vs. Addis Ababa University in which the parties agreed in their contract to resolve the dispute arising from or in relation to the contract through the help of the consulting engineer who should give decision within 60 days and if he fails to do so to resolve through arbitration, the federal first instance court ruled that the mere fact that one of the party to contract is a government entity does not mean that the contract is administrative contract[4](translation is mine). The court ruled that the fact that the respondent is government education institution does not make the contract the respondent entered into with appellant administrative contract.[5] The implication is that who is administrative authority or agency in defining administrative contract is also very controversial concept and needs address of the law (definition of law).

3. Arbitrability of disputes emanating from administrative contracts under the Ethiopian laws: Analysis under the Ethiopian Civil code, Civil Procedure Code and Pertinent Legislations

As far as the arbitrability of the disputes emanating from administrative contracts is concerned, scholarly writings have different opinion on the basis of the pertinent provisions of the Civil Procedure Code and Civil Code of Ethiopia.

The Civil Procedure Code envisage that no arbitration may take place in relation to administrative contracts as defined under article 3132 of the Civil Code or in any other case where it is prohibited by the law.[6] Bezawork argued that there is inexistence of anything implying such restriction in the Civil Code and expresses his opinion that legislator in the Civil Code never envisaged such restriction of arbitrability which he says would have been included in the Civil Code as it is something affecting the parties freedom.[7]

He strengthens his position citing article 3345 of Civil Code and article of 315(4) of Civil Procedure Code which respectively provided that it is the procedure for arbitration that should be determined by Civil Procedure Code and, that the provisions of the Civil Procedure Code chapter on arbitration shall not affect the Civil Code provisions on arbitration.[8]

This scholarly Writing is arguing that the Civil Code article 3345 clearly enshrined that, as far as arbitration is concerned, reference to Civil Procedure Code is to determine the procedure for arbitration and the Civil Procedure Code by itself speak out under article 315(4) that the provisions of Civil Procedure Code chapter on arbitration i.e. articles 315-319 shall not affect the provisions of Civil Code on arbitration there by implying that it is not the jurisdiction of procedural law but substantive law, Civil Code, that would have determine matters amenable to arbitration and matters not amenable to arbitration, and article 315(2) of Civil Procedure Code is restricting what matters are not amenable to arbitration though there is no such restriction or even an implication

[1] Aberham Yohannes and Desta G/Michael, Administrative Law Material for Academic Study, 2009, p.74
[2] Federal government determining the procedures of public procurement and establishing its supervisory agency proclamation, proc. No.430, 2005, Federal Negarit Gazette, 11th year, No.15, 2005
[3] Id, article 2(f)
[4] Tewodros Abera Construction Works Vs Addis Ababa University (Federal First Instance Court File no. 210554) (unpublished)
[5] Ibid
[6] The Ethiopian Civil Procedure Code, article 315(2)
[7] Bezawork Shimellash, The formation, content and effect of arbitral submission under Ethiopian law, Journal of Ethiopian Law, vol.17, 1994, p.83
[8] Ibid.

to that effect under the Civil Code and there by defeat article 315(4).

Zekarias Keneaa argued that it is surprising to find a provision that reads "no arbitration may take place in relation to administrative contracts as defined in article 3132 of Civil Code or in other cases where prohibited by the law in the Civil Procedure Code but nothing to that effect or similar to that is stated in any one of articles 3325-3346 of the Civil Code."[1] He also argued that the issue of interpretation of the two legal texts i.e. article 315(2) of Civil Procedure Code on one hand and articles 3325-3346 might as well arise and this become even more glaring if one considers article 315(4) of the Civil Procedure Code which states that nothing in this chapter shall affect the provisions of articles 3325-3346 of the civil code.[2]

Accordingly, he argued that if nothing in Chapter 4 of the Civil Procedure Code affects the provisions of articles 3325-3346 of the Civil Code and nothing as to whether or not matters arising from administrative contracts are in arbitrable is mentioned in articles 3325-3346 of the Civil Code, could article 315(2) of Civil Procedure Code be given effect[3] Or if the overriding texts of articles 3325-3346 are silent as to whether or not disputes emanating from administrative contracts are arbitrable; cannot that be taken as an implication that even disputes arising from administrative contracts are arbitrable in so far as nothing express is stated in articles 3325-3346 that they are non-arbitrable[4] implying that the interpretation or the construction of the two legal texts tends towards to showing that disputes arising from administrative contracts is amenable to arbitration because if nothing in Chapter 4 of Civil Procedure Code affects the provisions of articles 3325-3346 of the Civil Code as per article 315(4) of the Civil Procedure Code and nothing is stated as to whether or not disputes arising from administrative contracts are in arbitrable in articles 3325-3346 of the Civil Code or it is silent, by interpretation it implies that disputes emanating from administrative contracts are arbitrable.

Thus, this scholarly writing is implying that what matters in determining whether disputes emanating from administrative contracts are arbitrable or otherwise is the interpretation or construction of article 315 of Civil Procedure Code and articles 3325-3346 of the Civil Code.

A survey of some pertinent Ethiopian legislations/proclamations reveal that there are government administrative organs that have legal mandate to resolve disputes that may arise in their legal relationship with other party through arbitration. To begin with, Ethiopian civil aviation proclamation clearly reads that:

Ethiopian civil aviation authority shall have the power and duties to own property, enter into contract, sue and be sued in its own name, and may submit dispute to the arbitration.[5]This provision unequivocally indicates that the dispute that arise from contract Ethiopian civil aviation authority entered into with other party can be submitted to and settle through arbitration.

In similar vein, a proclamation to establish agency for government houses enshrined that the agency shall have the power and the duty to own property, enter into contract, sue and be sued in its own name including settlement of disputes through arbitration.[6]

A proclamation that defines the powers and duties of the executive organs of the federal democratic republic of Ethiopia also empowers the ministry of justice to institute or cause to be instituted or intervene in proceeding before judicial body or arbitration tribunal where the rights and the interest of the public and the federal government so requires[7] which implies that the possibility of settlement of disputes in connection to that through arbitration.

Ethiopian water resource proclamation also envisaged that the supervising body (ministry of water resource or organ delegated by ministry per article 2(8) of the proclamation) …. "*In the event that the agreement can't be reached through negotiations pursuant to sub-article (3) of this article, the case shall be settled by arbitration.*"[8]

Thus, a survey of these laws or proclamations which allow these government administrative organs to resolve disputes that may arise from the legal relationship they enter into with other party through arbitration show that there is possibility of settling disputes that may arise from administrative contracts that these government administrative organs concluded with other party through arbitration.

These may be taken as clear instance where disputes emanating from contract entered into between government administrative organs and other party can be capable of settlement through arbitration i.e. arbitrable.

Therefore, the possible critical thinking may be raised at this juncture is that how these laws are going to be seen in light of article 315(2) of the Civil Procedure Code even if we take it as mandatory provision. Can we take them as exceptions assuming that article 315(2) of the Civil Procedure Code prohibits disputes arising from

[1] Zekarias Keneaa, Supra Note 5, p.119
[2] Ibid.
[3] Ibid
[4] Ibid.
[5] Civil aviation proclamation, proc. No. 616, 2008, article 10(18), Federal Negarit Gazette, 5th year, no. 23, 2009
[6] Agency for the government houses establishment proclamation, proc. No. 555, 2007, article 6(11), Federal Negarit Gazette, 14th year, No. 2, 2007
[7] Definition of powers and duties of the executive organs of the federal democratic republic of Ethiopia proclamation, proc. No. 4, 1995, article 23(8), Federal Negarit Gazette, 1st year, no. 4, 1995
[8] Ethiopian Water resource Management proclamation, proc. No. 197, 2000, article 9(4), Federal Negarit Gazette, 6th year, No.25, 2000

administrative contracts to be settled through arbitration (can we take it as list of exceptions) or can we say these proclamations amended the provision of article 315(2) of Civil Procedure Code? I am in the position that these laws amended this provision of the Civil Procedure Code with regard to disputes emanating from the matters the proclamations are addressing provided that it is prohibitive clause.

My argument is that the provision of article 315(2) of the Civil Procedure Code doesn't prohibit disputes emanating from administrative contracts from being arbitrable if we strictly interpret article 315(4) of the same code where there is no prohibition of settling dispute from administrative contracts through arbitration or similar to that is provided under the provisions of the civil code dealing with arbitration, or if we take it as prohibitive clause these proclamations amended this provision of the Civil Procedure Code. This, on the other dimension, conveys the message that the government can prohibits or permits, as it thinks fit through laws or proclamations, disputes arising from administrative contracts concluded between government administrative organs with other parties to be settled through arbitration. This may have its own effect on the justice system.

3. What the practice looks like as to the arbitrability of disputes emanating from administrative contracts in Ethiopia?

It is indisputable that the issues of arbitrability of disputes emanating from administrative contracts in Ethiopia become very controversial as we can observe from various scholarly articles, judicial interpretation of arbitrability on the point at issue as well as the opinion of individuals or academicians. Having seen the arbitrability of disputes emanating from administrative contracts under Ethiopian laws, now let us see what the practice looks like as to the same issue.

3.1The practice before the courts

It is vivid fact that the issue of arbitrability of disputes emanating from administrative contracts is traced back to the early of 1960s after the enactment of the civil code and civil procedure code. The point here is that how the courts deal with the matter. This practice before Ethiopian courts as to arbitrability of disputes emanating from administrative contracts is reflected in the decided cases on the subject matter under study as we can observe from the cases dealt with hereunder.

In the case between Highway Authority vs. Solel Boneh Ltd the imperial supreme court of Ethiopia affirmed the decision of the then High court ordering the government agency to comply with a clause of its contract with Solel Boneh Ltd that provided for the submission of all disputes under the contract to arbitration.[1]

"In Ethio-Marketing Ltd vs. Ministry of information the decision of the court reads that a contract concluded between parties pursuant to the provisions of the civil code is a law between the parties. The appellant and Respondent having, on the basis of the civil code, agreed to resolve the dispute between them by arbitration, the civil procedure code shouldn't prevent the enforcement of the contractual agreement."[2]

According to Tekle Hagos, the decision of the court was based on the argument that procedural laws should neither limit nor extends substantive rights though it is too difficult to maintain the argument.[3]

In Water supply and Sewage authority Vs. Kundan singh Construction Limited, the then High court rejected the argument of the Indian party that article 315(2) of civil procedure code should not be given effect since the overriding substantive law is silent as to the in arbitrability of the issues arising from the administrative contracts and ruled that this provision of civil procedure code exclude disputes arising from administrative contracts from settlement by arbitration.[4] In justifying its position, the court argued that "the question relating to which court or tribunal has jurisdiction is a matter of procedure and that procedural matters are provided for in the civil procedure code, not in the civil code".[5] The other argument raised by the court to justify its ruling is that matters relating to administrative contracts are in arbitrable under the French law (French code of civil procedure prohibits matters related to administrative contracts from arbitration) from where our civil code is taken.[6] However, the court's decision has been seen by some commentators as unconvincing endeavor to get around the strong point under article 315(4).[7]

In the Zem zem Plc vs. Ilu Abbabor Zonal Department of education[8] in which they agreed to settle dispute that arises out of contract concluded between them for construction of elementary school which falls under contracts of public works (article 3344 civil code *et seq*) amicably through informal negotiation, if no amicable

[1] Imperial Highway authority Vs. Solel Boneh Ltd (Supreme Imperial court civil Appeal No. 670/57) Mizan Law Review, Vol.4, No.2, 2010
[2] Ethio Marketing Ltd vs. Ministry of Information (Ethiopian supreme court decision, March 29, 1975), Mizan Law Review vol.3, No.1, p.19
[3] Tekle Hagos, Arbitrability of Government Construction Disputes" Mizan Law Review, vol.3 No.1, p.19
[4] Water supply and Sewage authority Vs. Kundan singh Construction Limited (Addis Ababa High court, Civil File No.688/1979), Mizan Law Review, vol.4, No.2, 2010, p.314
[5] Ibid
[6] Ibid
[7] Zakarias Keneaa, Supra Note 5, p.120
[8] Zem zem Plc vs. Illubabor Zone Education Department (federal supreme Court Cassation File No.16896, 1998), Mizan Law Review, vol.3 No.1, p. 21

solution by negotiation either party may require that dispute be referred to adjudication or arbitration, the Federal supreme court Cassation division ruled in its holding that the term of the contact is clear and doesn't need interpretation, and the contractual agreement entered into between the parties is a law and binding by virtue of article 1731 of the civil code there by reversed the decision of Oromiya Supreme court and ordered the Illubabor Zonal Bureau of Education to go to about settling its dispute with appellant through arbitration.[1] The federal Supreme Court cassation bench by this decision "hammered the final nail on article 315(2)'s coffin" thereby make any arbitral clause or submission in administrative contracts enforceable.[2] This means the decision of federal Supreme Court cassation bench is binding over decision of courts.[3]

The point here is that how we will treat article 315(2) of the civil procedure code if the decision of the federal Supreme Court cassation division is binding over all courts, be it federal or regional (state) courts. The possible convincing argument is that the provision of article 315(2) of civil procedure code is repealed by this federal Supreme Court cassation bench decision.

Tekle argued that the lesson we may draw the from this decision of the federal Supreme Court cassation division decision is that the court has stripped article 315(2) of the civil procedure code by hammering the last nail in its coffin and thereby permits any arbitral clause or submission in administrative contracts is enforceable, and the federal supreme court cassation bench erred in holding the decision that is unequivocally against clear public policy consideration of non-arbitrability of the administrative contracts disputes enshrined under article 315(2) of the civil procedure code.[4]

In the case between Tewodros Abera construction works Vs. Addis Ababa University in which the parties agreed in their contract to resolve the dispute arising from or in relation to the contract through the help of the consulting engineer who should give decision within 60 days and if he fails to do so to resolve the dispute through arbitration, the federal first instance court ruled that the mere fact that one of the party to contract is a government entity does not mean that the contract is administrative contract and the court ruled that the dispute arising from their agreement should be decided through arbitration according to their agreement.[5]

The point we can infer from the aforementioned discussion of the practice before courts as to the arbitrability of disputes emanating from administrative contracts in Ethiopia is that some courts treat the disputes arising from administrative contracts as arbitrable whereas other courts treat the same as in arbitrable. This creates the controversy over the matter to continue.

Conclusion

Dispute which refers to a conflict or controversy or conflict of claims or rights may possibly arise from or in relation to contract concluded between the contracting parties or certain defined legal relationship between the parties. And it may be resolved outside of the courts through the alternative dispute resolution mechanisms based the agreement of the contracting parties. Arbitration is one of the mechanisms to achieve this end. But due to public policy related considerations of a country some matters are amenable to arbitration (arbitrable) whereas other matters are not amenable to arbitration (in arbitrable).

Whether disputes arising from administrative contracts are arbitrable or otherwise is a point of controversy in Ethiopia starting from the 1960s. This divergence is primarily based on article 315(2) & (4) of civil procedure code on one hand and articles 3325-3346 of the civil code on the other. This leads one to critically wonder whether article 315(2) of the civil procedure code is prohibitive clause, if so, what is the purpose of article 315(4) of the same code, or is not prohibitive clause or should not be prohibitive clause where there is nothing that prohibits or to that effect is envisaged or even inferable in articles 3325-3346 of the civil code. The other critical point one may raise in connection to this is how to treat article 315(2) of the civil procedure code in light of the proclamations which gives legal mandate to some administrative organs of the government to settle their dispute through arbitration.

Above all, the decisions of the Federal Supreme Court cassation bench in the case between Zem zem Plc vs. Illubabor Educational Bureau File no.16896, 1998 "hammered the last nail in article 315(2)'s coffin" there by ensures disputes emanating from administrative contracts arbitrable and enforceable as the decision of Federal Supreme Court Cassation Division is binding under Ethiopian Legal system.

Therefore, these all aids to find as well as argue that disputes emanating from administrative contracts are arbitrable in Ethiopia.

Recommendations

Since the arbitrability of disputes arising from administrative contracts are very controversial in Ethiopia, the

[1] Tekle Hagos, Supra Note 30, p. 22
[2] Id, p.27
[3] Federal Courts Establishment Proclamation, Proc. No. 25, 1996, article 10, Federal Negarit Gazette, 2nd year, No. 13, 1996
[4] Tekle Hagos, Supra Note 24, p.27
[5] Tewodros Abera construction works vs. Addis Ababa University, cited above at note 15

government or the concerned body:

- Need to undertake further research to come up with the possible solutions.
- Should address the alleged controversy of the pertinent provisions of the Ethiopian Civil Code and Civil Procedure Code
- Should have administrative procedure law which helps to address the controversy in relation to administrative agencies or authorities in identifying administrative contracts.
- Need to address the issue pertaining to arbitrability of administrative contracts under the Civil Procedure Code vis-à-vis Proclamations which clearly authorize or mandate some government administrative organs to resolve their dispute through arbitration.

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Misleading Advertisement in Islamic Law and Consumer Law in Arab Countries

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Abstract
Advertising can greatly increase a company's revenue and it becomes part of company's promotion tool. Many companies invest significantly on advertising. Nonetheless, in attracting new customers, some advertising makes false promises, which is forbidden in Islam. This study highlights the notion of misleading advertisement from the Islamic perspective and from legal perspective based on the legislation in some Arab countries with special reference to Jordan. Islam allows business conducts so long that they abide by the principles of Shari'ah. Hence, misleading practices, deception, unfairness, misrepresentation, force and injustice in measurement, are prohibited. This paper attempts to identify the Islamic standpoint towards misleading advertisement, to promote truthful advertising.
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1. Introduction

The expression "advertise" comes from a Latin word "advertere" which refers to "turn toward or to take note of." In essence, visual and verbal commercial messages make up an advertising with the purpose of grabbing viewer's attention and compelling the viewer to show certain response. It is nearly not possible to dodge advertising as it is ubiquitous in nature. There are various ways of advertising, however, newspapers and magazines often have more advertisements compared to other media. As providers of entertainment, radio and television present advertisements too, and advertisements also appear on Internet sites, emails, mails, subways and train stations, bus stop benches, vehicle license plates, billboards, and so forth. In short, advertising and its creative elements are to make viewers pay attention.[1]

2. Misleading Advertisement from Islamic Perspective

'Shari'ah' encompasses an Islamic law, but it should be noted that the concept of 'law' in Islam is wider than that within a legal context. This Arabic word means 'path' or 'guide' and it means all-encompassing characteristics of Islamic Law coming from two primary sources: the Holy Qur'an and the Glorious Prophetic Sunnah (Prophetic Traditions).

Other than these two sources, Islamic law is also based on secondary sources such as Ijma' and Qiyas. In addition, Islamic law in Jordan refers to the Majalla which is based on the Hanafiyah School thought. This School of thought was established in the 8th century by Abu Hanifah Al-Nu'man and it is among the four renowned Islamic Schools of thought. In protecting consumer, the Shari'ah or Islamic law bridges the gap in Jordanian legislation.

The verses of the Quran and Sunnah are ample resources of directives and regulations governing consumption in contemporary societies. In this regard, the Islamic law provides a unique insight into transactions between individuals. This insight is not meant for achieving a private interest but for establishing the public Islamic legitimate interests as a collective public interest to serve all individuals.

3. Provisions of Quran and Sunnah

Islamic laws prohibit the uncertain deals which are based on speculation and unclear situations, as it has been clarified before. So, in any negotiation, the Shari'ah law presents two essential principal requirements: first, if there is any kind of fraud, and second, within the mutual consent of the parties, if misleading advertisement or pressure has been exercised on the customer, then, the negotiation should be cancelled immediately.[2] As such, communications based on uncertain commodities or those on commodities that are yet to exist, are greatly forbidden in Shari'ah law, as this can lead to the accumulation of wealth at the cost of others, if by chance, these commodities are muddied before the customer accepts them.

On the order hand, laws of Shari'ah boost and encourage urges trade and free trade, and also compel manufacturers to provide high quality goods and products at reasonable and fair prices without any wrong and

[1] Pushpa Girimaji. "Misleading advertisement and consumer". "T*his Monograph is published with the Financial Assistance from Department of Consumer Affairs. Ministry of Consumer Affairs, Food & Public Distribution,* Government of Indian" "*institute of public administration*. (2013)"**.**
[2] Siddiqui, Anjum. "Financial contracts, risk and performance of Islamic banking." "*Managerial finance* 34", no. 10 (2008): 680-694.

untrue information. For those that abide by such laws in their business deals, God will give rewards in this world and the hereafter. This reward has been guaranteed by Prophet Mohammed [PBUH] as the Prophet had stated that God said: God loves best those who hasten to worship.[1]

There is no doubt that Islamic has prohibited cheating, lying, and deceit, as mentioned in many verses in the Quran and Hadith:

3.1 Evidence from Quran

Allah the Almighty says: "O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.2" This verse clearly states that trade can only be legitimate if it was conducted with mutual consent and satisfaction without fraud or deception, otherwise the transaction is prohibited.

Furthermore, Allah the Almighty says, "O you who have believed, fulfil [all] contracts.[3]" Allah the Almighty has ordered us to honour contracts, as He also says, "Indeed, Allah orders justice and good conduct.[4]" Justice is one of the values Islam has highlighted in its moral message and teachings. Justice, honouring contracts, and cooperation in righteousness and piety are valuable moral assets that form the basis for consumer protection, because both the producer and the dealer should possess high morals.

3.2 Evidence from Sunnah

Many Hadiths prohibit fraud and promote consumer protection, including what was narrated on the authority of Abu Huraira. As conveyed by Abu Huraira, Prophet Muhammad (PBUH) passed by a pile of corns, and placed his hand into the pile, and found his fingers moistened. The Prophet then said to the owner of the corns: What is this? The owner replied: Messenger of Allah, these have been drenched by rainfall. He (the Holy Prophet) remarked: Why did you not place this (the drenched part of the heap) over other eatables so that the people could see it? He who deceives is not of me (is not my follower).[5]

Another evidence can be found in the narration of Wa'lah who said that the Messenger of Allah (PBUH) said: "No one may sell anything before discloses everything he knows about the goods and hide nothing,[6]" This Hadith clearly states that the dealer must expose the defects of what he's selling to the buyer and that any act of concealment is considered cheating.

The Hadith, which was narrated by Uqbah bin Amer, also prohibits fraud in transactions in general: "The Messenger of Allah (P.B.U.H), said: Muslims are brothers, and no Muslim may sell his brother a defected item without disclosing this defect to him."[7]

The main function of an advertisement is to carefully, honestly, and measurably describe an item for consumers, and state its benefits and characteristics with high credibly away from the methods of influence, seduction, lies, and deception. This strategy provides the consumer with the required freedom to choose.[8]

4. Ijma' and Qiyas

Anthropological intellectual is practically applicable under Islamic law because of a method of investigation called fiqh, and this must be interpreted in English as jurisprudence. Fiqh is settled over jurists' planned energies to comprehend and spread over moralities and directions placed dejected in the heavenly foundations (the Qur'an and the Sunnah). Expressed another way, fiqh quotes and articulates exhaustive verdicts which are specified in blissful sources. This procedure is exposed to an extremely articulated provisions or approaches sketched in the Discipline of Moralities of Islamic Jurisprudence[9]. It is referred as Usul al-fiqh in Arabic.

Fiqh is an extremely articulated discipline and therefore only a few have sound knowledge of it such as professionals in the Qur'an and Sunnah. The Qur'an can train perceptive and this perceptive is named ijtihad in Arabic. Ijtihad in Islam is an integral aspect. Within the common fiqh, Muslims jurists are obliged to observe any of the two approaches when forming an Ijtihad such as inferring a report after the topmost texts.[10]

Originally, Muslim scholars can rely on Ijma' which refers to "a contract of a cluster (Jama'ah) on a firm

[1] Al-Albani, M. *Selselat Al ahadeith Al sahiha*, 4th edition, Part 3, Al-Maktib Alislami. Hadith No. 1113. (1985).
[2] An-Nisa', Ayah (29).
[3] Al-Ma'edah, Ayah (1).
[4] An-Nahl, Ayah (90).
[5] Sahih Muslim, Book of Faith, Chapter: The Saying of the prophet (saws): "Whoever deceives us is not one of us." Hadith no. 102, *"Dar Al-Kutub al-Ilmyah*", Beirut, (2001).
[6] Al-Shawkani, Ali Muhammad "Nabeel al Awtar Muntaqa al-Akhbar min Ahadeeth Saeed Al-Akhbar*", Dar al-Jameel, Beirut*, P5, (1973).
[7] Ibid.
[8] Al-Salaheen, Abdul Majeed "Commercial Advertisements: Concept and Regulations in Islamic Fiqh", "*Sharia and Law Journal*", Vol 21,(2004).(In Arabic)
[9] Zahraa, Mahdi. "Unique Islamic law methodology and the validity of modern legal and social science research methods for Islamic research." "*Arab law quarterly* 18, no. 3 (2003): 215-249".
[10] Alzaagy, Abdulrahman A. "Electronic Contract: A Study of Its Application in the Light of Islamic Law with Particular Reference to Saudi Arabia Case." "*PhD diss., University of Wales, Aberystwyth",* (2009).

query by exploitation or by desertion."[1] It is based on the utterance of Prophet Mohammad: "my people do not encounter upon mistake." Notably, compromise cannot be professed as a distinct rule, but must be grounded upon indication from either the Sunnah or the Qur'an. Also, the consent cannot be constructed in a void, but from a genuine clarification of the key foundations.

Additionally, Muslim scholars can count on the Analogy in the course of assembling the Ijtihad, or in Arabic term, Qiyas. Contrasting to the accord techniques, equivalence can be founded only on a verdict of an individual. Qiyas is well-defined as "founding the applicability of a governing in single situation to added situation on the estates of their resemblance, related to the characteristic on which the presiding is founded."[2] Such distinct intellectual assumed by Qiyas and Ijma' produces what is named today "Islamic seminaries of thought." Different Islamic zones practices different perceptive, and accordingly, there are various seminaries of thought. Such differences have been attributed to the detachments among diverse zones, customs and principles of the Islamic world.

Within the context of Jordan, the Jordan Civil Law 1976(JCL 1976) which is a codified legal framework influenced by the civil law system is mainly grounded upon the Majalla. This framework is in line with the Shari'ah. In Jordan, the Islamic jurisprudence 'fiqh' is the second source of legal provision. It also becomes an alternative solution if a given case cannot be resolved with JCL 1976.

Other enactments are also bound by Majalla. In other words, Jordanian legislation is heavily influenced by the Islamic governance system,[3] and it can be viewed as an Islamic oriented approach.[4] Majalla is grounded upon the Hanafi School of thought, a well-known Islamic school of thought, founded by Abu Hanifah Al-Nu'man during the 8th century AC. As such, s the JCL 1976 is to be understood and construed according to the Islamic jurisprudence,[5] and the likelihood of closing contracts and scrutinizing consumer protection scope under the Shari'ah.

The Majalla does not directly address consumer protection issue, but it offers general principles for contractors to understand how a valid contract should be closed.[6] Hence, the Majalla has no detailed rules on information requirements, for example, but generally states that the sold commodities "must be known to the purchaser."[7]

Another example is in the case of misrepresentation, whereby the Majalla provides the following: If a given property sold by vendor is to have certain necessary quality but the said quality does not exist, buyer can choose to either accept or cancel the sale for full price. An example is as follows:

1. If a sold cow is claimed as producing milk but otherwise, purchaser acquires an option;
2. If a stone sold at night time is claimed as a red ruby but is in fact a yellow ruby, the purchaser acquires an option.[8]

In making an item known to a prospective purchaser, two methods can be used. For tangible items, they can be simply shown to the purchaser during sale meeting, and in this situation, seller is not obliged to give any description, for instance, the items' colour, dimension, weight, quantity, and quality.[9] In other words, in this situation, purchaser can physically view the item before making a transactional decision.[10]

Accordingly, based on the Majalla "in the e-commerce arena leave uncertainty for consumers where, by analogy, it requires only that a picture of the product, rather than a description, be provided to the consumer. Secondly, the product can be known by mentioning the distinguishing characteristics if the subject matter of the contract was not presented at the time of the sale." Also, in making known the distinguishing characteristics of the product, seller can just inform the purchaser about the product's quantity, measurements and species.[11]

5. Shari'ah Regulations for Commercials

There are a number of Shari'ah regulations that every advertisement process should adhere to – from the

[1] Asherman, Jeanne. "Doing Business in Saudi Arabia: The Contemporary Application of Islamic Law." "*The International Lawyer*",vol. 16, p. 321. (1982).
[2] Alzaagy, Abdulrahman A. "Electronic Contract: A Study of Its Application in the Light of Islamic Law with Particular Reference to Saudi Arabia Case*". "PhD diss., University of Wales, Aberystwyth,* (2009)".
[3] Hayajneh, Abdelnaser Zeyad. "Vanishing Borders: Can Human Rights be a subject of Private Law? Exploring Human Rights under Jordanian Civil Law." *"European Journal of Social Sciences"* (2011).
[4] Hayajneh, Abdelnaser Zeyad. "Legal Surgery: The Need to Review Jordanian Civil Law.",*" British Journal of Humanities and Social Sciences"* (2012).
[5] JCL 1976, s 3.
[6] Alhusban, Ahmad. "The importance of consumer protection for the development of electronic commerce: the need for reform in Jordan." PhD diss., Doctoral dissertation, University of Portsmouth, (2014).
[7] Majalla, s 200. Al-Majallah al-Ahkam al-Adaliyyah (The Majelle) - the Civil Law of the Ottoman Empire (Hanafi). Available at: http://www.global-islamic-finance.com/2009/07/al-majallah-al-ahkam-al-adaliyyah.html#ixzz575wer3Rt (Accessed on July 2016).
[8] Majalla, s 310. Al-Majallah al-Ahkam al-Adaliyyah (The Majelle) - the Civil Law of the Ottoman Empire (Hanafi).Available at: http://www.global-islamic-finance.com/2009/07/al-majallah-al-ahkam-al-adaliyyah.html#ixzz575wer3Rt. (Accessed on July 2016).
[9] Majalla, s 202.
[10] Haider, Ali. "The Explanation Ottoman Courts Manual". "*Dar Ala'am Alkotb* , *Beirut*, 1st, (2003)". 178 (in Arabic).
[11] Ibid

advertiser's side – in order to be permissible in terms of legitimacy. These regulations are derived from the Quran and the Sunnah. Every advertiser should be honest and avoid deceit and fraud, for his ads to be permissible.[1]

5.1 Honesty

Honesty is the mainstay of all transactions, as Prophet Muhammad (PBUH) had said: "Both parties in a business transaction have the right to annul it so long as they have not separated; and if they speak the truth and make everything clear they will be blessed in their transaction; but if they tell a lie and conceal anything the blessing on their transaction will be blotted out."[2]

The best way to demonstrate the importance of honesty in transactions is by stating the great status of the honest trader in the Day of Judgment, as indicated by the words of Prophet Muhammad (PBUH): "The trustworthy, honest Muslim merchant will be with the martyrs on the Day of Resurrection."[3]

Any commercial advertising must be based on honesty, since it is basically an introduction to a commercial dealing. The advertiser must be keen to display honesty and objectivity in his advertisements by disclosing all the positive and negative traits of his goods/service/institution.[4]

Adhering to honesty can spare commercial advertising the criticism directed to the advertisements, which claims that marketing advertisements mislead the public, proved false information, and exaggerate about the advertised goods, service, or institution, leaving a wrong impression about the item, service, or institution.[5] Examples of commercial advertising that is dishonest are as illustrated below:[6]

1. An announcement that describes a product or service with advantages and characteristics that are non-existent, like a biscuit factory claiming its products are free of preservatives while the truth is otherwise.
2. An advertisement that uses absolute superlative claims that are inaccurate, since it's difficult to verify its veracity.[7]
3. An advertisement that promises the consumer positive outcomes after using the advertised product, while none actually exists, e.g., a cell phones shop announcing that a certain brand of mobile phones can make the consumer more masculine.[8]

5.2 Avoiding Fraud and Deception

Business transactions in Islam, which include commercial advertisement, are based on advice and clarity. Prophet Muhammad (PBUH) said: "Al-Din is a name of sincerity and well wishing. Upon this we said: For whom? He replied: For Allah, His Book, His Messenger, and for the leaders and the general Muslims."[9] Therefore, the advertiser should avoid fraud and deception in his advertisements, like claiming a certain product or service has an advantage, where none exists, or advertising an item and making it more appealing on the television, internet, or newspapers by using technology.[10]

Based on the above, any commercial that involves fraud or deception is considered prohibited under Islamic law, since Allah the Almighty says, " O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.[11]"

This verse clearly states that Allah the Almighty has specified that mutual consent and satisfaction are a condition to legalize earning money through trade, and there is no doubt that a consumer who buys an adulterated or misleading product, will not be satisfied. In this situation, the transaction has included fraud, deception, and falsehood, and is rendered prohibited.

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[1] Al-Manaseer, Ali Abdul Kareem Muhammad, "Commercial Advertisements: Concept and Ruling in Islamic Fiqh", *"Dissertation, School of Legal Studies, Jordan University*", (2007).
[2] Sahih Muslim, Book of Faith, Chapter: The Saying of the prophet (saws): "Whoever deceives us is not one of us.", Hadith no. 102*, "Dar Al-Kutub al-Ilmyah, Beirut",* (2001).
[3] In Majah," Book of Business Transactions", *al-Maktab al-Islamy, Beirut, Hadith* no. 2139, (1986).
[4] Al-Manaseer, Ali Abdul Kareem Muhammad, "Commercial Advertisements: Concept and Ruling in Islamic Fiqh", *Dissertation, School of Legal Studies, Jordan University",* (2007).
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[6] Al-Manaseer, Ali Abdul Kareem Muhammad, "Commercial Advertisements: Concept and Ruling in Islamic Fiqh", *"Dissertation, School of Legal Studies, Jordan University"*, (2007).
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[8] Ibid
[9] Sahih Muslim, Book of Faith, Chapter: The Saying of the prophet (saws): "Whoever deceives us is not one of us*"," Hadith" no. 102," Dar Al-Kutub al-Ilmyah, Beirut*", (2001).
[10] Al-Salaheen, Abdul Majeed "Commercial Advertisements: Concept and Regulations in Islamic Fiqh", *"Sharia and Law Journal*", Vol 21, (2004). (In Arabic).
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6. Arab Countries

Within the Arab domain, customer safety is an attractive zone for researchers since it has been ignored by the law makers. Somehow, the emphasis of academic script has been limited to the progress of customer defence regulation in developed states and the universal strategies of Islamic law in the customer defence arena, as there is no sole organised customer guard law in the Arab zone.1 Interestingly, advertisements in the Arab world was worth $4.6B USD in 2009 conferring to a description presented by Dubai Press Club.[2]

Many Arab countries have recently showed real attention towards consumer protection by the issuance of special laws including The Egyptian Law, consumer protection No. 67 of 2006, consumer protection Syrian Law No. 14 of 2015, as well as federal Law of UAE No. 24 of 2006 on the protection of the consumer.[3]

JCL 1976, section 94 /2 stipulates that: "the publication and announcement and the statement of prices being handled by another statement and all related offer or requests addressed to the public or individuals is not considered when in doubt, but an invitation to negotiate."[4] Accordingly, must be displayed clearly, it denies doubt the intention of the source and its sanctity as well as an intention to negotiate.[5]

Section 26 in the UAE Law consumer protection states that it is prohibited for any person to advertise any service or good to the consumer using a misleading or deceitful way. There are a few elements in the Draft Law 2013 and UAE Consumer Protection Law, showing the need to amend and re-examine those laws in order to ensure civil protection from misleading commercials for consumers.[6]

Reviewing the Consumer Protection Law of UAE and the Draft Law 2013, it seems that both laws are not clear on the concept of misleading commercial advertising, whereby Draft Law 2013 stated that advertisements are misleading only when they put the consumer in the wrong, and this is the standard adopted by a majority of the Arab consumer protection laws.[7]

Moreover, the UAE Law makers ignored to state whether it would be possible to consider the omission or hiding of some data in the advertisement as a misleading act. On the other hand, British lawmakers do not miss this, and they stated clearly that intentional omission of standard information related to the advertised product or services is a form of deception. The British Law allowed to judge the question and decide the extent to which hidden information is essential or not.[8]

Section 6 in the Egyptian Consumer Protection Law (No. 76) of 2006) stated that every supplier and advertiser mostly provide consumers with the right information on the nature of the product and its features and avoid what may cause consumer to be misled on the true information on the product.

The Syrian Consumer Protection Law 2015 section 1 provides that advertisement is any way, aimed at promoting sale or marketing of a product or service, whether directly or indirectly readable or heard or visible or encoding. Added to that, the Syrian law had defined the misleading advertisement in a direct way. Section 1 provides that misleading advertisement is any advertisement that deals with a good, service, an offer or statement and includes false allegation or allegation formed in a way that will directly or indirectly deceive or mislead the consumer. The Syrian Consumer Protection Law is the only law among the Arab laws related to consumer protection that identifies misleading advertising directly.

7. Conclusion

In marketing strategy, advertising is a very important element, and advertising is in fact a potent tool greatly impacting the purchasing decision of consumers. Advertising familiarizes consumers with the product to consumers while promoting brand quality. Advertisement impacts the choice of consumer, and for this reason, advertisement needs to be fair and truthful. Aside from being unethical, misleading and false advertisements distort competition and consumer choice as well. Such advertisements violate some basic rights of consumers, including the right to information, the right to make a choice, and the right to be safeguarded against hazardous goods and services and against one-sided trade practices.[9]

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[1] AlGhafri, Abdulla. "The inadequacy of consumer protection in the UAE: the need for reform." PhD diss., (2013).

[2] See Dubai Club Press, "*Advertisement Revenue in the Arab World Reach $4.6 Billion"*, published in 17/04/2010. Available at: http://alrroya.com/node/69818.

[3] AlGhafri, Abdulla. "The inadequacy of consumer protection in the UAE: the need for reform." PhD diss., (2013).

[4] JCL 1976,s94.

[5] Khasawneh, Maha Youssef, and Hattab, Rasha Mohammed Tayseer. "Civil protection for the consumer of commercial advertising is misleading, according to the provisions of the Jordanian civil law and consumer protection Draft Law 2006", *"University of Sharjah Journal of Shari'a and Law Sciences 9*, no. 1 (2012): 163-186. (In Arabic)

[6] Rasha Hattab.*"* Indeed, Legislative civil protection for the consumer of commercial advertising misleading": Study in the federal law on consumer protection and the draft Jordanian Consumer Protection Act. *Sharjah*,16 May (2016). https://www.sharjah24.ae/ar/studies-and-research/121593. (Accessed in February 2017).

[7] Ibid.

[8] Ibid.

[9] Pushpa Girimaji. "Misleading advertisement and consumer" . "T*his Monograph is Published with the Financial Assistance from Department of Consumer Affairs. Ministry of Consumer Affairs, Food & Public Distribution,* Government of India" Indian Institute of Public Administration.(2013)**.**

As a form of communication, advertising is mean to draw the attention of consumers, and in today's business, it is an important element. Globalization and marketing have led to the flourishing of both advertisements and advertising agencies. In this regard, advertisement should be viewed as an important tool to expand the business and reach out to larger market of consumers.[1]

Notably, a misleading advertisement does not display true information of the advertised product, and one or more potentially misleading attributes may be included, for instance, wrong information, overstatement, deceptive price, and so forth. Such advertising misleads consumer in many ways. For instance, it may use ambiguous phrases that reader may misconstrue. Accordingly, consumer protection is stressed in Islamic teaching whereby all forms of misleading advertisement and deception in transaction are prohibited.

The points highlighted in this study imply the need for legislature intervention to achieve appropriate level of consumer protection, considering that the consumers are the weaker party from an economic standpoint. Also, consumers are viewed as less experienced and are not sufficiently educated legally.

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Covid-19, Emergency Laws and Enforcement in Nigeria: An Appraisal

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Abstract
The essence of the paper is to examine the Infectious Diseases laws and the Nigerian Quarantine Act of 1926 and see if the laws cover the COVID-19 pandemic like the Spanish fluid, Ebola etc. Also, whether other eminent laws are required to mitigate deficiencies in the existing laws. The emergency laws and COVID-19: guidelines (law enforcement) will also be analyzed. In a nutshell, the legal analysis of relevant emergency legislation and/or jurisprudence as it is applicable to principal controls and compliance proposed by World Health Organisation and member countries for the monitoring, control and administration of the disease will be examined. The enforcement of the emergency rules and laws and its impact on human rights violations will equally be x-rayed with a view to recommend mitigations and solutions. This paper concludes by advocating a health law that will cater for health emergencies and aligning with best world health practices for Nigeria
Keywords: Covid-19, Nigeria, emergency, laws, enforcement
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1. Introduction

Coronavirus disease called COVID-19 is an infectious disease like every other infectious disease that has existed before now. Coronavirus disease is caused by a newly discovered virus in the year 2019 and was named after the year of its occurrence as COVID-19. Furthermore, it is referred to as COVID-19 pandemic because of its widespread nature from nation to nation as a result of movement of people.

Most people infected with the COVID-19 virus will experience mild to moderate respiratory illness and recover without requiring special treatment or a combination of medication on trial. COVID-19 is mainly transmitted through droplets generated when an infected person coughs, sneezes, or exhales the virus. These droplets are too heavy to hang in the air, and quickly fall on floors or surfaces.[1] You can be infected by breathing in the virus if you are within proximity of someone who has the disease, or by touching a contaminated surface and the eyes, nose or mouth are medium of exchange of this disease.[2] The best way to prevent and slow down transmission is to be well informed about the virus, the causes and how it spreads.

Immediate WHO recommendation for prevention and control is by washing your hands or using an alcohol-based sanitizer frequently and avoid touching your face. Upon the discovery and confirmation of this notable disease by World Health Organisation (W.H.O), an immediate notification was passed to member countries, preliminary precautions and conditions were laid out for both people and countries to follow and comply to save lives and avoid spread of the disease. This appears to be the first rule of law or regulations on COVID-19.

Historically, this Coronavirus emerged in Wuhan, China between October and December 2019 and spread to other countries and nations due to movement of infected people. Before 11th March 2020, this virus was viewed as normal politics played among the Group of Eight Countries (G8) world powers and World Health Organisation (WHO). WHO announced COVID-19 outbreak as a pandemic on this date and a set of rules were announced to be followed by people and nations. After the Spanish influenza in 1918 – 1920, other infectious diseases have been local or at worst among few counties within a nation and has been easy to control and manage without affecting the entire world. WHO[3] at its initial announcement marshalled out eights (8) rules for guiding the spread and control of the disease, without analysing how effective these rules will be.

These rules are: -

- Regularly clean your hands with an alcohol-based hand rub or wash them with soap and water.
- Maintain at least 1 metre (3 feet) distance between yourself and others.
- Avoid crowded places.
- Avoid touching eyes, nose and mouth.
- Good respiratory hygiene.
- Stay home and self-isolate when infected.
- If you have a fever, cough and difficulty breathing, seek medical attention from your local authority.

[1] Nigerian Centre for Disease Control and Prevention Act 2018 (NCDC) statement in March 2020.
[2] As item 1 above
[3] World Health Organisation Dashboard; available at: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public assessed 24th September 2020; accessed 3rd August 2020.

- Keep up to date on the latest information from trusted sources (WHO and your local authority).

These monsters called rules then became the underlying guiding principles for countries. Countries emergency laws further created hydra headed monsters that took control of the world and led to global lockdown, paralysed world economic activities and created a 'new normal' for human existence. It is the intent of this paper to view how this new normal interrelate with existing laws, and challenges it posed.

Due to the uncertainty and nature of this virus, presidents and parliaments of different countries relied on their respective constitutional emergency provisions to address and set up parallel and special laws to address the pandemic. Countries had to set up special task forces to address and handle the virus. However, it was observed that these emergency rules and laws trampled upon human rights. The human rights[1] are:

- The right to equality and freedom from discrimination
- The right to life, liberty, and personal security
- Freedom from torture and degrading treatment
- The right to equality before the law
- The right to a fair trial
- The right to privacy
- Freedom of belief and religion
- Freedom of opinion

2. Covid-19 and Problems Encountered

First, the virus was known in 2019 and World Health Organisation, in addition to its numerous roles, monitored the infectious disease, warned and proffer solutions and remedy to ensure member nations benefit; it announced the virus as a pandemic in 11th March 2020. This information and announcement came late as the virus had spread to other countries and nations due to movement of infected people. The second problem was the emergency laws and enforcement by various countries that were not consistent or harmonized as it is a global issue, thereby impacting on both human rights and countries' border relationships. These rules and laws created panic in the world leading to world economy collapse and lockdown in many countries. Third issue is the creation of "new normal", which citizens are yet to adapt and comprehend.

The first report of this disease met Nigeria unprepared because while other nations immediately locked down and closed borders to contain the virus, there was confusion as to how and what laws should be applied. The initial challenge was the Nigerian Centre for Disease Control (NCDC) committee, which relied on the powers of the President in the Nigerian 1999 Constitution. Before now, on 12th November 2018 the Nigerian Centre for Disease Control and Prevention was established with powers to deal with infectious disease rather than using the Nigerian Quarantine Act of 1926. This created issues and people became worried as different interpretations were given between the 1999 Constitution, the guiding rules of NCDC and the Nigerian Quarantine Act of 1926. The Act was referenced in the Constitution with no elaboration.[2] Finally, on 29th March 2020, the President relied on the rules under the Quarantine Act of 1926 law, which allows the President to declare a place within the country an infected local area. This declaration nailed the highly controversial issues but still left legal questions on emergency laws and enforcements hanging.

3. Overview of Emergency Laws and Covid-19 Guidelines

The objective of this paper is to review the emergency laws and enforcement and their impact on human rights in Nigeria. Before now, Nigeria had several Acts that tend to deal with infectious diseases with no harmonization. These Acts are, the Nigerian Quarantine Act,[3] Nigeria Centre for Diseases Control and Prevention Act[4] and the Nigerian Constitution.[5] Upon the setup of the emergency NCDC committee by the President, these three laws were x-rayed with learner mindset as to which is more appropriate to deal with the Coronavirus pandemic. The process and setting of the Special Task Force became subject of critics by human right activist and legal luminary. Also was the issue of whether all these Acts be married in dealing with the pandemic or not, not minding the human right violations

Before going further, it is important to elucidate on NCDC. The Nigerian Centre for Disease Control[6] outdid the powers of the country's national public health institute, because, the NCDC mandate was to oversee the preparedness, detection and response to infectious disease outbreaks and public health emergencies. NCDC was established in 2011 under the departments in the Ministry of Health, including the Epidemiology Division, the

[1] Human Rights; available at: https://www.ohchr.org/EN/Issues/ESCR/Pages/Whatareexamplesofviolations of ESCR.aspx; accessed 5th August 2020.
[2] See section 305 of the Nigerian Constitution (as amended).
[3] The Nigerian Quarantine Act 1926.
[4] Act no. 18 dated 12th November 2018 establishing Nigerian Centre for Disease Control and Prevention.
[5] The 1999 Nigerian constitution as amended.
[6] https://ncdc.gov.ng/ncdc; Accessed 7th August 2020.

Avian Influenza Project and its laboratories. The Nigeria Field Epidemiology and Laboratory Training Programme (NFELTP) were created to form the nucleus of the agency.[1]

The task of NCDC is 'to protect the health of Nigerians through evidence-based prevention, integrated disease surveillance and response activities, using a one health approach, guided by research and led by a skilled workforce'.

The core functions of NCDC are:

- Prevent, detect, and control diseases of public health importance.
- Coordinate surveillance systems to collect, analyze and interpret data on diseases of public health importance.
- Support States in responding to small outbreaks and lead the response to large disease outbreaks.
- Develop and maintain a network of reference and specialized laboratories.
- Conduct, collate, synthesize and disseminate public health research to inform policy.
- Lead Nigeria's engagement with the international community on diseases of public health relevance.

Suffice to say that NCDC is structured under a Director General and six Directorates, four of which are Technical Directorates. The body is made up of:

- Public Health Laboratory Services
- Prevention Programmes and Knowledge Management
- Emergency Preparedness and Response
- Surveillance and Epidemiology
- Finance and Accounts
- Administration and Human Resources

In appointing the task force, the President, under the Emergency Act nominated a chairman and some of the Federal Executive Council members to join the NCDC members and asked the Secretary to the Government of the Federal Republic of Nigeria to lead this unprecedented committee. This was against the principles setting up NCDC. The core functions of the NCDC include: Prevent, detect, and control diseases of public health importance. Coordinate surveillance systems to collect, analyze and interpret data on diseases of public health importance. It also supports States in responding to small outbreaks and lead the response to large disease outbreaks.

This emergency committee of the NCDC had to put up ten guidelines,[2] many of which impacted on human rights. The ten guidelines are:

- COVID-19 discharge Policy 24.06.2020: The revised discharge policy is aligned with the guidelines on the three tier COVID facilities and the categorization of the patients based on clinical severity available.[3]
- CPCB Guidelines for disposal of COVID-19 19.04.2020; Guideline for treating, handling and disposal of waste generated during treatment/diagnosis/quarantine of COVID-19 patients.[4]
- Revised guidelines quarantine facilities NCDC 24.04.2020: Quarantine is the separation and restriction of movement or activities of persons who are not ill but who are believed to have been exposed to infection, for the purpose of preventing transmission of disease. Persons are usually quarantined in their homes, but they may also be quarantined in community-based facilities.[5]
- Roles and Responsibilities of Rapid Response Teams (RRTs) in COVID-19 responses; composition of central RRTs are epidemiologist, microbiologist and any other person deployed as per need. Members of the central RRT will work in close coordination with state and district RRTs both at central and local levels.[6]
- Guidelines to be followed on detection of suspects or confirmed COVID-19 cases.[7] Actions to be taken on detection of suspect/confirmed COVID-19 case in a healthcare facility.
- Home Quarantine Guidelines EMR division;[8] Detection of a travel related/unrelated suspect case of novel Coronavirus Disease (COVID-19) will be followed by rapid isolation of such cases in designated health facilities and line listing of all contacts of such cases. Home quarantine is applicable to all such contacts of a suspect or confirmed case of COVID-19.
- Model Micro plan for containment of local transmission of COVID-19.[9] The containment zone will be decided by the RRT based on the extent of cases/contacts listed and mapped by them.

[1] The Bill for an Act to establish NCDC was signed into law in November 2018.
[2] https://www.ncdc.gov.in/index1.php?lang=1&level=1&sublinkid=703&lid=550 Accessed on 14th August 2020.
[3] https://www.mohfw.gov.in/pdf/FinalGuidanceonMangaementofCovidcasesversion2.pdf): Accessed on 14th August 2020.
[4] https://www.ncdc.gov.in/showfile.php?lid=551: Accessed on 16th August 2020.
[5] https://www.ncdc.gov.in/showfile.php?lid=552: Accessed on 17th August 2020.
[6] https://www.ncdc.gov.in/showfile.php?lid=523: Accessed on 17th August 2020.
[7] https://www.ncdc.gov.in/showfile.php?lid=553: Accessed on 17th August 2020.
[8] https://www.ncdc.gov.in/showfile.php?lid=555: Accessed on 17th August 2020.
[9] https://www.ncdc.gov.in/showfile.php?lid=529: Accessed on 17th August 2020.

- Home care guidelines for 2019-nCoV.[1] Any person(s) suggestive of 2019-nCoV, should be confined at home for a period of 14 days and avoid close contact with public and other members in the family.
- Guidelines on clinical management of severe acute respiratory illness converted.[2] Clinicians taking care of hospitalized adult and paediatric patients with severe acute respiratory infection (SARI) when an nCoV infection is suspected
- Guideline for workplace of COVID-19.[3] Someone who has COVID-19 coughs or exhales, they release droplets of infected fluid. Most of these droplets fall on nearby surfaces and objects - such as desks, tables or telephones. People could catch COVID-19 by touching contaminated surfaces or objects – and then touching their eyes, nose or mouth.

Beyond above guidelines, the following were also put in place, total boarder lockdown (interstate, national and international) and a stop of social and economic activity, except those activities relating to essential services. Both police, paramilitary and the armed forces were used to checkmate movement of people, restrictions and compliance to COVID-19 guidelines. These measures strangled existing public health advisories. These raised significant legal, constitutional and human rights issues. While blocking roads both within state and interstate, people's rights were heavily infringed by the unguided uses of forces as if war is declared.

Palliatives were initiated and both individuals and State governments were encouraged to sustain citizens without adequate plans, the lockdown period became prolonged and the duration unknown. There was no available demographic data to guide the government resulting in few individuals getting the palliatives. More saddening was the fact that the needy were disenfranchised leaving an unprecedented situation. Furthermore, the rights of the needy were infringed upon as many were assaulted during the sharing of the palliatives by the law enforcement agents The Minister of Communications was reported to have said that the poorest of the poor in the country were identified and offered supports through the SIM registration data mined by the ministry.[4] This is a gross violation of the right to privacy and data protection in Nigeria, as data protection regulation is not in place. It is worth noting that the Nigerian Constitution provides for the right to privacy in section 37,[5] the right to data protection can only be indirectly implied in this section.

The following human rights were badly impacted,

- The right to equality and freedom from discrimination – COVID patients' isolation issues cases.
- The right to life, liberty, and personal security – lockdown at home (Movement restrictions).
- Freedom from torture and degrading treatment – violations of lockdown were punished.
- The right to equality before the law – Parallel laws existence.
- The right to a fair trial – COVID-19 enforcement laws.
- The right to privacy – Restrictive laws (prison syndrome existed).
- Freedom of belief and religion – Religious restrictions rules.
- Freedom of opinion – Emergency Restriction rules.

The 1999 Constitution in effect accorded the President of Nigeria the power to declare an emergency where there is imminent danger or disaster or natural calamity affecting a community, or any other public danger constituting a threat to the country. Declaration of an emergency in this case would require the ratification by the National Assembly after the President's proclamation otherwise such a proclamation would expire in 10 days.[6]

Notwithstanding the above, the President decided a different approach to impose restrictions. Instead of passing a proclamation of emergency, which would have required the input of the National Assembly, he issued rules under the Quarantine Act, of 1926 law, which allows the President to declare a place within the country an infected local area. In line with the Quarantine Act, States can only make guidelines where the President fails to do so. However, it is also important to highlight that quarantine and labour are exclusive matters under the Constitution, and only the Federal Government has the authority to make laws relating to them. This meant that, that States cannot make guidelines where the President had done so, and if states had already passed rules, such cases would cease to exist or become invalid.

In the midst of the confusion, some States passed rules and executive orders that restricted entry and prohibited work except essential services, and imposed penalties, thus violating the rights of persons to movement and to other rights. Some of these matters were brought before the courts, and decisions were hazily taken against the culprit with fines and in other cases, community service was imposed on offenders.[7]

[1] https://www.ncdc.gov.in/showfile.php?lid=462: Accessed on 17th August 2020.
[2] https://www.ncdc.gov.in/showfile.php?lid=458: Accessed on 17th August 2020.
[3] https://www.ncdc.gov.in/showfile.php?lid=495: Accessed on 17th August 2020.
[4] On 24th April 2020, Olugbenga Adani reporter for International Centre for Investigative Reporting (ICIR) reported Isa Pantami- Minister of Communication - COVID-19: Controversy trails Ministers' decision to mine data of phone users without consent.
[5] Chapter IV, Fundamental Rights of 1999 Constitution as amended.
[6] Section 305 sub-section 4 (b) of 1999 Nigerian Constitution.
[7] The case of Nigerian entertainer Funke Akindele and her husband who were convicted for having a party involving the gathering of over fifty persons and in which social distancing was not observed which was clearly against the COVID-19 regulations.

At the beginning, there were deceptive opinion and public acceptance on the restrictions of the COVID-19 Regulations, and this led to a notch of compliance because of fear. The manner of enforcement of the restrictions in several states around the country led to reports of human rights abuses. These included killing of over seventeen[1] people by law enforcement agents, confinement without court orders in places where physical distancing[2] was impossible, demolition of a hotel in River State, and deportation[3] of young children under the name of beggars on the northern Nigeria streets. These children rights were infringed as well as their socio-economic rights under Nigerian law.

These regulations under this pandemic were felt in all sectors of Nigerian economy, the country has a large informal sector and people who survive on daily basis suffered most. With a limited welfare system in Nigeria, the government was unable to provide enough support, which raised displeasure and doubt among people. Furthermore, this impacted the poor mostly and also led to people coming out to beg for food in many cities. There were cases of sexual and gender[4] cruelty, and disabilities[5] people moved from State to State at nights in search of where to beg for food or where palliatives are being shared. Eminent unrest became visible and this may be the major reason for the early easement on restrictions, while the country still had a high number of cases of COVID-19. Nigeria's daily statistics across the country showed rise in the curve during this period, rather than flatten as required by WHO.

Human rights challenges and other issues within the legal framework provided grounds for the National Assembly to initiate the enactment of new legislation. The Bill to strengthen Nigeria's public health system became eminent. The major apprehensions[6] concerning the provisions of this Bill were Nigeria's outcry of adoption of other countries infectious disease Acts verbatim without taking lessons learnt from the pandemic in Nigeria and its effects on human rights. The emergency rules and laws became issues of litigations, as there were abuses on both the law and human rights by these emergency rules and laws that were in conflict with the 1999 Constitution. Also, the Nigerian Governors' forum rejected the proposed Control of Infectious Disease Bill, noting that it will take away their powers under the state and local governments.

Many Nigerians criticized the intent of the proposed Bill and requested that COVID-19 should be better looked at and treated under the Nigerian Quarantine Act for now, like Ebola, Cholera and Malaria that had existed in the past and further said, all these diseases are similar and have at one time of the other been declared an infectious disease.

4. The Rule of Law and Evaluation of the Various Applicable Acts under Covid-19

There is no gain saying that under the 1999 Constitution and the legal analysis of relevant emergency powers, the President[7] can proclaim a state of emergency by an instrument published in the Official Gazette of the Government under any of the following conditions:

a) the federation is at war, or there is an imminent danger of invasion or involvement in a state of war; there is a breakdown of public order or public safety in part or the whole of the country.
b) there is a situation of imminent danger, public danger or disaster or natural calamity.
c) a state of emergency can be declared where the President receives a request from a state governor which is sanctioned by a majority in the House of Assembly.

The Constitution provides a closed list, which means it does not admit circumstances that are not listed. Abuse of emergency powers are one area where citizens get worried and would always refer to the Constitution. The Nigerian Constitution provides control on emergency powers. The legislature must approve any declaration by the President, the Senate and House of Representatives must immediately be informed after a declaration, to consider the situation and decide whether or not it should be ratified.[8] If the legislative houses fail to pass a resolution approving the declaration, then such a declaration shall immediately cease to be implementable.[9] However, the Nigerian Constitution provides for legislative awareness on the process of state of emergency. The Constitution authorizes certain emergency rights in as much as it is reasonably justifiable for the purpose of dealing with the situation that exists during the period of emergency.[10] Citizens are aware and can revert to the judiciary to challenge if the declared emergency powers are required and eminent is necessary.

[1] https://www.bbc.com/news/world-africa-52317196. Accessed 4th September 2020.
[2] https://www.placng.org/situation_room/sr/human-rights-concerns-mount-over-covid-19-measures/. Accessed 4th September 2020.
[3] https://www.bbc.com/news/world-africa-52617551. Accessed 4th September 2020.
[4] https://www.premiumtimesng.com/news/top-news/395296-amidst-covid-19-lockdown-nigeria-sees-increased-sexual-and-gender-violence.html. Accessed 4th September 2020.
[5] https://www.premiumtimesng.com/news/top-news/395296-amidst-covid-19-lockdown-nigeria-sees-increased-sexual-and-gender-violence.html. Accessed 4th September 2020.
[6] https://nairametrics.com/2020/05/02/why-nigerians-ncdc-dg-are-opposed-to-the-new-ncdc-bill/. Accessed on 24th September 2020.
[7] Section 305 Part II of Chapter VII of the Nigerian constitution 1999 as amended.
[8] Section 305(2) Part II of Chapter VII of the Nigerian constitution 1999 as amended.
[9] Section 305(6) Part II of Chapter VII of the Nigerian constitution 1999 as amended.
[10] Section 45(2) Part II of Chapter VII of the Nigerian constitution 1999 as amended.

Other boundaries regarding to human rights restrictions in times of emergency can also be derived from the International Covenant on Civil and Political Rights (ICCPR).[1] First attempt to repeal Emergency Powers in Nigerian constitution was in 1961[2] and subsequent bill in 2016. All these suffered setbacks because there were no plans and well thought out bill that can sail in the National Assembly at each attempt, rather citizens see these bills as mere copying and outright adoption of other countries infectious diseases Acts without aligning with Nigerian social, cultural and economic conditions.

Emergency powers have been used in several occasions in Nigeria in the past, especially for the purpose of reinstating peace in boundary conflicts and attacks. The most recent use of emergency power was in 2013 when former President Goodluck Jonathan[3] declared a state of emergency in the whole of the North-Eastern Nigeria as a result of the attacks by a terrorist group called *Boko Haram*[4] and emergency during the Ebola pandemic 2014. President Muhammed Buhari now using the emergency powers under section 305 of the Constitution for the purpose of restricting the COVID-19 pandemic is not out of place. However, both Ebola and COVID-19 situations based on notable authorities[5] are not enough grounds for emergency or to warrant a declaration of state of emergency in a country like Nigeria, if we have a proper and functional health care system.

President Muhammadu Buhari used the existing emergency powers under the Infectious Diseases Law – the Quarantine.[6] The Act gives the President comprehensive powers towards the preventing, introduction and spread in Nigeria, and the transmission from Nigeria, of dangerous infectious diseases and to make regulations for associated purposes. The President in line with the Act allotted the first COVID-19, 2020 Regulations, which declared the disease an infectious disease and proclaimed total national lockdown. This proclamation by the President generated legal disagreement:[7] questions have been raised regarding the difference between the emergency powers under the Quarantine Act and those provided in section 305 of the Constitution. Both powers are different but tend to convey the same result. The President saw the loophole on the Quarantine Act and used it. It is important to note that a state of emergency is an exclusive process as recognized by the Constitution and this is different from the use of emergency powers under the regulations pursuant to the Quarantine Act of 1926. The constitution requires legislative approval after proclamation while under the Quarantine Act it is purely an executive function.

The rules issued by the President in line with the Quarantine Act suspends a lot of a human rights. It stipulates[8] that inter and intra state movements in the concerned areas were prohibited for an initial period of 14 days and security agencies were instructed to strictly enforce the lockdown order. Citizens of the affected regions were to stay at home, COVID team to identify, trace and isolate infected persons. Certain groups of persons were exempted including people on essential duties such as medical workers and journalists. While the nation's seaports were to remain operational due to cargos, international boundaries closed along with airports (local and international). These unplanned rules inflicted pains and sufferings on people. Initial two weekly review were moved randomly so that citizens became disobedient and the law enforcement agents started compromising. States joined in putting their own state lockdowns alongside the federal one already imposed. All these constituted further infringements on human rights. Whereas, if perhaps we had a working health system, all these emergency laws and law of enforcement would have been unnecessary.

5. Covid-19 Monitoring, the Applied Laws and Nigerian Experience

At the onset of the panic emergency laws and enforcement, if well thought plans existed and the health system were working, perhaps, a better ideology would have taken place. Several issues arose on human rights and rule of law. The question now is all these imposed sacrifices are they indeed worthy for public health. Majority of Nigerian citizen still believe that COVID-19 is not real or even if real, is over flogged in its dimension, the restrictions became necessary but inflicted untold hardship on the ordinary citizens and may probably be a reason after a while they were several beaches and alternative ways were devised for survival by the citizens. The rules impacted upon the right to life as security agents enforcing the orders used this as an opportunity to extort and unjustifiably kill people. It was reported by the National Human Rights Commission that law enforcement agents

[1] Article 4 of the International Covenant on Civil and Political Rights (ICCPR) dated 16 December 1966; Accessed 24th September 2020.
[2] https://thenationonlineng.net/senate-emergency-powers-act-1961-repeal-bill/: Accessed 25th September 2020.
[3] Nigerian President from 5 May 2010 – 29 May 2015.
[4] Covid-19 and states of emergency (Nigerian Emergency (legal) responses to Covid-19: A worthy sacrifice for public health? by Dr. Likman Abdulvant 18th May 2020. Accessed 26th September 2020.
[5] See item 33 reference above.
[6] Article 3; Presidential power to declare any place an infected local area: Nigerian Quarantine Act, dated 27th May, 1926.
[7] On 2nd April 2020; Lawyers divided over president's power to invoke State of Emergency, Quarantine Act; available at: https://www.vanguardngr.com/2020/04/covid-19-lawyers-divided-over-presidents-power-to-invoke-state-of-emergency-quarantine-act/; Accessed on 27th September 2020.
[8] National broadcast by President Mohammed Buhari on COVID-19 dated 29th March 2020: https://nairametrics.com/2020/03/29/president-muhammadu-buharis-full-speech-on-covid-19-pandemic/ Accessed on 27th September 2020.

had killed more than seventeen people during the lockdown in several incidents of extrajudicial killings,[1] as well as series of punishments inflicted on people who violated lockdown orders. Furthermore, lockdowns increased cases of domestic violence across the Country, as a lot of marriages experienced breakdown while our courts were shut down and culprits got away unpunished. This is indeed a huge challenge to the nation at large considering the insecurity and hardship meted on the citizen by government and world economy before the pandemic. The COVID-19 rules also affected freedom of worship since restrictions on gathering for religious purposes was imposed. All these necessitated the Amnesty International[2] to issue caution to government agencies to respect human rights and give clear instructions to security agencies not to abuse their powers. To prevent the spread of COVID-19, NCDC expanded the role of police, paramilitary and armed forces to not only uphold pre-existing laws but to also enforce new public health enforcement directives.

6. Recommendation

Based on what happened during the COVID-19 pandemic in Nigeria and how the government grappled with the emergency laws and law enforcement application, which ended up in confusion, litigation and nation-wide criticism, it is advised that we take learnings on the ineffectiveness and dilapidated Nigerian health sector system, conditions of our hospitals and general lesson learnt within this period. Also, how the citizens felt in the management of COVID-19, as well as stock knowledge on the Nigerian Quarantine Act of 1926, Nigeria Centre for Diseases Control and Prevention Act and Nigerian 1999 Constitution in the call for public debate on revamping the Nigerian Health sector. New initiative would be to collect legal documents from the coronavirus responses and learn from the laws that were implemented for appropriate constitutional review

Furthermore, Nigerian legislators should initiate review of 1999 constitution to accommodate and harmonize the ethnics of Nigerian Quarantine Act of 1926, Nigeria Centre for Diseases Control and Prevention and Act and Nigerian 1999 Constitution on health and infectious disease control.

In a nutshell, Nigerian health system should be given upmost priority and under the exclusive list in the Constitution. Furthermore, emergency should be declared in the Nigerian health sector now, to align with best world standard and practices, to rebuild confidence in the citizenry. One good lesson got from COVID-19 pandemic is that both the poor and rich were all confined and forced to use the Nigerian health system since our independence 1960, which afforded the citizens the opportunity to know that our health sector needed serious upgrading and re-trainings of our health personnel's. Also, capital flight on health treatment cost abroad were saved in terms of foreign exchange.

7. Conclusion

The legal enforcement of coronavirus restrictions serves as a reminder of how the law can help or hinder the public health response. The various Infectious Diseases Acts in Nigeria should be harmonized and updated based on experiences, lessons learnt and the management of COVID-19. In such emergency situations, the human rights of Nigerians citizens should be guided and protected in line with best global standards and practices.

[1] On 16th April 2020 BBC reported that Nigerian Security forces have kill more Nigerians than Covid-19, available at: https://www.bbc.com/news/world-africa-52317196; Accessed 26th September 2020.

[2] On 1st April 2020; Osai Ojigho, Director of Amnesty International Nigeria issued a note that Nigerian Authorities must uphold human rights in fight to curb COVID-19; available at: https://www.amnesty.org/en/latest/news/2020/04/nigeria-covid-19/ : Accessed 26th September 2020.

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Examination of the Crime of Genocide Under the Rome Statute of the International Criminal Court

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Abstract.
The crime of genocide has historical antecedents, dating back to several decades before its eventual acceptance as an international crime and codified as such. Ironically, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (the Genocide Convention) did not provide punishment for the crime of genocide or genocide related matters. Instead, it empowered the Contracting Parties to undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the Convention and, in particular, to provide effective penalties for persons guilty of genocide. But this lacuna is covered in Part 7 of Article 77 of the Rome Statute of the International Criminal Court (ICC Statute), which provides applicable penalties for a person convicted of genocide or genocide related matters. Generally, conducts that amount to genocide are clear even though definition of the four classes of group 'is an intricate problem that requires serious interpretative efforts'. This paper examines the crime of genocide under the Statute of the International Criminal Court. The paper begins by examining the general overview of the crime of genocide by way of introduction and historical background; and then proceeds to appraise the very nature of the crime and the requirement of proving the offence. Noting the difficulties associated with proving the crime of genocide, particularly 'intent', the paper examines situations wherein inference can be drawn. The paper concludes with overarching recommendations.
Keywords: Genocide, Genocide Convention, intent, *dolus specialis, jus cogens,* ICC.
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1. Introduction

The definition of Genocide in the Genocide Convention has been incorporated into the various statutes namely: (a) the Rome Statute, (b) the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTYSt), (c) the International Criminal Tribunal for Rwanda Statute (ICTRSt) as well as other court's instruments established by or with the support of the UN.[2] The Genocide Convention defines genocide in Article 2 as:

> '... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such':
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Genocide is an indiscriminate killing of a group of people with total disregard for the individual's life. Its immediate effect is death and, dehumanization. For example, it is estimated that more than two hundred thousand people were killed in Darfur, Sudan during the genocide and over two million persons were internally displaced.[3] Genocide has global impact. It disregards international law, creates political instability, destroys entire cultures, and obliterates morals. Kenneth J. Campbell in his book "Genocide and the Global Village" indicates that unchecked genocide will eradicate global cooperation and make larger conflicts inevitable If genocide goes

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[2] Diane F Orentlicher, *(1999)* 'Genocide' in Roy Gutman, David Rieff and Anthony Dworkin (ed) *Crimes of War: What the Public Should Know* 2.0 (Reprint – edition W W Norton & Co 191.
[3] "Civilian Devastation: Abuses by all Parties in the War in Southern Sudan ", (1994), *Human Rights, Watch.* www.hrw.org/hrw/pubweb/webcat-93.htm. Accessed on 26/11/2020.

unchecked, no group is save as every group could be the next target Campbell further said that even the most powerful nations may be drawn in and ultimately it may threaten civilization through accidental or international use of more powerful weapons. Genocide when compared with war crimes and crimes against humanity, is generally regarded as the most heinous crime. At worst, genocide pits neighbour against neighbour, or even husband against wife. Unlike war, where the attack is general and the object is after the control of a geographical or political region, genocide attack individual's identity. The object is complete elimination of a group of people.

Genocidal actions have, over the years, become wide spread; and although the word was coined in response to the Armenian and holocaust killings, it now applies to other mass killings such as the Kurdish genocide in Iraq,[1] the Bosnian genocide,[2] and the Rwandan genocide,[3] amongst others. Importantly, developments in this area have led to genocide being recognised as a norm of international custom.[4] The International Court of Justice (ICJ)[5] attested to this fact when it stated: "the principles expressed in the Genocide Convention are part of general customary international law".[6] Therefore, all states are under obligation to respect the principles whether or not they ratify the Convention.[7] This effectively imposes a responsibility on states to recognise genocide as a peremptory norm of international law (*jus cogens)* to which no derogation is allowed.[8] The purpose of this paper is to examine the concept of Genocide as international criminal conduct set out in the Rome Statute of the International Criminal Court (ICC Statute). With specific reference to the nature of the crime, the paper highlights the crime as one that embodies the principle of special intent (*dolus specialis*) as well as the specific elements of the crime in relation to what is required to effectively establish that the crime of genocide has been committed.

2. Historical Perspective

Genocide is historically linked to a Polish lawyer called Raphael Lemkin,[9] who coined the word from the Greek and Latin prefixes-*genos* (race/tribe) and *cide* (killing). The word was devised (a) in reaction to the Nazi policies of systematic murder of Jewish people during the holocaust; and (b) in response to previous instances in history of targeted actions aimed at destroying particular groups of people.[10] Events of that period led Lemkin to steer a vigorous campaign to actualise international recognition and codification of genocide as an international crime.[11] Genocide was eventually recognised as a crime under international law in 1946 by a resolution of the United Nations General Assembly (GA);[12] and later codified as an independent crime under the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (the Genocide Convention).[13]

The need to recognise and codify genocide as international crime arises from the immense loss often associated with the conduct. This is expressed in a number of documents such as (a) the preamble to the Genocide Convention to the effect that "... at all periods of history genocide has inflicted great losses on humanity..."[14] (b) the *travaux préparatoires* of the Convention which refers to genocide as an historical fact;[15] and (c) a GA resolution[16] that refer to many instances of crimes of genocide that occurred when "racial, religious, and other groups have been destroyed, entirely, or in part."[17] This essentially reaffirms (i) the notion that genocide is not a new phenomenon; and (ii) that events that occurred before the adoption of the Genocide Convention have the

[1] This genocide took place between 1986-1989. It targeted the Kurds. Consequently, between 500, 000 and 182,000 Kurds were killed. See Human Rights Watch, Genocide in Iraq, at <www.humanrightswatch.org> accessed 1 May 2018

[2] The Bosnian genocide usually refers either to the genocide committed by the Bosnian Serb forces in 1995 or the wider ethnic cleansing campaign throughout areas controlled by the Army that took place during the 1992-1995 Bosnian War. See John Richard Thackrah, (2008): *The Routledge Companion to Military Conflict since 1945* Routledge Companion Series, Taylor & Francis), 81-84

[3] This was the genocidal mass slaughter of the Tutsis in Rwanda where an estimated 500,000-1,000,000 Rwandans were killed during a 100-day period from 7 April to mid-July 1994. See BBC, Rwanda: How the Genocide Happened, 17 May 2011, <www.bbc.com> accessed 2 July 2018

[4] A norm of international custom (*jus cogens)* is a peremptory norm that cannot be derogated from. See Lawrence R. Helfer and Ingrid B. Wuerth, (2016) "Customary International Law: An Instrument Choice Perspective" *Michigan Journal of International Law,* 37 (4), 563

[5] The ICJ was set up in 1945 under the UN Charter to be the principal organ of the organization and its basic instrument (Statute of the ICJ) forms part of the Charter-Chapter XIV. It began work in 1946. See ICJ at <www.icj-cij.org> 7 June 2018

[6] See ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) Judgement, I.C.J Reports, 2007, pp 39-44

[7] Ibid

[8] See International Law Commission at <http://legal.un.org/ilc/summaries/1_14.shtml>7 June 2020

[9] Raphael Lemkin, (1944).*Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, Carnegie Endowment for International Peace, Division of International Law,

[10] Ibid.

[11] According to the British Broadcasting Corporation (BBC), Lemkin began to campaign for genocide to be recognised as a crime under international after witnessing the horrors of the holocaust that claimed the lives of his entir.e family except his brother. See BBC, How do you define genocide? <www.bbc.com> 7 June 2020.

[12] See resolution A/RES/96-1.

[13] The Convention was adopted in 1948 but it came into force on 12 January 1951, the 19th day following the date of deposit of the twentieth instrument of ratification or accession, in accordance with article XIII has been ratified by 149 States as at January 2018.

[14] Ibid.

[15] See Brill Online. The Genocide Convention: The Travaux Preparatoires (2 vols.) (2009), <http://brill.com> accessed 6 August 2018.

[16]Resolution 96(I) (11 December 1946) of the United Nations General Assembly.

[17] Ibid.

characteristics of genocide as defined in the Convention.

3. Definition of Genocide

The word genocide was first defined in article II of the Genocide Convention as:

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a Killing members of the group;
> b Causing serious bodily or mental harm to members of the group;
> c Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d Imposing measures intended to prevent births within the group;
> e Forcibly transferring children of the group to another group.

With regard to this definition, the important point to note is that it came as an outcome of high-powered negotiating process that reflects the compromise reached among UN Member states in 1948[1] during the critical time of drafting the Convention. This possibly accounts for why the definition is adopted verbatim in article 6 of the Statute of the International Criminal Court (ICC Statute);[2] and in some other Statutes of international and hybrid jurisdictions such as the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY)[3] and International Criminal Tribunal for Rwanda (ICTR).[4]

Following the adoption of genocide as part of peremptory norm of international law, states began to criminalise it in their domestic law while many are yet to do so. An example of a state that has criminalised genocide is Ethiopia where the High Court tried and convicted former President Mengistu in absentia in *Mengistu & ors*[5] on charges of genocide.[6] However, several states are yet to specifically criminalise genocide in their national laws.

4. Genocide under the ICC Statute

The crime of genocide is one of the four omnibus crimes within the jurisdiction of the ICC[7]as contained in article 5 of the ICC Statute. As already noted and for purposes of emphasis, the critical need to create a special criminal court to try people for atrocities committed during armed conflict had been contemplated by the United Nations (UN) at different times after the Second World War (WW II) culminating in the setting up of two *ad hoc* tribunals in 1993 and 1994. This is for purposes of giving effect to the crime through the punishment of serious violations of international humanitarian law committed, respectively, in the former Yugoslavia and Rwanda. A series of negotiations to establish a permanent international criminal court that would have jurisdiction over serious international crimes regardless of where they were committed started up in 1994 and led to the adoption of the ICC Statute in July 1998 in Rome.

This accomplishment is the culmination of years of effort and shows the resolve of the international community to ensure that those who commit grave crimes do not go unpunished. Genocidal actions were treated as a sub class of crimes against humanity until after the adoption of Genocide Convention in 1948 when it became crime *per se.* Genocide as a crime of individuals began to be punished following the establishment of the International Criminal Tribunal for Former Yugoslavia (ICTY)[8] and International Criminal Tribunal for Rwanda (ICTR)[9] both of which provide for the crime of genocide.

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[1] See the United Nations Office on Genocide Prevention and the Responsibility to Protect www.un.org/preventgenocide/adviser

[2] The Rome Statute of International Criminal Court is the treaty, which established the International Criminal Court's jurisdiction, structure and functions. It was adopted on July 17, 1998 and entered into force on July 1, 2002 as the 60th instrument of ratification was deposited with the Secretary General on April 11, 2002 when 10 countries simultaneously deposited their instruments of ratification. See also, http://www.un.org/law/icc/statute/romefra.htm: accessed 12 September 2020.

[3] The International Criminal Tribunal for Former Yugoslavia (ICTY) is a UN Tribunal with jurisdiction to try war crimes committed during the conflicts in the Balkans in the 1990s. It was established in 1993. More information about the Tribunal can be obtained at, http://www.icty.org/sections/AbouttheICTY; accessed 20 November 2020.

[4] The International Tribunal for Rwanda was established by the UN Security Council by resolution 955 of November 8, 1994 following wide spread violations of humanitarian law in Rwanda. The Tribunal was established to prosecute persons responsible for genocide and other serious crimes in Rwanda between January 1 and December 31, 1994. More information on the establishment, powers and functions of the Tribunal are available at, http://www.unictr.org; accessed 6 December 2020. See also Article 5, Statute of International Criminal Tribunal for Former Yugoslavia; U. N. Doc. S/25/04 at 36, and S/25704/Add.1 (1993); adopted by Security Council on May 25, 1993, U.N.Doc S/RES/827 (1993).

[5] See generally, Firew Kebede Tiba, (2007) "The Mengistu Genocide Trial in Ethoipia" *Journal of International Criminal Justice* 2(1), 513-528.

[6] Ibid.

[7] Article 1 of ICC Statute established the ICC to try crimes listed in article 5, i.e. genocide, crimes against humanity, war crimes and very recently, crime of aggression.

[8] The International Criminal Tribunal for Former Yugoslavia (ICTY) is a UN Tribunal with jurisdiction to try war crimes committed during the conflicts in the Balkans in the 1990s. It was established in 1993. More information about the Tribunal can be obtained at, http://www.icty.org/sections/AbouttheICTY; accessed 17 November 2020.

[9] The International Tribunal for Rwanda was established by the UN Security Council by resolution 955 of November 8, 1994 following wide spread violations of humanitarian law in Rwanda. The Tribunal was established to prosecute persons responsible for genocide and other serious

4.1. Elements of the Crime of Genocide

The important point to note from the outset is the importance of article I of the Genocide Convention in terms of its content to wit: (a) that genocide could occur in the context of armed conflicts of international or non-international nature, (b) it could also occur in peace times-this situation is not common even though it remains a possibility, (c) obligation of contracting parties to prevent and punish the crime of genocide. Authors, commentators and experts[1] are however of the opinion that the definition of genocide under article II of the Genocide Convention is narrow, containing mainly two elements-mental (subjective) and physical (objective); and that what constitutes genocide tends to be broader than the content of the norm under international law. In general terms, elements of the crime of genocide are discussed in this paper under two heads-objective elements and subjective elements.

4.1.1. Objective/physical element

As noted above, conducts that may constitute genocide are clearly labelled in Article II of the Genocide Convention namely:

a *Killing* members of a particular group referred to as a 'protected group' who may be of the same national, ethnic, racial or religious links. [2]
b Causing *serious bodily or mental harm* of a 'protected group'
c Deliberately inflicting on the group *conditions of life calculated to bring about its physical destruction* in whole or in part
d Imposing *measures intended to prevent birth* within the group; or
e *Forcibly transferring children* of the group to another group

For experts, conducts that amount to genocide are clear even though definition of the four classes of group 'is an intricate problem that requires serious interpretative efforts'.[3] These conducts were clearly spelt out in a number of judgements of the ICTR, including the judgement in Akayesu case.[4] Judicial pronouncements on the acts constituting genocide are highlighted as follows:

a With regards of killing members of a group, 'killing' must be interpreted as 'murder' –voluntary or international killing
b In terms of causing serious bodily or mental harm, the ICTR held in Akayesu that the harm caused 'do not necessarily mean that the harm is permanent or irremediable'. It is enough if it involves harm that goes beyond temporary unhappiness, embarrassment or humiliation. Further, the harm must be such that results in grave and long term disadvantage to a person's ability to lead a normal and constructive life. The ICTY TC relied on this pronouncement and stated clearly in *Krstic*[5] that inhuman treatment; torture, rape, sexual abuse and deportation are among the acts that may cause *serious bodily or mental harm.* The ICT further include sexual violence, mental torture and persecution in Prosecutor v *Blagojevic and Jokic*[6] and *Prosecutor v. Georges Nderubumwe Rutaganda.*[7]
c On the issue of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, the TC held in *Akayesu* that 'subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement(s), or the deliberate deprivation of resources indispensable for survival, such as food or medical services. The list also extends to the 'creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion'.[8]
d The ICTR in *Akayesu* also held that 'imposing measures intended to prevent birth within the group' includes 'sexual mutilation, the practice of sterilization, forced birth control and the separation of the sexes and the probation of marriages'. More crucially, the measures may be physical or mental and include 'rape as an act directed to prevent births when the woman is raped refuses subsequently to procreate.'[9]
e With regards to forcibly transferring of children to another group, Article 6 (e) clearly specify elements

crimes in Rwanda between January 1 and December 31, 1994. More information on the establishment, powers and functions of the Tribunal are available at, http://www.unictr.org; accessed 17 November 2020.

[1] See Kok-Thay Eng, Redefining Genocide, at <www.genocidewatch.org> accessed 17 November 2020.. See also, Carola Lingaas, (2015) "The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law" *3 International Criminal Law Review*

[2] Antonio Cassesse, (*2008) International Criminal Law (2nd edn.: Oxford University Press*) p.133

[3] Ibid

[4] *Prosecutor v Akayesu*, Judgement No: ICTR-96-4-T (September 2, 1998)

[5] Radislav Krstic was indicted for war crimes by the ICTY in connection with genocide of around 8, 000 Bosniak and civilians on 11 July 1995 during the Srebrenica massacre (outcome of Bosnia-Serbia war), known to be Europe's worst atrocity since WWII. On 2 August 2001, Krstic became the first man to be convicted of genocide by the ICTY and sentenced to 46 years in prison

[6] Case No. IT-02-60-T (Prosecutor v. Blagojevic and Jokic (Judgement on Motions for Acquittal pursuant to Rule 98 Bis) International Criminal Tribunal for the former Yugoslavia, 5 April 2004 www.refworld.org/cases.ICTY.47fdfb302.htm/ accessed 17 November 2020.

[7] Case No. ICTR-96-3-T < www.refworld.org/cases.ICTR.415923304.html accessed 17 November 2020.

[8] See also Cassesse, note 28 at 133-134

[9] Ibid. Akayesu, note 30 at para, 507-8.

of the crime of genocide as follows:

- The perpetrator forcibly transferred one or more persons
- Such person or persons belonged to a particular national, ethnical, racial or religious group
- The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
- The transfer was from that group to another group.
- The person or persons were under the age of 18 years. Note that persons under the age of 18 are regarded as children as contained in international law instruments including the (CRC).[1]
- The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
- The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

By and large, forcibly transferring children of the group to another group may constitute threats, intimidation leading to the forcible transfer of children to another group.[2]

4.1.2. Subjective/mental element

Article 9 of the ICC Statute stipulates that elements of Crimes shall assist the Court in the "interpretation and application of articles 6, 7 and 8 consistent with the Statute". Regarding these elements, the provisions of the Statute, including article 21 as well as the general principles set out in Part 3 are applicable. Article 30 specifies that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., *intent*, *knowledge* or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, (including applicable law under its relevant provisions), are indicated as:

1. Existence of intent and knowledge can be inferred from relevant facts and circumstances.
2. In cases relating to mental elements associated with elements involving value judgment, such as those using the terms "inhumane" or "severe", it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated.

The mental element is contained in Article II (1) of the Genocide Convention, Articles 5 and 30 of the ICC Statute that defined the crime; and contained in rules of international customary law and they are highlighted as: *the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.* Genocide has been summarised as a typical crime based on the 'depersonalization of the victim.[3] In other words, the victim of the crime is not *really* the object but rather the group to which the person belongs. Cassesse[4] observed that those that commit the act of genocide against a victim only see the victim as a member of a protected group rather than as a human being.

This type of intent, according to scholars,[5] amounts to *'aggravated criminal intent' (dolus specialis)*[6] and is usually required in addition to the criminal intent accompanying the underlying offence-

> 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; forcibly transferring children of the group to another group.

What can be inferred from this provision is that other categories of intent such as gross negligence and recklessness, etc. can be excluded. The ICTR TC *in Akayesu defined the 'aggravated criminal intent'* in relation to the commission of genocide, as 'the specific intention required as a constitutive element of the crime which demands that the perpetrator clearly seeks to produce the act charged'.[7]

[1] The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force September 2, 1990, in accordance with article 49. It is available at, <www2.ohchr.org/english/law/crc.htm> accessed 17 November 2020. See also, The ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour Convention, 1999, was adopted at the 87th Session on June 17, 1999 for the purpose of eliminating child labour and offer protection to children and young persons against labour exploitation. It came into force on November 19, 2000, but was ratified by Nigeria on October 2, available at, <www.un.org/children/conflict/keydocuments/english/iloconvention1828.html> accessed 28 November 2020.

[2] See Akayesu, note 30, at para 509, Antonio Cassesse, note 28 at 134.

[3] Dragan Jovasevic, (2017) The Crime of Genocide in Theory and Practice of Criminal Law of Republic of Serbia *Voj No Delo. 4,* 224-235

[4] Ibid. See also, Cassesse, note 28, p.137

[5] Aksar, Yusuf, (2009), "The Specific Intent (Dolus Specialis) Requirement of the Crime of Genocide: Confluence or Conflict between the Practice of Ad Hoc Tribunals and ICJ", *Uluslararası İlişkiler,* Volume 6, No 23 p. 113-126.

[6] Paul Behrens, (2012) "Genocide and the Question of Motives" *Journal of International Criminal Justice,* vol. 10, Issue 3, 501-523

[7] *Akayesu,* note 30, para. 498, 517-522.

5. Proof of the subjective/mental element in genocide

With regards to proof of mental element, the TC acknowledged that proving the mental element is extremely difficult, and near impossible to determine; and accordingly set out guidelines on how the mental element can be inferred in the absence of a confession. According to the court, intent of the accused person can be inferred from a certain number of presumptions of fact, particularly from 'all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group'. This is regardless of whether such other acts were committed by the same perpetrator or by other perpetrators. This ruling was followed by the ICTR CT in several other cases including the case of *The Prosecutor v. Clement Kayishema* and *Obed Ruzindana, Kajishema*[1] as well as *Rutaganda*.[2] In *Kayishema*, the accused persons were charged with 24 counts as prefect of Kibuye with involvement as a superior in the massacres, which occurred in that area from April to June 1994. Ruzindana was charged with five counts for his role in the crimes committed in Bisesero between 9 April and 30 June 1994.On 21 May 1999, Trial Chamber II of the ICTR found both Accused guilty of crimes of genocide. *Kayishema* was found guilty of four counts of genocide and was sentenced to life imprisonment, while *Ruzindana* was found guilty of one count of genocide and was sentenced to 25 years of imprisonment. Both Accused appealed against their convictions and the sentence imposed on them. The appeal was based on several grounds including lack of equality of arms, defective indictment and inadequate proof against the accused. The Appeals Chamber, after examining the arguments, ruled that it was convinced that the Trial Chamber did not commit any error on a question of law or error of fact in the case. It therefore affirmed the judgment handed down by the Trial Chamber when convicting and sentencing the Accused.

5.1. Elements required to be proved in a crime of genocide

The requirement of 'unlawfulness' found in the ICC Statute[3] or in other parts of international law, particularly international humanitarian law (IHL),[4] is generally not specified in the elements of crimes. As used in the Elements of Crimes,[5] the term 'perpetrator'[6] is nonaligned to guilt or innocence.[7] The elements, including appropriate mental elements, apply, *mutatis mutandis,* to all those whose criminal responsibility may fall under Articles 25[8] and 28[9] of the Rome Statute Further, a particular conduct may constitute one or more crimes. The elements of crimes are generally structured along the lines of certain principles:

- As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;
- Where required, a particular mental element is listed after the specific conduct, consequence or circumstance; and contextual circumstances are usually listed last

In relation to the last element listed for each crime: The term "in the context of" would include the initial acts in an emerging pattern;

- The term "manifest" is an objective qualification;
- Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

5.2. Intent required prior to the commission of the act of genocide

The need to establish the presence of *intention* prior to the commission of was succinctly established by the TC in *Kayishema and Ruzindana*[10] to the effect that "the *mens rea* must be formed prior to the commission of the

[1] Case No. ICTR-95-1-A
[2] Case No. ICTR-96-3-T
[3] The Rome Statute of International Criminal Court is the treaty, which established the International Criminal Court's jurisdiction, structure and functions. It was adopted on July 17, 1998 and entered into force on July 1, 2002 as the 60th instrument of ratification was deposited with the Secretary General on April 11, 2002 when 10 countries simultaneously deposited their instruments of ratification. See also, http://www.un.org/law/icc/statute/romefra.htm: accessed 17 November 2020
[4] See for example, ICRC, Practice Relating to Rule 3. Definition of Combatants at <http:ihl-databases.icrc.org> 7June 2018. See also Articles 2 (f), 8 (2)(a)(iv)(vii), 31(1)(a)(b)(c), 33 and 85b(1) of the Rome Statute.
[5] See Articles 9, 21 and 30 (1) of the Rome Statute. See also, Benjamin Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/1985/6, paras. 30-35
[6] See the Preamble and Article 53 (2)(c)
[7] See Articles 65 and 66 of the Rome Statute; and Antonio Cassesse, *note 28.* See also, Raphael Lemkin, (1944), *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, Carnegie Endowment for International Peace, Division of International Law, 63, 90-94
[8] This Article establishes individual criminal responsibility and confer jurisdiction on the ICC to try individuals who commit offences within the jurisdiction of the court
[9] This Article makes commanders and other superiors criminally liable for crimes (within the court's jurisdiction) committed by persons or forces under their authority or control.
[10] (Trial Chamber), May 21, 1999, para. 91

genocidal acts." even though the individual acts do not necessarily require premeditation in which case the only consideration would be that the act is "done in furtherance of the genocidal intent".[1]

5.2.1. Specific mental elements required

Intent to destroy in whole or in part: "in part" relates to the intention to destroy a considerable number of individuals of the same group.[2] In that regard, the International Law Commission (ILC)[3] stated that 'the intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in particular group.'[4] While agreeing with the ILC's statement, the TC observed that the "intention to destroy must target at least a substantial part of the group"[5] even though the destruction sought need not be directed at every member of the targeted group. The main import of the provisions of both the Genocide Convention and the ICC Statute relating to *destruction,* is that the meaning of *destroy* only encompass acts or conducts that amount to physical or biological genocide.[6] There are several forms of destruction one of which is sexual violence.

Generally, acts of sexual violence can form an integral part of the process of destruction of a group. This would be held to be the case where rapes resulted in physical and psychological destruction of women, their families and their communities belonging to a targeted group. In the case of Rwanda, sexual violence was held to be an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[7]

a) Killing members of the group- to establish this particular offence, the prosecutor must show that an accused intended to destroy the group as such, in whole or in part; that the perpetrator intentionally killed one or more members of the group, without the necessity of premeditation; and that such victim or victims belonged to the targeted ethnical, racial, national, or religious group.[8] In the particular instance, *intent* is required.[9] Like in criminal law cases, causation of killing and other genocidal acts will be effected by an immediate proximate cause ion addition to the communication itself. Application of the principle of causation was considered in *Akayesu* where the Chamber found evidence of widespread killings throughout Rwanda sufficient to show both "killing" and "causing serious bodily harm to members of a group". The evidence includes the following:

- testimony regarding "heaps of bodies . . . everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed",
- testimony stating that "many wounded persons in the hospital . . . were all Tutsi and . . . apparently, had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles' tendon, to prevent them from fleeing",
- testimony that the "troops of the Rwandan Armed Forces and of the Presidential Guard [were] going into houses in Kigali that had been previously identified in order to kill" and testimony of other murders elsewhere;
- "photographs of bodies in many churches" in various areas; and
- testimony regarding "identity cards strewn on the ground, all of which were marked 'Tutsi.'"[10]

b) Causing serious bodily or mental harm to members of the group

The TC in *Akayesu,* at paragraph 504 defined serious bodily or mental harm" as, *inter alia*, "acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution." This meaning should however be "determined on a case-by-case basis, using a common sense approach" according to the TC in *Kayishema and Ruzindana,*[11]noting that the meaning of "causing serious bodily harm" does not need serious interpretation as it is largely self-explanatory, and "could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses. The harm caused here does not however need to be permanent or irremediable. By interpretation therefore, rape and sexual violence and threats during interrogation can qualify as stated in *Akayesu,* where the TC stated that rape and other acts of sexual violence constitute infliction of "serious bodily or mental harm" on members of the group;[12] and that death threats during interrogation, alone or coupled with beatings, constitute infliction of "serious bodily or mental harm"

[1] ibid
[2] see Kayishema at paras 96-97
[3] The ILC was established by the General Assembly in 1947 to undertake the mandate of the Assembly under Article 13(1)(a) of the UN Charter to "initiate studies and make recommendations for the purposes of …encouraging the progressive development of international law…". See UN, International Law Commission-Office of Legal Affairs, <www.legal.un.org> accessed 5 September 2018
[4] See the TC in *Kayishema* at paras 96-97
[5] see *Bagilishema,* (Trial Chamber), June 7, 2001, para. 64
[6] See the TC in *Akayesu,* note 30. See also, Elisa Novic, (2015) Physical-Biological or Socio-cultural 'Destruction' in Genocide? Unveiling the Legal Underpinnings of Conflicting Interpretations *Journal of Genocide Research* 17, 63-82
[7] *See also Kayishema and Ruzindana,* (Trial Chamber), May 21, 1999, para. 95.
[8] *Semanza,* (Trial Chamber), May 15, 2003, para. 319
[9] See TC in *Akayesu, note 30*, para. 500-501. See also Article 2 (2) (a) of the Statute as well as *Rutaganda* at, para. 50
[10] See Akayesu, note 30 at, para. 114-116
[11] Kayeshima, para. 108-113
[12] See *Akayesu,* note 30 para. 706-707 and 731-734, 688. *See also Kayishema and Ruzindana,* (Trial Chamber), May 21, 1999, para. 108

inflicted on members of the group.[1] The specific element of *intent* to inflict *serious mental harm* is specifically required here.

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

This phrase was interpreted in *Akayesu*[2] to mean "methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."[3] This includes, "*inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement."[4] The deliberate act of inflicting on a group the conditions of life calculated to bring about its physical destruction in whole or in part" was also interpreted by the TC to include "circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion" and "methods of destruction which do not immediately lead to the death of members of the group."[5] Further, the TC held in *Kayishema and Ruzindana,*[6] that although the Tutsi group in Kibuye were "deprived of food, water and adequate sanitary and medical facilities," "these deprivations were *not* the deliberate creation of conditions of life . . . intended to bring about their destruction" because these "deprivations . . . were a result of the persecution of the Tutsis, with the intent to exterminate them within a short period of time thereafter;" and that the times periods "were not of sufficient length or scale to bring about destruction of the group."[7]

d) Imposing measures intended to prevent births within the group

One of the issues for consideration in *Akayesu* relates to the interpretation of this phrase. The TC held that *imposing measures intended to prevent births within the group* include: "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages".[8] A critical example is a patriarchal society[9] where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. To that end, the TC noted that the measures might be mental as well as physical, referencing rape as a measure which can be intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.[10]

e) Forcibly transferring children of the group to another group

This phrase was again interpreted by the TC in *Akayesu* where it was observed that the objective of this phrase is two pronged-to sanction a direct act of forcible physical transfer; and to support acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[11]

f) Complicity in the crime of genocide

Complicity in relation to the subjective element of genocide speaks to the issue of joint criminal enterprise[12] as a principle of criminal law in which one or more persons perpetuate a criminal act with *intent* or *knowledge.*[13] With regards to the *element of complicity,* the TC in *Akayesu* stated the true import of this concept and also laid the foundation for holding individuals accountable for conducts arising from mental element of complicity.[14] According to the court,

> …the intent or mental element of complicity implies . . . that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly." He is not required to "wish that the principal offence be committed." "[A]nyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence. Thus, the *mens rea* . . . required for complicity in genocide is *knowledge* of the genocidal plan.

This principally means that the perpetrator must have acted intentionally, knowing fully well that he was aiding, abetting or contributing to the offence of genocide "including all its material elements" as, stated in *Semanza*

[1] Ibid
[2] *Akayesu,* note 30, para. 505-506
[3] Ibid
[4] Ibid
[5] Ibid
[6] *Kayishema and Ruzindana,* (Trial Chamber), May 21, 1999, para. 548
[7] Ibid
[8] *Akayesu,* note 30, para. 507-508
[9] in patriarchal societies, identity of the child is determined by that of the father.
[10] *See also Kayishema and Ruzindana,* (Trial Chamber), May 21, 1999, para. 117; *Rutaganda,* (Trial Chamber), December 6, 1999, para. 53;*Musema,* (Trial Chamber), January 27, 2000, para. 158.
[11] *Akayesu* note 30, para. 509: *See also Kayishema and Ruzindana,* (Trial Chamber), May 21, 1999, para. 118; *Rutaganda,* (Trial Chamber), December 6, 1999, para. 54; *Musema,* (Trial Chamber), January 27, 2000, para. 159.
[12] See Elies van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide" (2007) *Journal of International Criminal Justice,* 5 (1), 184-207
[13] Ibid
[14] *Akayesu,* note 30 para. 540-545

supra.[1] This raises the question of the nature of complicity in genocide. In that regard, unlike in the case of the main perpetrator of the crime of genocide, the element of *dolis specialis* is not required in the case of complicity. This was the position of the TC in Akayesu[2] where it stated that:

> [T]he intent of the accomplice is . . . to knowingly aid or abet one or more persons to commit the crime of genocide." "Therefore . . . an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such." Thus, "an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

6. Elements not required to be proved

a) Specific plan not required, but is strong evidence of intent

The rule that specific plan is not required was elucidated by the TC in *Kayishema and Ruzindana*[3] where it was held that although a specific to destroy does not actually represent an element of genocide, it would appear that carrying out the act of genocide would be difficult in the absence of such a plan "or organisation". The ruling explains the irrelevance of a specific plan as bearing on the impossibility of the crime of genocide to be committed "without some or indirect involvement on the part of the State given the magnitude of this crime;" hence it becomes "unnecessary for an individual to have knowledge of all details of genocidal plan or policy." [4] However, the existence of a genocidal plan would be strong evidence of the specific intent requirement for the crime of genocide.[5]

b) Actual extermination of entire group not required

The principle relating to the extermination of the group is such that it is not necessary for the entire group to be destroyed. But it is sufficient that once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy 'in whole or in part' a national, ethnical, racial or religious group."[6] Furthermore, it is not necessary to establish genocide throughout country. Except in the case of Rwanda, a person could be held accountable for the crime of genocide without necessarily having to establish that genocide had taken place throughout the country concerned."[7]

6.1. Where proof of intent is difficult

Conceding that proving intent in genocidal cases could be difficult, or even impossible especially with regards to evidence gathering relating to confessional statements, the TC enumerates alternative means of establishing the presence of the subjective element in genocide. In the cases of *Rutaganda,*[8] *Musema,*[9] and *Prosecutor v. Semanza,*[10] the TC noted that intent could be inferred: (a) from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused, (b) from the perpetrator's actions-deeds or words which should naturally be decipherable from "patterns of purposeful action";[11] or (c) *from* the context of the act. However, this must be done on a case-by-case basis. Other factors from which *intent* can be inferred according to the TC in *Akayesu* includes the:

- scale of atrocities committed
- general nature of the atrocities committed in a region or a country;
- fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups,
- general political doctrine which gave rise to the acts
- repetition of destructive and discriminatory acts; and or
- the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list . . . but which are committed as part of the same pattern of conduct.

[1] See TC in Akaeyesu, 15 May 2003, para. 395
[2] *Akayesu,* note 30, para. 540-545:
[3] (Trial Chamber), May 21, 1999, para. 94, 276
[4] Ibid
[5] Ibid
[6] See *Akayesu,* note 30, at para. 731; and also *Rutaganda,* (Trial Chamber), December 6, 1999, para. 48-49
[7] Akayesu, Ibid
[8] (Trial Chamber), December 6, 1999, para. 61-63
[9] (Trial Chamber), January 27, 2000, para. 167
[10] Case No. ICTR-97-20 (Trial Chamber), May 15, 2003, para. 313:
[11] See the case of *Bagilishema,* (Trial Chamber), June 7, 2001, para. 63:

7. Problems associated with genocide

Beginning with the Genocide Convention through the Statutes of the International Military Tribunals, down to the ICC Statute, state signatories are under obligation to "prevent and to punish" genocide. But since the adoption of the definition of genocide, specifically under the Genocide Convention, it has been shrouded in controversy and condemnation. For example, it has been condemned for being too narrow as it excludes targeted political and social groups; and is limited to direct acts against people to the exclusion of the environment.[1] Furthermore, it has been argued that proving intention beyond reasonable doubt[2] in genocide cases is extremely difficult. [3] Other difficulties associated with genocide include the fact that the concept is being devalued due to misuse,[4] difficulty in measuring "in part". There is also the problem of hesitation by member states to single out other members or intervene, as was the case in Rwanda.[5] Be that as it may, genocide, as agreed by some,[6] is recognisable.

8. Distinction between genocide and other crimes

Genocide is clearly a *serious crime,* and so are other crimes within the ICC's jurisdiction. So the question is what sets genocide apart from the other crimes? For experts, [7] the nature of genocide as a crime that embodies special intent (*dolus specialis)* is what makes it distinctive. [8] The *dolus specialis,* according to Clark[9] *is* the specific intention required as a constitutive element of the crime. [10] As pointed out above, it is that element that shows that the perpetrator clearly intend the outcome of the act for which he/she is charged. In the specific context of genocide, *dolus specialis* is "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group". [11] In that regards, the TC observed that "the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Genocide Convention (Article 6 of ICC Statute) with the clear intent to destroy, in whole or in part, a particular group". [12] Accordingly, *Akayesu* was found culpable mainly because he knew or should have known that the act committed would destroy, in whole or in part, a group." [13] This was reechoed in the TC's *Musema case.*[14] The TC stated in *Rutaganda*[15] that one of the conditions upon which a person may be convicted of the offence of genocide is if the person committed one of the enumerated acts with "the specific intent to destroy, in whole or in part, a particular group."[16]

9. Case Law on Elements of the Crime of Genocide

Generally, genocide often occurs in societies where such groups become entangled or locked in identity-related conflicts.[17] However, it is really not the differences in identity *per se* that generate tensions and conflicts. Rather, it is the real or perceived inequality associated with these differences in terms of access to power and resources, social services, development opportunities and the enjoyment of fundamental rights and freedoms. This principally speaks to issues around the need to ensure equality in the society, good governance and constructive management of diversity as a means of eliminating gross political and economic inequalities among groups; and for promoting a common sense of belonging on equal footing.

10. Conclusion/Recommendations

Ironically, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 otherwise known as the Genocide Convention does not provide any punishment for the crime of genocide or genocide related matters.[18] Instead, the Convention empowered the Contracting. Parties to undertake to enact, in accordance with their

[1] See the TC in *Akayesu case,* note 30.
[2] Ibid. See also case of *Bagilishema,* (Trial Chamber), June 7, 2001, para. 63; and *Kayishema case.*
[3] Ibid
[4]See *Human Rights Watch*, Case Law of the International Criminal Tribunal for the Former Yugoslavia, <www.hrw.org> accessed 7 August 2018. See also UN, Guidance Note: when to refer to a situation as genocide, <www.un.org> accessed 3 September 2018.
[5] BBC News, How the Genocide Happened (2011), <www.bbc.com> accessed 3 September 2018
[6] See for example, Alain Destexhe, Rwanda and Genocide in the 20th Century ()
[7] See Melinda Rankin, "The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability" (2018) *Journal of Genocide Research* 20 (3), 392-411. See also, Antonio Cassesse, *note 28*. See also, Raphael Lemkin, (1944), *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, Carnegie Endowment for International Peace, Division of International Law, 63, 90-94
[8] Ibid.
[9] Janine Natalya Clark, (2015) Elucidating the *Dolus Specialis:* An Analysis of ICTY Jurisprudence on Genocidal Intent *Criminal Law Forum* 26(3-4), 497-531.
[10] Ibid
[11] Ibid
[12] *Akayesu,* note 30, para. 498, 517-522.
[13] Ibid
[14] Ibid, para. 164.
[15] Ibid, para. 59
[16] Ibid
[17] For in-depth discussion on how identify-related conflict and inequality can cause war (and perhaps, genocide), see Gran Holmqvist, Inequality and Identity: causes of war? Discussion Paper 72, Nordiska Afrikainstitutet, Uppsala, 2012, pp. 8-15
[18] Appendix B, p. 324 — 328, for the entire texts of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. .

respective Constitutions, the necessary legislation to give effect to the provisions of the Convention and, in particular, to provide effective penalties for persons guilty of genocide.[1] But this lacuna is covered in Part 7 of Article 77 of the Rome Statute of the International Criminal Court. Unlike the Genocide Convention, the Rome Statute provides applicable penalties for a person convicted of genocide or genocide related matters.[2]

Persons committing acts of genocide must 'be punished whether they are constitutionally responsible rulers, public officials or private individuals' under Articles 25 and 27 of ICC Statute. Although the provisions in both the Genocide Convention and the ICC Statute enjoin parties to enact the necessary legislation 'to provide effective penalties for persons guilty of genocide,[3] the most potent remedy would be to adopt preventive measures to forestall the occurrence of genocide. For example, states must address issues around guns and arms control. They can, in collaboration with the UN place embargo on countries and citizens involved in genocide activities. Prevention also involves enhanced national security measures and engaging in advocacy geared at discouraging the promotion of hate symbolisms-make them legally forbidden; and to make hate speeches culturally unacceptable. Additionally, the primary objective of criminalizing genocide by the Rome Statute is to ensure effective deterrence and to put an end to impunity. By its establishment, the message that has been sent to all and sundry , is that, the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out punishment , be it to Heads of States, commanding officers or any individual who is desirous to commit this heinous crime of genocide.. Similarly, in this era of internal and international displacements and enhanced refugee crisis, real safe areas or refugee escape corridors should be established with heavily armed international protection. The most effective preventive measure is to address the root causes of disaffection within and outside the state. That means, good governance, equality and the promotion of and respect for human rights and the rule of law should tower above self-interest.

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Kok-Thay Eng, Redefining Genocide; Carola Lingaas, (2015)

[1] Convention on the Prevention and Punishment of the Crime of Genocide 1948 Article 5

[2] The Rome State of the International Criminal Court provides that, the court may impose one of the following penalties on a person convicted of a crime of genocide crimes against humanity war crimes and the crime of aggression: .
(1) (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or.
(b). A term of life imprisonment when justified by the extreme gravity of !he crime and the individual circumstances of the convicted person
(2) In addition to imprisonment the Court may order
(i,) A fine under the criteria provided for in the Rule of Procedure and Evidence;
(ii) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime; without prejudice to the rights of bonafida third parties

[3] See generally, 'Convention on the Prevention and Punishment of the Crime of Genocide' (1951) *The American Journal of International Law,* vol. 45, No. 1 Supplement: Official Documents (Jan., 1951) 7-13

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Ghana's Deposit Protection Act: Are Depositors Protected?

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Abstract
A Deposit Protection or Insurance as the name suggests is intended to provide a sustainable funding to reimburse depositors should an insured act(s) be triggered. Over time, it helps build confidence in the financial ecosystem thereby facilitating a strong and robust financial system. Ghana enacted a Deposit Protection Act in 2016 (the "Act") and added some new sections in 2018 aimed at protecting small depositors, and create faith and stability in the financial system. However, the Act in its present form can neither protect small depositors nor build any faith and stability in the financial system in Ghana. It is not suggested that a deposit insurance alone can create a stable financial system but the part envisaged by the Deposit Protection Act in creating a stable financial system is seriously undermined by sections in the Act itself.
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I. Introduction

This article originally written in early 2018 would first address the institutional and practical challenges that the Ghana Deposit Protection Act, 2016, Act 931 (as amended) was to face before the establishment of the Ghana Deposit Protection Corporation (GDPC).

It has always been identified that banking systems has often been in turmoil. From the great depression through to the recent financial crises in 2008-2010.[1] History has however, provided us lessons over the years as to how we can safely deal with such turmoil when they rear their heads. However, without some understanding of banking history according to Carnell,[2] many elements of banking regulation appear "arbitrary, capricious, even perverse."[3] Unfortunately, many of the elements have not work as expected. That as a result, in and around 1929 bank failures were isolated events. "But in 1930 a rash of bank failures in the US Midwest and South sparked what economist Milton Friedman and Anna Schwartz called a 'contagion of fear' among depositors."[4] Fast forward to 2007, where large credit growth in the banking system, which is also associated with high appreciation of real estate values and ultimately a collapse in real estate values.[5] "Taxonomically, that is the genre of [the] crises"[6] that cause bank runs and its attendant need for deposit insurance in the US in the 1930s. Since a financial system are interconnected,[7] what happens in the US has direct or indirect relationship with financial system of Ghana. Most of the issues directly impact on the financial health of Ghana and therefore solutions elsewhere are brought home for implementation. "[During and after the] recent [global financial crisis between 2007-2008], some countries introduced new deposit insurance schemes and others extended the scope and coverage of their existing schemes to restore confidence in their banking systems."[8] For instance, Australia and Singapore introduced explicit deposit insurance to their banking systems for the first time, whereas Spain and the US increased the limit on the amounts that are covered by deposit insurance. Other countries increased the scope of securities and bank liabilities guaranteed. The world bank estimate that over 107 countries have some form of explicit deposit insurance scheme in place as of 2016.[9] Ghana is on that list. This paper seeks to examine Act 931 to see if it does address the problems

[1] Carnell, et al, *The Law of Financial Institutions*, 5th Edition, Wolters Kluter Law Business, 2013
[2] Carnell et al Ibid, providing an overview on American Banking jurisprudence.
[3] *Ibid.*
[4] *Ibid*
[5] *See generally*, The Future of Financial Regulation, John D. Morley and Roberta Romano John M. Olin Center for Studies in Law, Economics, and Public Policy Research Paper No. 386 Yale Law School, National Bureau of Economic Research (NBER), European Corporate Governance Institute (ECGI). This paper can be downloaded without charge from the Social Science Research Network Paper Collection at: http://ssrn.com/abstract=1415144
[6] *Ibid.*
[7] Crude oil prices, credit ratings, Sovereign bonds, IMF, aid and Grants from donor counties etc all impact on the Ghanaian economy.
[8] Anginer, Deniz; Bertay, Ata Can (2019): Deposit Insurance, ifo DICE Report, ISSN 2511-7823, ifo Institut – Leibniz-Institut für Wirtschaftsforschung an der Universität München, München, Vol. 17, Iss. 1, pp. 3-8. *See also* Charles W. Calomiris The Journal of Economic History Vol. 50, No. 2 (Jun., 1990), pp. 283-295 (13 pages) *Is Deposit Insurance Necessary?* A Historical Perspective
[9] *Ibid*.

envisaged under the Act.

II. The Concept and Rationale for Deposit Protection (DP)

Deposit insurance (or protection) covers losses that depositors might otherwise suffer when their Insured Depository Institutions (IDIs) fail. The first ever deposit protection scheme is the Federal Deposit Insurance Corporation (FDIC) which came into existence in response to the banking crisis of the Great Depression. "President Franklin D. Roosevelt signed legislation creating the FDIC in 1933."[1] The FDIC gave each depositor $2,500 in coverage.[2] Since then, the amount of federal deposit insurance coverage has increased significantly, and the underlying principles of **protecting depositors and promoting faith in the stability of the U.S. banking system remain the same** [emphasis].

It is widely accepted that banks play a very important financial intermediary role in any economy. This role is heavily regulated[3] from the commencement of the banking business, that is, licensing, and supervision (monthly reports and visitations by officials of BoG) during the operations of the bank.

The regulation of banks has been supported by many in the past including Adam Smith who, generally is not a fan of government controls but strongly advocated that "banks redeem all notes in specie upon demand."[4] The term specie is used in contradiction to paper money, which in some countries is emitted by the government, and is a mere engagement which represents specie. Bank paper in the United States is also called paper money. Specie is the only constitutional money in that country.[5]

It is needless to state the role played by banks as financial intermediaries providing transaction services with demand debt;[6] their susceptibility to runs and panics; their role in creating and destroying money; and their custodianship of the payment system.[7]In fact, a bank's susceptibility to runs is the main reason why deposit protection is necessary[8]. All customer deposits be they current, savings or time deposit accounts are called debts to the banks. That is, the deposits are liabilities that the bank invariably owes to its customers. A bank uses the deposits received from customers to advance loans, and grant overdrafts[9] to persons that it carries out business with. In order for banks to be able to serve their customers, they need to maintain a fine balance between customers' deposits and the ones they have given out as loans. This is called *reserves*. Every business enterprise uses some form of reserves to some extent. As a matter of life, ordinary people like all of us uses reserves by keeping some cash for immediate needs and putting others into longer term use. Because most firms and individuals can safely predict their cash needs, they are able to put some into illiquid projects. But banks cannot know for certain how much of their debt will become due on any given day because most of their debt takes the form of deposit payable on demand.[10] It would be easy for banks to keep all their deposits in the vault awaiting customers' withdrawal but vault money does not earn interest. Banks would then lose their most important income, which is interest on loans and other investments. This is why centuries ago banks learned a wonderful secret of keeping just a handful of the cash at hand to pay off demand deposit.[11]

Therefore, banks survive when one depositor is depositing funds, another is taking out and because these two acts are independently driven, the aggregate demand and supply are predictable.[12] But this predictability evaporates during runs[13]. Depositors who would otherwise have left their money in the bank withdraw it at once. In view of the above, if most depositors in a single day decide to withdraw large amount of money, there would be a total chaos and the bank cannot find all the money needed for them on a single day since some of the money

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[1] *See generally*, Transcript of Speech by President Franklin D. Roosevelt Regarding the Banking Crisis March 12, 1933 available at: https://www.fdic.gov/about/history/3-12-33transcript.html

[2] President Franklin D. Roosevelt signed a legislation creating the Federal Deposit Insurance Corporation (FDIC) in 1933. The first federal deposit insurance, available as of January 1, 1934, gave each depositor $2,500 in coverage.

[3] In the case of Ghana by the Central Bank, ("Bank of Ghana") by virtue of Article 183 (2) (c) of the 1992 Constitution of Ghana, which provides that; the Bank of Ghana shall encourage and promote economic development and the efficient utilization of the resources of Ghana through **effective and efficient operation of a banking and credit system in Ghana (emphasis).**

[4] Ales, L., Carapella, F., Maziero, P., & Weber, W. E. (2008). *A Model of Banknote Discounts. Journal of Economic Theory*, 142 (1), 5-27. http://dx.doi.org/10.1016/j.jet.2006.10.010

[5] John Bouvier, *Law Dictionary, Adapted to the Constitution and Laws of the United States.* 1856.

[6] Jose Luis Molina-Borboa; Bernardo Luis Bravo-Benitez, *The role of Financial Market Infrastructures in Financial Stability*, IGI Global,2018.

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[8] Besley T., *Handbook of Development Economics* edited by Hollis Burnley Chenery, T.N. Srinivasan, J. Behrman, Dani Rodrik, T. Paul Schultz, John Strauss, 1988

[9] *Unused Bank Overdrafts*: Their Implications for Monetary Analysis and Policy, International Monetary Fund. Research Dept. January 1968.

[10] Carnell, et al, *Ibid*

[11] *Ibid*

[12] ***See Richard A. Werner, Can banks individually create money out of nothing? — The theories and the empirical evidence., International Review of Financial Analysis Volume 36, December 2014, Pages 1-19.***

[13] Quoting from the Cornell University publication on "Bank-runs, Information Cascades, and The Great Depression." Justin Pritchard had described the phenomenon as "a bank run occurs when a large number of customers withdraw their deposits from a bank at the same time, usually because of fears that a bank is or will become insolvent. Customers generally request cash and may put the money into government bonds or other institutions they believe to be safer."

would have been advanced to other customers as loans, overdrafts and on projects and have not been paid back; the bank can come to its knees within a few days. Again, if the loans and overdrafts are not paid or not paid on time, the bank may be in trouble. It is for these reasons that a certain form of deposit insurance or protection is required to save depositors from losing their life time investment.

In acknowledging that the picture painted in the preceding paragraphs have not been experienced in Ghana before, (at least in recent times), it also follows that deposit protection is not the only medicine to cure bank failures as recent events in Ghana attest.

III. Ghana and Deposit Protection

Until the birth of Act 931 as amended, there was no explicit nor implicit deposit insurance in Ghana. This may be because very few banks have become insolvent or gone into official liquidation for which customers or depositors had to be paid out for their deposits in the collapsed financial institution[1] in a way envisaged by the current Act or the nature of their collapse[2] and their implications on the economy had influenced the policy of where other bank(s) are made to assume their assets.[3] In 2017, two banks had their licences revoked due to significantly undercapitalization and this bolden the need to protect small depositors. Although when a financial institution gets into liquidity or insolvent, it is not only a selected customer who suffer. The effect extends to institutional investors, companies and high net worth individuals.

At a glance, the Ghana Deposit Protection Act[4] and its amendment forebodes a noble and novel idea (at least in Ghana) where the country has witnessed several bank failures in recent past and depositors have gone home empty handed. However, in jurisdictions[5] where this type of insurance or protection has been instituted, their operations are very different from that anticipated by Act 931 as amended. The Deposit Protection Act in Ghana is to achieve *inter alia* the following;

> ***"provide the financial resources needed for the operation of the Scheme particularly for the reimbursement of the small depositors of a member of the Scheme on the occurrence of an insured event in respect of that member"***[6]

The primary meaning of the word "reimburse" is "to pay back."[7] It also means to make return or restoration of an equivalent for something paid, expended, or lost; to indemnify, or make whole.[8] The provision of the financial resources to reimburse "small depositors" when an insured event is activated must therefore remain a never changing commitment and that most depositors must be "reimbursed" should the insured event be triggered but that ***possibility of not receiving a reimbursement*** is what has been provided for by the Act 931 as amended.

IV. A Critical Review of Act 931 as amended

The long title of Ghana Deposit Protection Act, 2016, Act 931 provides that it is an Act;

> "…for the establishment of a Deposit Protection Scheme, Deposit Protection Fund, Deposit Protection Corporation and for related matters."

To achieve the intention of the Act espoused in the long title, the Act establishes a Deposit Protection Scheme (the "Scheme") as a form of insurance to protect the deposits of "small depositors". Section 3 of Act 931 which provides for the **object** of the Scheme states that it is to protect "small depositors" from events that are insurable under the Act, and to support the development of a safe, sound and stable financial market place. This is a two-prong object capable of smooth implementation.

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[1] In their book; *Financial Sector Reforms and Bank Performance in Ghana,* 2000, the authors T.O Antwi and E.K.Y Addison had chronicled the history of the Ghana Co-operative Bank (COOP) as having its genesis in the Gold Coast Co-operative Bank, which was established by the Association of Cocoa Co- operative Societies in 1948. Its main objective was deposit mobilisation and financing cocoa purchases by the co-operatives. This bank was closed down by the government in 1961 for political reasons, and its affairs were taken over by the Ghana Commercial Bank. In 1973, it was revived but it began operations only in 1975. This bank has been bedeviled by a small capital base and a poor reputation. In 1986 a share flotation with a target of #500 million yielded only #135 million. It could not meet the statutory capital requirement of 6% of risk-rated assets set by the BOG during 1988 and 1989. It was also removed from the Bank Clearing House System because of liquidity problems, so it arranged to clear its cheques through the NSCB between 1989 and 1992. The Bank of Ghana suspended operations of the COOP on 30 June 1992 and for two weeks, during which the ownership structure was changed and its legal status changed into a limited liability company (from co-operative ownership). A new management and board were appointed on July 1992 (Ghana Co-operative Bank, Annual Report 1994). The bank was recapitalized by the Bank of Ghana, SSNIT and SIC, diluting the holdings of other shareholders.

[2] *Ibid,* [T]he pre-1988 banking sector was plagued by high costs, poor services, low profitability, poor loan recovery and the weak capital position of all the state-owned banks. The weak macroeconomic environment of high inflation and negative economic growth compounded the problems of the financial sector. Similar to the recent reforms occasioned by negative capital, lack of corporate governance and unfavorable ratios.

[3] *See Ibid*, Liquidation of Meridian Bank BIAO and formation of Trust (TTB) which took over all its assets in 1994.

[4] *See*, Act 931(2016)

[5] US, China,Singapore, Switzerland etc

[6] Section 9 of Act 931, 2016

[7] *See,* Philadelphia Trust, etc., Co. v. Audenreid, 83 Pa. 264.

[8] *See*, Black Law Dictionary 11th Edition.

However, the Act in the present form would not be able to address the first and the easier part of the object, that is, the protection of small depositors (because of the structure of the Act), let alone the second part of the object of the Act which does not lie solely with the establishment of a deposit insurance.

First, the overall goal of the Act should have a non- recourse burden to the taxpayer[1] as an integral aim, although one may argue that a deposit protection and a safe and sound financial market are all intended for the protection of the taxpayer. Such a conclusion is an indirect public obligation. However, the amended provisions in Act 968 on the sources of funding for the Scheme is aimed at providing enough legal grounds to obtain funds from other sources other than the utilization of the original source of the Corporation[2] as done by most insurance companies. Most insurance companies heavily rely on their investment[3] of premiums as a fundamental source of their existence. Provisions in the Act[4] *to borrow money to ensure the attainment of the objects of the scheme where the Corporation has insufficient funds and financing reimbursement of depositors upon the occurrence of an insured even if fund A and B are not sufficient*[5] does sounds similar to the current receiver functions where public funds are used to pay depositors. It is therefore safe to conclude that the target of small depositors by the Ghana Deposit Protection Act, 2016, Act 931 and a safe and sound financial market place is not intended save the taxpayer from any hardship to be endured but are both for governmental benefit.

Under section 4 (3) of Act 931, membership of the Scheme is automatic upon the grant of a banking or specialised deposit-taking Institution licence by the Bank of Ghana. This in itself is problematic. What this means is that once the Bank of Ghana issues a licence to a bank or a specialised deposit taking institution, that institution would automatically become a member of the Scheme, subject only to the Bank of Ghana informing the Ghana Deposit Protection Corporation (GDPC), established under section 22 of the Act, of the issuance of such a licence without more.

However, for the deposits of depositors to be properly protected in a free market, banks and specialised deposit-taking institutions should be allowed to decide whether they want to join this GDPC or do otherwise (because of the huge financial burden associated with becoming a member).[6] In some jurisdictions[7] the option of joining a Deposit Protection Corporation (DPC) is given to the financial institutions. The financial institutions in those countries are therefore provided with options and because of the forces at the market place, their membership (although optional by the enabling legislation), has become compulsory because depositors are informed which of the financial institutions are members of DPC and which ones are not and therefore financial institutions are left with no choice than to become members of DPC and boldly advertise their membership. Therefore, when the opportunity for an amendment presented itself in 2018, there was the need to attempt some reforms to cure some basic birth defects in the Act. Unfortunately, that was not done only provisions for *the "paybox" function of the scheme, functions of the Corporation, information confidentiality, effect of cessation, funding sources for the scheme and exceptions of funds of certain persons from being insured* were the significant provisions amended or inserted as the case may be.

V. "Small Depositor"

It is concerning that the identification and definition of a "small depositor" and the amount proposed to be paid by the Scheme are both unknown and inadequate. The Act's object is to protect "small depositors" from losses incurred by depositors as a result of an insurable event[8]. Section 53 of Act 931 attempts to define a "small depositor"[9] to be a variable entity. That is, it is the Board of the GDPC that determines who a small depositor is, such a person (both natural and juridical) at any time. This could mean that "a small depositor" is a moving constant and not be a constant variable. This is a strange provision for an "insurance policy". All over in the insurance world, persons intended to be covered under any insurance scheme must be an identified person or group of persons. Since this provision goes a long way to resolve one of the cardinal principles for the establishment of the scheme, the category of "small depositors" need not be left for the Board but must be determined by Parliament and made knowable at any time.

Whereas the identification of this "small depositor" remains unknown or unascertained, the payment of a

[1] Sections 24(j)and (l) of Act 931 (as amended) provides for borrowing from non-member institutions to finance either the attainment of the objects of the scheme or reimbursement of insured depositors.
[2] Sections 24 (j) and (l) of Act 968.
[3] It in most business ventures or real estate, or otherwise lay it out, so that it may produce a revenue or income. *See,* Drake v. Crane. 127 Mo. S5, 29 S. W. 990, 27 L. It. A. 653; Stramann v. Scheeren, 7 Colo. App. 1, 42 Pac. 191; Una v. Dodd, 39 N. J. Eq. 180.
[4] Section 24(4) (j).
[5] *Ibid.*
[6] There are extensive provisions on the payment of regular premiums and a percentage of capital to be paid to the GDPC.
[7] Several countries have different modes of implementing their deposit protection or insurance. For instance, Brazil has two such deposit insurance while Canada and Germany have 9 of such schemes including provincial ones with Japan operating different schemes for financial institutions operating in different sectors of the economy. That is, there is a different deposit insurance for financial institutions operating in the agriculture and fisheries sectors separate from those who are into commerce.
[8] Section 3 of Act 931(2016).
[9] As a person who holds a deposit that the Board has determined to be small.

coverage limit of Six Thousand Two Hundred Fifty Cedis (GHS 6,250.00) in the case of banks and One Thousand Two Hundred and Fifty (GHS 1,250) for other specialized deposit-taking institutions[1] provides a hint to the public who the "small depositors" were at the time of the enactment in 2016. Therefore, small depositor is a person whose deposit falls within the threshold amount provided by the Act. Be that is may, the amount proposed to be reimbursed should an insured event triggers, appears to be woefully inadequate now and shall be even worse should the value of the amount be eroded by inflation over time.[2] This particular point is fortified by the recent actions of the receiver of the five collapsed banks and other micro finance institutions, when the receiver had earlier set a target of Ten Thousand Cedis (GHS 10,000.00) as the payment limit and later had to increase the limit to Twenty Thousand Cedis(GHS 20,000.00) after failing to meet majority of the deposit of depositors[3] and now Seventy Thousand Cedis(GHS 70,000). Therein lies partly the reason why membership must not be automatic. If a scheme is to protect small depositors with a limit of Six thousand two hundred and fifty Cedis (GHS 6,250.00) circa, then all deposits above the said threshold would not be protected and therefore Banks and Special Deposit-Taking Institutions whose clients balances are well above the above threshold, need not be members or need not part take in a scheme that only covers only a fraction of deposits. It seems equally wrong to pay premium on all deposits[4] when only a fraction of such deposit is catered for under the Act.

The above situation, may make the scheme unattractive for both the insured and deposit taking institutions. It may be partly the reason why the scheme itself is unable to tell Ghanaians their existence after several months[5]. An "insurance" or a "protection" for that matter, is to provide a minimum "indemnity, guarantee or assurance to put the insured in the same position which she was immediately prior to the happening of the uncertain event."[6] It appears to the authors that the Act fails a simple test for what an insurance must do for the insured.

Much as it is recognized, that the Board of the Corporation has the mandate to revise upward the amount reimbursable three years (3) after the commencement of the Corporation,[7] it thus appears that the Board of the Corporation is not properly clothed with the power to undertake such act though the parent Act says so. This is because a Board of a Corporation cannot amend an Act of Parliament on its own[8] despite the say so of the Act that empowers it.[9] It is clear such a provision is to resolve the constant depreciation of the value of the cedi that the Act provide for the occasional upward review without recourse to Parliament. However, a better resolution of the constant depreciation of the cedi problem could be cured by a regular revision of the covered amount payable by the Board and not explicit mention of the coverage in section 20 of the Act so that the Board can have the proper power not the current situation. In its current form, with the covered amount mentioned in the Act, the Board cannot do anything except to seek an amend to the Act again. [10]It is recommended that a proper research be conducted, or better still, the BoG by virtue of its prestigious position can come up with a figure that may better resonate with Ghanaians. After all, it is not difficult to obtain an average balance of bank and non-bank customers balances. Better still, a percentage[11] of deposit be used as the amount payable. The occasional upward revision by the Corporation's board is not the way forward and any process brought before the Supreme Court to pronounce on it will win day since same amount to

[1] Section 20 (3) (a) and (b) of Act 931.
[2] Laws are mostly made with future events in mind. In countries with ever eroding value of their currencies, the trend has often been to quantify money value in terms of units percentage of deposit so that the value can remain stable for a reasonably foreseeable period.
[3] The receiver announced that "Based on the total number and value of claims received in the receiverships of these MFCs at the extended deadline date for claims submission on Friday, September 27, 2019, the Receiver wishes to announce an ***increase in the capped payment from GH¢10, 000 to GH¢20, 000 per depositor***, to all depositors whose claims have been validated and accepted with immediate effect". [accessed at https://www.graphic.com.gh/business/business-news/microfinance-customers-can-access-gh-20-000-of-funds.html on May 29, 2020] emphasis supplied.
[4] Sections 14 and 15 provides for the payment of 0.1% on paid up capital and an annual premium on average deposit of member institutions.
[5] The website of the Ghana Deposit Protection Corporation says feasibility of such a scheme was done in 2012, the Act was passed in 2016 and an amendment in 2018, Yet very few persons are aware of them and the players in the industry are unwilling or cannot understand their birth.
[6] Builders Supply Co. v. McCabe, 366 Pa. 322 (Pa. 1951). The court expanding the term indemnity as a compensation in money or property for a loss suffered. It also means a contract to save another from the legal consequences of the conduct of one of the parties or of a third person. It is also an agreement whereby one party agrees to secure another against an anticipated loss or damage. . Indemnity can also be a right which insures to a person who, without active fault on his/her own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which s/he himself is only secondarily liable.
[7] Section 20(8) of Act 931 of 2016
[8] Clause 11 (7) (a) of the Constitution 1992, provides that; Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall be laid before Parliament. This means that no changes to the Act could be made by the Board without Parliamentary approval.
[9] An attempt to increase or decrease the reimbursable amount, would mean an amendment to the Act of Parliament.
[10] *See*, note 45 *supra*. The Act was amended in 2018 two years after the enactment of the parent Act in 2016.
[11] During the enacting phase of FDIC in 1932, the US Congress had had to discuss a percentage of deposit coverage by the insurance. Every five years, the FDIC and the (National Credit Union Administration) NCUA must jointly decide whether to increase deposit insurance coverage for inflation. If they do, they must round any increased coverage down to the nearest $ 10,000. 12 U.S.C § 1821 (a) (1) (F).

VI. Disparity in Insurable Amounts

Perhaps one critical creation in the Ghanaian Deposit Protection Act is the differences in the insurable coverage between Universal Banks and other Specialised-Deposit-taking Institutions (SDIs). That is, customers of Universal Banks are covered up to six thousand, two hundred and fifty Cedis (GHC6,250) and those of other Non-Banking institutions are covered up to one thousand, two hundred and fifty Cedis (GHC1,250).[1]It is difficult to fathom the intention of the framers since such intention is neither clear on the face of the Act nor accompanied[2] the Act. Is it the case that those who operate as SDI are less risky or that the persons who patronize their services require less protection? It is perhaps true that when an activity is brought under the deposit insurance safety net, "the production process for that activity and the resulting set of choices available to consumers and businesses may be altered significantly. For example, certain investment and lending decisions of insured institutions may be based more upon regulatory considerations than market incentives, and such distortions may diminish social welfare or productive capacity, or both."[3] It also true that the presence of a high value insurance cover can result in high moral hazard.[4] *Grossman* found that in the 1900's when thrifts were insured, they took more risk than their uninsured counterparts. A research conducted in Bolivia showed the tendency of banks conducting sub-prime loans,[5] when their deposits were insured, thereby putting the deposit insurance scheme at a higher risk. Be that as it may, such reckless risk taking can be overcome with differential premium pricing. Many of the SDI's are into equally high-risk businesses. In fact, they take customers that Universal Bank reject. They often play in the lower end of the customer value chain where the risk level is very high. People often cite the "reason for requiring such a separation [in the reimbursable amount] as the fear that a non-banking operation could expose a bank to greater risk of failure."[6] Some have argued that some non-bank activities may be less risky than traditional banking activities, that some risks may be difficult to detect or monitor without some degree of corporate separation. A related reason for requiring the separation of coverage of non-banking activities from banking activities is to prevent banks from using deposits insured by the government to fund these activities.

However, it is difficult to find any empirical data to support such a stance in the Ghanaian law. Globally, and for reasons already cited above, deposit insurance has come to stem a systemic defect of a financial system. A point could be made that between the two broad institutions, banks enjoy some advantage from their access to the Bank of Ghana "lender of last resort" coupled with the fact that they can use funds obtained from their relationship with the Bank of Ghana to do business with the SDI. This alone gives universal bank undue advantage over their SDI counterparts.

A disparity in the coverage amounts create distortions that may skew the decisions of market participants away from the most productive choices.

VII.Quantity or Quality Deposits Dichotomy

One major problem of a DP is the likelihood to create moral hazards[7]. Saunders defines moral hazard in this context as "The loss exposure faced by an insurer when the provision of insurance encourages the insured to take more risks."[8] In common usage, moral hazard infers a conscious malicious, even illegal, motivation, versus an unconscious behavior change. It may also refer to circumstance that increases the likelihood of a loss, or abnormal loss. "[Typically, due to a change in an insurance policy applicant's behavior after policy issuance,…]… incentives may lead the insured to act in ways that increase insurer risks and costs."[9] The presence of a DP may lead to some institutions engaging in is risky business because another institution will underwrite the risk should the one under taking the risky venture fails. That is perhaps why the funding source for the Corporation comes from both a percentage of capital and average deposit. There is also an additional opportunity for the Corporation to charge members a differential premium for their risks.[10]

However, an important point in this analysis is the quantity verses quality of deposits angle of the law. It is

[1] *Cf* note 41.
[2] Section 10 of Act 792, Interpretation Act,2009 provides a tall list of aids to interpretation or construction which includes explanatory memorandum and pre-parliamentary materials relating to the enactment.
[3] *See*, page 227, https://www.bis.org/publ/plcy07o.pdf
[4] Grossman, Richard S. 1992. "Deposit Insurance, Regulation, and Moral Hazard in the Thrift Indus- try: Evidence from the 1930's." *American Economic Review* 82: 800–821.
[5] Ioannidou, Vasso P and María Fabiana Penas. 2010. "Deposit Insurance and Bank Risk-Taking: Evidence from Internal Loan Ratings." *Journal of Financial Intermediation* 19(1): 95–115.
[6] *Ibid*, note 53
[7] Tracing the genesis of the term moral hazard as being of insurance origin which deals with situations when, for the existence of an insurance policy people refuse to take the needed risk, David Rowell and Luke B. Connelly in *The Journal of Risk and Insurance*, 2012, Vol 179 N0.4. 1051-1075.
[8] *See* GILLIAN GARCIA DEPOSIT INSURANCE: OBTAINING THE BENEFITS AND AVOIDING THE PITFALLS INTERNATIONAL MONETARY FUND, MONETARY AND EXCHANGE AFFAIRS DEPARTMENT (1996)
[9] The Journal of Risk and Insurance, *Ibid.*
[10] The risk that a bank poses to the insurance fund is considered: the probability that the bank will cause a loss to the fund and the likely amount of such loss. Section 16 of the Act and 12 U.S.C § 1817 (b) (1) (A), (C) of the FDIC.

easy to see that because the amount payable within the threshold is very low, most customers are likely to be captured within the Act thereby benefiting from the establishment of the Fund. On the surface, the thought may seem like a universal adult suffrage, whereby one person has one vote. But financial planning and safe and sound financial system does not operate in that form. Values of banking deposits must drive the law and not number of persons on the bank's books. After all the law is about deposits and not depositors. This reasoning is explained by the many reasons why people may have deposits in financial institutions; personal deposits, savings, investment in the form of fixed deposits, trust accounts, pension fund, insurance company accounts, escrow accounts, letters of credit,[1] and obligations to other financial instructions. It is also deepened by the type of customers that a financial institution may have; trading companies, sole proprietors, insurance companies, churches, schools, mosques, hotels and restaurants, associations etc. Therefore, with the range of deposits available to financial institutions, the limit "envisaged"[2] by the Act would require some revision to make it workable.

VIII.Receiver/Liquidator functions

The Ghana Deposit Protection Corporation (GDPC) should have as part of its functions a liquidator and or receiver of failed banks and other deposit taking-institutions. This function would be very important to the Corporation because of the substantial funds that are generated through the sales of both tangible and intangible assets so that the other significant provisions in Act 931[3] can be actualized. However, the combined reading of the relevant sections in both Acts 930 and 931 suggest a use of a third-party as a receiver.[4] It is possible that the Corporation may not have the experience required to perform such a function now, (but until recently, a third-party receiver functions with the magnitude witnessed for the failed banks and micro finance institutions, has not been seen in Ghana), they would be able to build capacity over time. Conversely, a third-party receiver may also not have the extensive experience that the Corporation may amass over time since the Corporation would sit at an advantage position with the regular reports from member institutions beforehand. Therefore, to allow depositors to chase a liquidator or receiver after been reimbursed by the Corporation for balance of their deposits appears to be a task that need not be encouraged since same would be a burden on depositors. There could also be a friction between a third-party receiver and the Corporation especially when the Corporation would be part of the regulatory committee of the third-party receiver.

IX.Conclusion

Deposit Protection or insurance is to provide some relief for depositors. Failure to provide same in view of the proposed reimbursable amount is not the expectation of the framers of the law. Thankfully, this is one Act that enjoys the support of both the major political parties, at least implicitly. Even if a government may reject it as unsound, it may face irresistible political pressure to protect dispositors of DKM, God is Love and their hues all the same. When thousands or hundreds of depositors have lost their money, the pressure for a bailout can become overwhelming.

The DP must instill the needed confidence in the public to serve the purpose of its creation. Nobody sits for an examination with a foreknowledge of the questions. Anyone that does well in an examination achieves success with adequate preparation. Events that may trigger a reliance on a DP are futuristic and uncertain, therefore the need for a robust scheme that has the capability and credibility to withstand shocks in both the domestic and international markets if need be is a key requirement. At present, the Deposit Protection Act, 2016 does not cover the emerging payment systems and services such as mobile money, issuance of electronic money.[5] The activities of the mobile money providers and electronic money issuers are regulated by the BOG. These payment system and services provides have stringent minimum capital requirement and may have their licences revoked by the BoG. The activities of mobile money providers constitute "deposit." The DPC Act should be amended to offer protection for customers of mobile money users and persons who may subscribe to electronic money. A reasonable compensation should be paid for depositors in the event that a Bank or SDI or PSP (Mobile Money provides and

[1] E.g . *see generally* FDIC *v. Philadelphia Gear Corp*., 476 U.S. 426 (1986), where the US Supreme ruled that a standby letter of credit backed by a promissory note does not constitute a deposit but letters of credit s*implicita* does.

[2] The Act has not been triggered and therefore enough opportunity to rework it to increase the payable amount to take inflation and effect of exchange rate depreciation on the Ghana Cedi.

[3] Section 20(9) provides that " Where the amount paid by the Corporation as compensation to an insured depositor is less than the amount credited to the account of the depositor that depositor may recover the difference between the amount paid and the amount credited to the account of the depositor from the liquidator or receiver of the bank or specialised deposit taking-institution.

[4] Section 123 of Act 930 (1) Where the Bank of Ghana determines that the bank or specialised deposit-taking institution is insolvent or is likely to become insolvent within the next sixty days, the Bank of Ghana shall revoke the licence of that bank or specialised deposit-taking institution.
(2) The Bank of Ghana shall appoint a receiver at the effective time of revocation of the licence under subsection (1).
(3) The receiver appointed under subsection (2), shall take possession and control of the assets and liabilities of the bank or specialised deposit-taking institution.

[5] For the example, the Payment systems and Services Act, 2019, Act 987 (came into force 13 May 2019) require mobile money and issuers of electronic money to register with the BoG.

Electronic Money Issuers) licence is revoked by the BoG.

It is therefore a good incentive for depositors to be assured a coverage of an appreciable percentage of their deposits than the current limit in the Act. Policy makers must quickly start working on a review of some aspects of the law before the D-day for it shall surely come and we do not have to be caught off guard.

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The Function of the Harbormaster for the Security and Safety of Shipping

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Abstract
Shipping safety is very important and is the center of all aspects of the shipping world. The harbormaster as the government at the port has the responsibility to ensure the safety and security of shipping. This research is a normative-legal research using a statute, comparative and conceptual approaches. The results show that the implementation of the safety and security functions of shipping by the harbormaster is carried out in accordance with international law and national law in shipping. Optimizing the harbormaster in carrying out the safety and security functions of shipping as well as carrying out supervision of the maritime affairs of the ship will realize the achievement of safety, security and order in shipping activities.
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1. Introduction

Indonesia has implemented Law No. 17 of 2008, Government Regulation no. 20 of 2010, Minister of Transportation Regulation No. 20 of 2015 and many other laws and regulations that regulate all matters relating to sea traffic, transportation of goods and / or people by sea, navigation and shipping activities as a means of sea transportation, including aspects of security and law enforcement. In carrying out the functions and duties of ship safety and security, the government in this case is the harbormaster given the functions and duties as regulated in Article 208 of Law No. 17 of 2008 that:

The harbormaster has the duty to carry out safety and security functions as referred to in Article 207 paragraph (1), namely: Pay attention to shipworthiness, safety, security and order at the port; Attention to orderly ship travel in port waters and shipping traffic; Paying attention to transboundary activities in port waters; Pay attention to salvage activities and underwater work; Pay attention to ship alert activities; Pay attention to scouting; Pay attention to the ups and downs of dangerous goods and hazardous and toxic waste; Pay attention to ship refueling; Pay attention to the orderliness of the embarkation and debarkation of passengers; Pay attention to island dredging and reclamation; Pay attention to the activities of building port facilities for ships; Carry out assistance to search and rescue ship accidents; Leading the pollution control and fire fighting team at the port; and Pay attention to the implementation of marine environmental protection; The inherent aspects of shipping safety include the characteristics of attitudes, values and activities related to the importance of meeting safety and security requirements related to transportation in waters and at ports. Neglecting shipping safety generally results in higher economic and environmental costs, such as reduced production, incurring medical costs, pollution and inefficient energy consumption.

Shipping is a high regulated sector where there are clear regulations regarding the role of each related party in shipping.[1] The existence of marine safety regulations that prioritize third party regulations is a result of the many shipping accidents caused by human errors. At the operational level, the harbormaster, ship owner and skipper are the trident of shipping safety. The three of them have roles and responsibilities as defined in the maritime affairs of the ship, which is explicitly regulated in article 1 paragraph (33) of Law No. 17 of 2008 which explains that shipworthiness is a condition of a ship that meets the requirements of ship security, crew members, cargo, health and welfare of crew and passengers as well as legal status of ships, security management and prevention of ship pollution, management of ship security to navigate certain waters.[2]

Shipping is not only about sea transportation, but more generally includes existing facilities and infrastructure, as well as guarantees of safety, security and protection in Indonesia's maritime environment.[3] This is what creates

[1] Baranyanan, A. S., Kuswara, K., & Nasrun, N. (2020). Kajian Pemodelan Dan Implementasi Alat Keamanan Kebakaranpada Km. Satria Express 99, Askar Saputra 07 Dan Km. Queen Marydalam Menunjang Keselamatan Transportasi Laut Ternate–Halmahera Selatan. *Clapeyron: Jurnal Ilmiah Teknik Sipil*, *1*(1). See too, Rayyan, A. (2017). *Tanggungjawab Hukum Atas Terjadinya Kecelakaan Kapal Km Zahro Express Di Pulau Tidung Dihubungkan Dengan Kuhd Dan Undang-Undang Nomor 17 Tahun 2008 Tentang Pelayaran.* (Fakultas Hukum Universitas Pasundan). Accessed on http://repository.unpas.ac.id/id/eprint/31391
[2] *Ibid.*
[3] Kimbal, M., & Kumayas, N. (2019). Pengawasan Pemerintah Dalam Penanganan Keselamatan Berlayar (Studi Di Kantor Kesyahbandaran Dan Otoritas Pelabuhan Kelas III Kota Manado). *Jurnal Eksekutif*, *3*(3).

a variety of marine support, routine supervision and maintenance and the need for marine and ship safety guarantees as a guarantee of safety, security and protection in the maritime environment.[1] Sea transportation requires many facilities, such as marine warehouses, sea guides, cargo equipment, tugs and support ships.[2] In addition, the facilities that must be provided for securing port channels, ship lighting, port access points and patrol boats are also not yet available for pioneer ships to guide ships to port docks.[3]

The enactment of Law No. 17 of 2008 relating to shipping has undergone many improvements that will improve the function of the porters and safety and security issues on shipping are the main responsibility at the port because the main problem in shipping accidents on shipping is a matter of a person's ability and expertise in carrying out port duties.

The duties of the harbormaster in the field of shipping security and safety according to Indonesian law are as law enforcers in the field of Indonesian shipping safety and security, as head of government at ports or as coordinators of all activities in ports, as supervisors and are responsible for shipping security and safety in Indonesia, and as a shipping document issuer. The responsibility of the harbormaster in shipping security and safety according to Indonesian law is to ensure that the ship is fit for sailing and the risk of sea accidents due to ship unworthiness, overcoming marine pollution, making efforts to prevent and minimize marine pollution and participating in search and rescue of victims in the event of a ship accident when there is a disturbance in shipping.[4]

The importance of safety and security issues, as well as all marine transportation activities is the responsibility of the port because one of the main problems in shipping accidents during shipping is the problem of a person's ability and expertise to carry out his duties both in carrying out all duties at the port and in the performance of cooperation or relations with agencies other businesses assigned to supervise shipping and shipping itself. This study aims to analyze the implementation of the harbormaster function in the effort of shipping safety and security.

2. Methods of Research

This research is a normative-legal research using a statute, comparative and conceptual approaches.[5] Its data will be provided from primary and secondary legal materials. The primary legal materials resulted from some relevant laws and legislation. Those legal material collected are analysed descriptively related to the problems and prescriptively.

3. Results and Discussion

Major works related to the law of the sea can be traced back to the 1600s. Mare Liberum by Hugo Grotius in 1609 is one of the earliest academic writings on the subject. The book applies the terms 'safety' and 'safe' several times in describing the imagined situation at sea.[6] First, Grotius highlighted how the King of Spain told the Counselor and Viceroy of India to organize a fleet suitable for a particular mission in a certain part of the sea, as well as to select the appropriate command and head for it.[7] In this historic article, conformity is a factor related to safety. Grotius also underlined further that maritime trade between Spain and India is very important to the safety of Spain and therefore cannot be maintained without weapons.[8] The thinking of Grotius led discussions in other major works of international maritime law such as William Welwood with his work, "De Dominio Maris," in 1615 and John Selden with "Mare Clausum Seu de Dominio Maris" in 1635. Overall, this publication suggests that some of the important factors related to maritime safety in the 17th century consisted of at least two sets of factors: the technical element (ship type) and the human element (crew capacity). These works also show that maritime safety is an integral part of nations' strategic thinking, as they compete and try to win wars by ensuring the safety of sea lanes.

Maritime security is implicitly discussed in The Influence of Sea Power upon History 1660-1783, published in 1890 by Alfred Thayer Mahan. Amid an extraordinary recipe for how a country can become a leading maritime nation, the book highlights the need for maritime security to achieve that vision.[9] Interestingly, Mahan distinguished the concept between controllable aspects of maritime safety (such as maritime traffic safety, port safety, safety points in all international waters to ensure shipping operations, naval efficiency, and property safety on board) and those aspects that uncontrolled (such as natural harbor and coastal landscapes, and the potential for monsoons). Mahan's work is one of the leading works of a time when a social science perspective was still

[1] Indah, D. J. (2019). *Analisis Pentingnya Status Hukum Kapal Guna Mewujudkan Keselamatan Pelayaran Di Pelabuhan Tanjung Emas Semarang* (Politeknik Ilmu Pelayaran Semarang). Accessed on http://repository.pip-semarang.ac.id/2136/
[2] Baranyanan, A. S., Kuswara, K., & Nasrun, N. *Op. Cit.*
[3] Kimbal, M., & Kumayas, N. *Op. Cit.*
[4] *Ibid.*
[5] Marzuki, P. M. (2009). *Penelitian Hukum*, 5th ed. Jakarta: Kencana.p. 59
[6] Centre for Strategic and International Studies. (2020). *Maritime Safety in Indonesia: Mapping the Challenges and Opportunities*. Jakarta: Centre for Strategic and International Studies (CSIS). p. 8
[7] Hugo Grotius. (2004). *The Free Sea*, trans. Richard Hakluyt, ed. David Armitage. Indianapolis: Liberty Fund. p 62
[8] *Ibid*. p. 77
[9] Mahan, A.T. (2010). *The Influence of Sea Power upon History 1660-1783.* Cambridge: Cambridge University Press.

dominant in discussions of safety at sea. The way of studying maritime safety changed with the extraordinary technological advances of the early 20th century. The sinking of the unprecedented large-scale passenger ship RMS Titanic in the North Atlantic Ocean in 1912 sparked a more scientific analysis. The main cause of the Titanic accident was the dynamics of pressure on the sea level that brought icebergs to the Titanic's shipping lanes, accompanied by the absence of regulations regarding shipbuilding technology.[1]

The initial international response then was the formulation of the first Convention on the Safety of Life at Sea (SOLAS) in the following two years. More than half of the provisions in SOLAS 1914 deal with technical components of shipbuilding, including but not limited to construction, radiotelegraphy, life-saving equipment and fire protection. This marked the start of a science-led paradigm on maritime safety, which was further emphasized by the establishment of the Maritime Safety Committee by the International Maritime Consultative Organization (IMCO, now called IMO) in 1959. At its first session, the committee was mandated to cover four thematic areas, Safety of Life at Sea, International Code of Signals, Measurement of Tonnage, and the Prevention of Pollution by Oil.[2]

There are several important international conventions at this time, including: Safety Of Life At Sea (SOLAS 1974) which has also been ratified by Indonesia. The convention has been amended by the 1978 Protocol, in particular concerning safety requirements for tankers. Indonesia has also ratified the convention even though the legislation regarding shipping safety that is still formally valid is the Shipping Regulations and Ordinances based on the 1929 SOLAS Convention. Another important convention is the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG Convention 1972), International Convention on Load Lines, 1966 (LOAD LINES Convention 1966) and International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE Convention 1969) which have also been ratified by Indonesia. In the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW Convention 1978) has recently come into effect. This Convention is seen as a milestone for action to improve safety at sea and prevention of marine pollution and prevention of marine pollution through international standardization of standards and procedures for training, certification and safeguards for seafarers of all categories and levels.

The Indonesian government is currently considering ratifying the convention. This is actually something that is urgent so that Indonesian ships visiting other countries implementing the convention do not experience difficulties. Several other conventions include the International Convention for Safe Containers, 1972 (CSC Convention 1972), Convention on the International Maritime Satellite Organization, 1976 (INMARSAT Convention 1976), Torremolinos International Convention for the Safety of Fishing Vessels 1977 and International Convention Maritime Search And Rescue, 1979 With Annex And 1998 Amendments To The International Convention On Maritime Search And Rescue, 1979.

Finding an explicit definition of maritime safety from the available academic literature can be challenging. One of the difficulties is the fact that maritime safety has in many cases and research been taken to be underestimated, as something that is generally understood. Much of the literature considers the concept of maritime safety to be self-explanatory and suggests that further efforts to decipher the concept are unnecessary. Yet in providing a conceptual basis, several works are noteworthy: Spiro and Parfitt discuss the application of cost-benefit analysis to marine safety measures;[3] Hetherington, Flin, and Mears highlight the human element of shipping safety;[4] Panayides noted the importance of maritime policy and research to the maritime industry;[5] and Fenstad, Dahl, and Kongsvik closely examined how ship safety is affected by external actors - ship owners and regulatory authorities.[6]

All users of sea transportation in Indonesia in particular and the world in general always prioritize safety and security issues, which are then followed by aspects of affordable costs, speed and timeliness, and aspects of comfort. Preventing marine accidents such as drowning, burning, etc. is a matter related to the safety and security of marine transportation. For the implementation of the improvement of sailing safety, the Directorate General of Sea Transportation has issued policies to prevent shipping accidents, such as making shipping announcements regarding increased safety supervision of passenger ships, announcements about weather conditions in Indonesian waters, such as telegrams regarding readiness for bad weather at sea.[7]

Shipping which is part of sea transportation as mandated by Law No. 17 of 2008 is a very strategic part from the perspective of the Indonesian nation, as well as an important means of supporting the goals of the unity and

[1] Linkin, M. E. (2007). Icebergs Ahead!: How Weather Doomed The Titanic. *Weatherwise*, *60*(5), 20-25.
[2] Simmonds, K. R. (1963). The Constitution of the Maritime Safety Committee of IMCO. *Int'l & Comp. LQ*, *12*, 56.
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[5] Panayides, P. M. (2006). Maritime policy, management and research: role and potential. *Maritime Policy & Management*, *33*(2), 95-105.
[6] Fenstad, J., Dahl, Ø., & Kongsvik, T. (2016). Shipboard safety: exploring organizational and regulatory factors. *Maritime Policy & Management*, *43*(5), 552-568.
[7] Kadarisman, M. (2017). Kebijakan keselamatan dan keamanan maritim dalam menunjang sistem transportasi laut. *Jurnal Manajemen Transportasi & Logistik*, *4*(2), 177-192

integrity of the Republic of Indonesia as a maritime country. Shipping or sea transportation, which is a part of transportation that cannot be separated from other parts of transportation means that are able to face future changes, has certain characteristics because it is able to carry out mass transportation that can connect and reach regions through waters so that it has a strong development potential and role , both nationally and internationally, as well as being able to encourage and support national development to improve people's welfare in accordance with the mandate of the Pancasila and the Constitution of 1945.[1]

The shipping safety and security system is thus an important factor that must be considered and as a basis and benchmarks for decision making in determining the feasibility of a voyage, both in terms of ship facilities and infrastructure such as navigation systems and the personnel involved. involved in this. The following maritime safety and security are the main policies that must be prioritized in shipping in supporting smooth sea transportation in Indonesia as an archipelagic country.[2]

Control over the sea means that the government is obliged to carry out governance in the field of law enforcement at sea, both against the threat of violations, the use of waters and the maintenance and creation of optimal shipping safety. Based on Law No.17 of 1985 for Indonesia by the UN convention, it means that Indonesia has been recognized as an archipelago by the international community.

Indonesia's geographic location, which is located between the continents of Asia and Australia and between the Indian and Pacific Oceans, has placed Indonesia in a strategic position in the economic, political, socio-cultural, and defense and security sectors. In addition, the location and marine resources also make Indonesia very important for countries from various regions. However, this strategic position is not only an opportunity, but also an obstacle for the nation. Indonesia in realizing the ideals of the nation), because besides having a beneficial impact at the same time it can threaten Indonesia's interests, it creates complex problems in the fields of security, justice, economy and national defense.

Sea transportation as one of the transportation capital is regulated in one integrated national transportation unit to realize the provision of transportation services in accordance with the needs and availability of safe, comfortable, orderly and efficient transportation services. To achieve this, the government naturally has an important role to play in supporting the smooth running of shipping, namely by enforcing the law at sea.

One of the efforts in the field of legal supervision at sea is the supervision of ships sailing in Indonesian waters. Ships that meet the seaworthy requirements that can sail in the Indonesian sea. In Article 1 number 33 Law no. 17 of 2008, shipworthiness is a condition of a ship that meets the requirements of ship safety, prevention of water pollution from ships, crew members, cargo lines, cargo, crew welfare and passenger health, legal status of ships, management of security and prevention of ship pollution, and management of security. vessels for navigation in certain waters.

The importance of a sailing approval letter is specifically regulated in Law No. 17 of 2008. Although there are regulations for sailing approval letters, it is not uncommon to find various sea transportation accidents caused by negligence in issuing shipping permits. Safety and security issues as well as shipping activities are the responsibility of the port. One of the main problems in maritime shipping accidents is the problem of a person's ability and expertise in carrying out his or her fatherly duties in issuing shipping certificates, navigation permits, shipping safety and security, as well as all marine transportation activities in Indonesian waters.

The duties and powers of the harbormaster based on the Umdang Law No. 17 of 2008, namely carrying out the functions of shipping safety and security, including implementation, supervision and law enforcement in the field of transportation in waters and ports. and protection of the maritime environment in ports.

Ship safety is the condition of a ship that meets the requirements for material, construction, building, machinery and electricity, stability, construction and auxiliary equipment and radio, ship electronics, which is proven by a certificate after inspection and testing. In accordance with the provisions of laws and regulations relating to Indonesian shipping, the port skipper has the task of carrying out safety and security functions, namely:

1) Overseeing the maritime affairs of the ship, safety, security and order at the port;
2) Overseeing orderly ship traffic in waters, ports and shipping lanes;
3) Overseeing the activity of towing ships;
4) Overseeing the orderliness of the embarkation and debarkation of passengers;
5) Supervise the loading and unloading of dangerous goods and hazardous and toxic waste.

Security and safety is the most important thing in transportation, not only in the national scope, but also in the international sphere. In this effort, the government in the maritime sector continues to improve the development of marine navigation and marine transportation. The sea is not only limited to natural resources, but also as a means of communication, meaning that the use of the sea for inter-island, land and intercontinental shipping, both for passenger and goods transportation, must be guaranteed for the security and safety of local and international

[1] Redita, W., Prakoso, L. Y., & Hipdizah, H. (2020). Implementasi Kebijakan Vessel Traffic Services Direktorat Jenderal Perhubungan Laut Di Selat Sunda Dalam Keselamatan Pelayaran Terhadap Strategi Pertahanan Laut. *Strategi Pertahanan Laut*, *6*(1).
[2] Wulan, S. E. R. (2020). Pengawasan Hukum Syahbandar Dalam Upaya Mewujudkan Keselamatan, Keamanan Dan Ketertiban Penumpang Speed Boat Di Pelabuhan Tarakan. *Journal de Facto*, *7*(1), 108-126

shipping supported by ship security facilities. such as Shipping Navigation Assistance Facilities (SBNP), ship telecommunications, national navigation vessels which are the responsibility of local governments to implement them. In addition, shipping activities with a wide sea and coastal surface area and increasingly extreme climatic conditions also tend to cause accidents, this is a problem or challenge in the field of shipping safety. All parties involved in shipping safety must anticipate and be prepared for climate change and prepare adequate facilities and infrastructure.

Maritime safety and security, including the safety and security of transportation in waters and ports, as well as protection of the maritime environment, must be carried out carefully by the relevant agencies as stakeholders,[1] in this case it is specifically regulated as the elaboration of the shipping law through the Regulation of the Minister of Manpower, Office of the Harbormaster and Port Authority.

Foreign ships that will enter Indonesian territorial waters are required to follow ship inspection procedures to continue their previous voyages. Port state control is carried out by the Harbormaster Section. The results of the above foreign vessel inspection are divided into: (a) seaworthy; (b) substandart; and (c) unsafe.[2]

The follow-up or decision from Seaworthy is to issue a clearance out permit (Permit to leave the port); In substandard circumstances, clarification is required with the ship operator; and unsafe conditions require corrective action and even prevent ships from going to sea. Ships that have been declared seaworthy can sail with their destination or to a special port provided by the government, namely a special port for ocean shipping. If a ship is declared unsafe or unsuitable for shipment, the ship must repair the ship's systems or equipment which have been declared damaged or not seaworthy to perform safety and security functions during the voyage.

According to Article 1 number 33 Law no. 17 of 2008, shipworthiness is a condition of a ship that meets the requirements of ship safety, prevention of water pollution from ships, crew members, cargo lines, loading, crew welfare and passenger health, legal status of ships, management of safety and prevention of pollution from ships, and management safety of ships to sail in certain waters. The feasibility of a ship in accordance with its operational area includes: ship safety, prevention of ship pollution, ship manning, ship loading and unloading routes, crew welfare and health of passengers, legal status of ships, security management and pollution prevention from ships, ship security management. The feasibility of the ship is proven by completing administrative and technical requirements.

Administrative requirements in the form of security certificates such as citizenship certificates, measurement documents, security certificates, shipyards, marine equipment security certificates, radio certificates and certificates held, as well as technical requirements such as supporting equipment for security devices at sea must first be fulfilled so that the ship has a seaworthy status. Maritimeity of ships is closely related to shipping safety.[3] Marine if not assisted by marine safety equipment, the risk of shipping accidents will increase. Ships that are seaworthy are proven by having a Marine Ship Certificate. The Ship Marine Feasibility Certificate issued by the port captain is based on the results of class test data from the Indonesian Classification Bureau (BKI).

The importance of the role of the harbormaster in supervising the maritime nature of the ship is reflected in the Indonesian shipping law related to ship safety. Some things that require the attention of the harbormaster in his supervision are ship material, shipbuilding, shipyard, ship engineering and electricity, ship stability, staging and equipment including auxiliary equipment and radio, and ship electronics. Users of sea transportation services using ships that are not seaworthy can cause losses to the goods being transported so that passengers and crew lose their lives.

To prevent this, the harbormaster performs checks in the form of:

a) Annual Inspection, checked every 12 months while floating on the shipyard.
b) Major examination, which is carried out every 4 years at the same time as the annual doc.
c) Inspection or repair of damage is carried out if someone is damaged which affects the perfection of the ship.
d) Additional checks, are carried out if a waiver is required, for example the transportation of passengers, transportation of dangerous cargo and others.

Seaworthy conditions must always be maintained, among others by maintaining the in-house crew, marine engine, safety equipment and other aids so that everything is in good condition and ready to use when needed. Article 207 paragraph (2) of Law No. 17 of 2008, states that the harbormaster participates in the search or rescue of sea transportation if the sea transport experiences an accident or disruption during shipping activities.[4]

The role of the harbormaster in the field of supervision is very important, this can be seen in the Indonesian

[1] Maulita, M. (2020). Prosedur Pemeriksaan Sertifikat Bahan Kimia Berbahaya Oleh Kupp Kelas I Loktuan Guna Mendapatkan Surat Persetujuan Berlayar. *Jurnal Maritim*, 10(2), 25-38.
[2] Bayuputra, T. B. (2015). Tinjauan Yuridis Mengenai Peran Syahbandar Dalam Kegiatan Pelayaran Angkutan Laut Di Indonesia. *Lex et Societatis*, *3*(3.
[3] Aguw, R. (2013). Tanggung Jawab Syahbandar Dalam Keselamatan Pelayaran Ditinjau Dari UU Pelayaran No. 17 Tahun 2008 Tentang Pelayaran. *Lex Administratum*, *1*(1).
[4] Article 1 point 56 of Law No. 17 of 2008

shipping law regarding ship safety standards, there are several things that need attention from the harbormaster in his supervision, namely:

1) Ship material
2) Ship building
3) Ship machinery and electricity
4) Stability of the ship
5) Arrangement and equipment including auxiliary equipment and radio
6) Ship electronics

The harbormaster is the government at the port appointed by the Minister and has the highest authority to implement and monitor compliance with the provisions of laws and regulations to ensure the safety and security of shipping, as well as coordination of government activities at the port. To ensure the safety of shipping in supporting the smooth movement of ships at sea, competent, capable and competent crew members are required, so that every ship that will sail must be manned with sufficient and suitable crew to carry out its duties. board a ship based on its position by taking into account the size of the ship, ship arrangement and shipping area.

Article 1 point 33 of Law No. 17 of 2008 states that shipworthiness is the condition of the ship that meets the requirements of ship safety, prevention of water pollution from ships, manning, loading lines, cargo, crew welfare and passenger health, legal status of ships, safety management and prevention of pollution from ships, and management safety of ships to sail in certain waters.

Sea transportation is a mode that plays an important role in the Indonesian transportation system.[1] Sea transportation plays a role as a means of realizing an understanding of the archipelago, especially in the context of advancing the unity of the national economy which is considered an inseparable part of the national transportation system. This is because sea transportation is used as a transportation service, both local (Interrinsulair) and overseas (Ocean Going).[2] In addition, sea transportation is considered to have high economic value because it is more effective and efficient than transportation by air. This is because ships have a larger and cheaper transport capacity.

In order for the activities referred to above to be carried out properly, it is necessary to have a good supervisory role for passengers. This is of course a concern for the harbormaster, considering that they are the authorities at the port who must play an active role in maximizing their authority, especially in monitoring activities of passengers at the port. However, the reality found in the field is that there are still people who do not fully feel comfortable when they want to travel by boat. The reason that is often cited by passengers is because of the inaccuracy of the supervision activities carried out by the harbormaster officer.

The enactment of Law No. 17 of 2008 has undergone many improvements that have led to an increase in the portability function. The issue of safety, security and order in shipping is the main responsibility, because one of the problems with the number of victims of sea transportation users is the lack of competence and understanding of a person in carrying out his harbormaster duties. Therefore, anyone who carries out the task of patience must fully understand every task that must be carried out.

According to Law No. 17 of 2008 Article 207 paragraph (1), states that the harbormaster carries out the safety and security functions of shipping which include implementation, supervision and law enforcement in the field of transportation in waters, ports, and protection of the maritime environment at ports.

In order to support the achievement of national development goals, shipping is a very decisive element in the smooth running of sea transportation, as regulated in Law No. 17 of 2008. Incompatibility in handling sea transportation systems and problems, as well as an imbalance of attention to shipping safety issues, can hamper the provision of transportation services throughout Indonesia.

4. Conclusion

The implementation of the safety and security function of shipping by the harbormaster is carried out in accordance with international law and national law in shipping. Optimizing the harbormaster in carrying out the safety and security functions of shipping as well as carrying out supervision of the ship's maritime affairs will realize the achievement of safety, security and order in shipping activities.

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Legal Principle of Authentication Power of Authentic Deed Becomes Private Deed Due to Age Limit for Notary Appearers

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Abstract
Besides having to obey the Law on Notary Position and the Code of Ethics, a Notary must pay attention to certain principles, one of which is the Precautionary Principle. This Principle is an important factor in knowing the appearers attending the Notary Office. To avoid mistakes and errors in making the deeds, the Notary must be able to acknowledge the appearers. In addition, the Notary should read the deed in front of the parties, so that the parties signing and witnessing the birth of the deed are fully aware of every point stated by the deed and its legal consequences. Furthermore, other significant matter that the notary must also pay attention to is the age of the attending parties. Article 39 paragraph (1) of the Act on Office of Notary Public states that a person who appears before the Notary to make a deed should meet the requirements of the minimum age 18 (eighteen) years or married. (2) The appearers must be recognized by the Notary or introduced to him by 2 (two) knowing witnesses attaining the minimum age of 18 (eighteen) years or married, and is capable of taking legal actions or is introduced by other 2 (two) appearers. Article 40 states: Every deed read out by a notary is attended by at least 2 (two) witnesses, unless the statutory regulations stipulate otherwise. Witnesses as referred to in paragraph (1) shall meet the following requirements: a. attaining the minimum age of 18 (eighteen) years or married; b. being capable of doing legal actions; c. understanding the language used in the deed; d. being able to affix signature and initials; and e. mot having marriage relations in upper or lower straight line without any degree limitation and until the third degree with the Notary Public or parties.Referring to Article 39 of the Act on Office of Notary Public regarding the minimum age of appearers, philosophically is also related to the legal age limit. In fact, several laws and regulations in Indonesia show the differences between one another in determining the adult age limit. The Civil Code considers that adults boundary is at the age of 21 (twenty one) years, Article 47 paragraph (1) of the Law on Marriage states 18 (eighteen) years, and Act on Office of Notary Public is at least 18 (eighteen) years old. It certainly affects the legal certainty of the adult age limit. If the appearer is still under 18 (eighteen) years of age, then the deed that will be made by the notary will become underhanded deed, while the position of the deed is weak and does not have legal certainty.
Keywords: Age limit, authentic deed, legal certainty, notary public, private deed
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1. INTRODUCTION

Based on the 1945 Constitution of the Republic of Indonesia Article 1 paragraph (3) Indonesia is a constitutional state *(rechstaat)*. This provision implies that, first, Indonesia is a State of law *(Rechsstaat),* which is not merely based on power *(Machstaat)*; second, the government is based on a constitutional system (basic law), or is not absolutism (unlimited power). It means that the dynamics of law in Indonesia shall refer to legal ideals oriented towards the aspects of certainty, expediency and justice.[1] This ideals include the regulations that underlie the duties of a notary as a public official.[2] Notary is a social institution known as a "notariat", arising from the needs of the community who require evidence regarding the existing civil law relationships among them. Notaries are assigned by the general power (openbaar gezag) to make written evidence having an authentic power, where the law requires and the community wants.[3] Thus, the position of notary is born due to the needs of the community.

The word "notary" derives from the word *"nota literaria"* which means a written sign or character used to write or describe sentences conveyed by a resource person. The sign or character in a sign used in shorthand *(stenographie)*. This notary who became a royal writer had a position as a palace employee, which is not in accordance with the position of a notary today. Notaries also exist in the papal powers called *"tabellio"* and

[1] Marwan Effendy *Kejaksaan Republik Indonesia, Posisi dan Fungsinya dari Perspektif Hukum*,(Jakarta: PT. Gramedia Pustaka Utama, 2005), p. 151
[2] Penggunaan kata "pejabat umum" mengacu pada buku Habib Adjie, *Hukum Notaris Indonesia, (Bandung : Refika Aditama, 2008),*p16
[3] G.H.S. Lumban Tobing, *Peraturan Jabatan Notaris*, Erlangga, Jakarta, 1982, p. 2.

"clericus notarius publics" which provide assistance on civil law relations.[1] At the beginning of the birth of the notary office, it was clear that the nature of being a public official (private notary) was assigned by the general power to serve the needs of the community for authentic evidence that provides certainty of civil law relations. Thus, as long as authentic evidence is still required by the country's legal system, the existence of the notary is still needed by the community.[2] Notary is a public official who has the duty and obligation to provide legal services and consultations to the public. Legal assistance that can be provided by a notary is in the form of making written evidence that has authentic power, namely in the form of authentic deeds or other authorities as referred to in the law.[3]

Notaries shall provide legal advice in accordance with the existing problems. Any legal advice given by the notary public to the parties and put it into the deed, it remains as the wishes or statements of the parties concerned, and it is not a statement of the notary.[4] Article 16 of the Act Number 2 of 2014 on the Position of Notary paragraph (1) letter (a) in carrying out his position, notaries are obliged to act trustworthy, honestly, thoroughly, independently, not taking sides and protecting the interests of the parties involved in legal actions. The meaning of "thorough" in this article can be interpreted as being careful in carrying out the task as well as in getting to know the appearers. In carrying out a legal action, a notary shall always act carefully by examining all relevant facts in his consideration based on the prevailing laws and regulations. Checking all the completeness and validity of evidence or documents shown to the notary and hearing the statements of the parties shall be done as a basis for consideration to be stated in the deed.[5] In performing the duties, a Notary must be professional, namely prioritizing the expertise based on code of ethics and the provisions of the applicable laws and regulations, having trustworthy performance, upholding the applicable legal rules, performing and producing accurate results. Furthermore, notaries shall be able to provide appropriate and good legal counseling for the parties.

The aspects of a notary's authority cannot be applied beyond what has been determined in the applicable regulations. It means the notary shall not take advantage of his authority for other purposes other than those specified in the applicable regulations or to use the authority that exceeds its limit. A notary deed must provide certainty that the events and facts mentioned in the deed were actually carried out by the notary or explained by the appearers in accordance with the procedures stipulated in the deed drafting. Formally, to prove the truth and certainty of the day, date, month, year, and hour (time), the appearers, initials and signatures of the parties/ appearers, witnesses and notaries, as well as proving what was seen, witnessed, heard by a Notary (on the official deed/minutes), and recording information or statements of the parties/ appearers (on the deed of parties).[6]

In addition to having to obey the Law on Notary Public and the Code of Ethics, a Notary must pay attention to certain principles, one of which is the Precautionary Principle. This Principle is an important factor in knowing the appearers attending the Notary Office. To avoid mistakes and errors in making the deeds, the Notary must be able to acknowledge the appearers. In addition, the Notary should read the deed in front of the parties, so that the parties signing and witnessing the birth of the deed are fully aware of every point stated by the deed and its legal consequences.[7] Furthermore, other significant matter that the notary must also pay attention to is the age of the attending parties. Article 39 paragraph (1) of the Act on Office of Notary Public states that a person who appears before the Notary to make a deed should meet the requirements of the minimum age 18 (eighteen) years or married. (2) The appearers must be recognized by the Notary or introduced to him by 2 (two) knowing witnesses attaining the minimum age of 18 (eighteen) years or married, and is capable of taking legal actions or is introduced by other 2 (two) appearers. Article 40 states: Every deed read out by a notary is attended by at least 2 (two) witnesses, unless the statutory regulations stipulate otherwise. Witnesses as referred to in paragraph (1) shall meet the following requirements: a. attaining the minimum age of 18 (eighteen) years or married; b. being capable of doing legal actions; c. understanding the language used in the deed; d. being able to affix signature and initials; and e. mot having marriage relations in upper or lower straight line without any degree limitation and until the third degree with the Notary Public or parties.[8]

In regards to Article 39 of the Act on Office of Notary Public regarding the minimum age of appearers, philosophically is also related to the legal age limit. In fact, several laws and regulations in Indonesia show the differences between one another in determining the adult age limit. The Civil Code considers that adults boundary is at the age of 21 (twenty one) years, Article 47 paragraph (1) of the Law on Marriage states 18 (eighteen) years, and Act on Office of Notary Public is at least 18 (eighteen) years old. It certainly affects the legal certainty of the

[1] *Ibid*., p. 41.
[2] *Ibid*., p. 42.
[3] Komar Andasasmita, *Notaris Selayang Pandang,* Cet.2, Alumni, Bandung, 1983, p. 261
[4] Habib Adjie, *Hukum Notaris Indonesia (Tafsir Tematik Terhadap UU No. 30 Tahun 2004 Tentang Jabatan Notaris)*, Cet. Pertama, Refika Aditama, Bandung, 2009, p. 24.
[5] M. Luthfan Hadi Darus, *Hukum Notariat dan Tanggung Jawab Jabatan Notaris*, (cetakan pertama, UII Press, 2017, Yogyakarta), pp. 38-39
[6] Habib Adjie, *Kebatalan Dan Pembatalan Akta Notaris,* (Surabaya : 2010, refika Aditama), p.19.
[7] Freddy Haris & Leny Helena, *Notaris Indonesia*, (Jakarta : Lintas Cetak Publishig, 2017), hal.77
[8] http://www.pa-blitar.go.id/informasi-pengadilan/160-untuk-kepentingan-apa-batasanusia- dewasa-itu.html Diakses pada tanggal 9 januari 2020

adult age limit. If the appearer is still under 18 (eighteen) years of age, then the deed that will be made by the notary will become underhanded deed, while the position of the deed is weak and does not have legal certainty. Based on the description of the age limit of appearers as above mentioned, the legal issues entitle **"Legal Principle of Authentication Power of Authentic Deed Becomes Private Deed Due to Age Limit for Notary Appearers"** is interesting to conduct. The title is a representation of the research problems, namely: *What is the ratio legis for setting the age limit for notary appearers? What is the legal principle that underlies the gradation of authentication power of authentic deeds to private deeds due the inability to meet the age limit for notary appearers?*

2. RESEARCH METHODS

The normative juridical method is applied in this research, meaning that it emphasizes on the normative legal science; in obtaining legal materials, this study adheres to the legal aspects contained in the law and decisions concerning marriage agreements and in relation to legal protection of creditors. The problem approaches used are: statutory approach, conceptual approach, and historical approach.

3. RESULTS AND DISCUSSION

3.1 The *Reatio Legis* of Age Limit Regulations for Notary Appearers

There are various provisions regarding the adult age limit in Indonesian legal regulations, which causes confusion in determining the exact age a person can be said to be mature and capable of taking legal actions. One of the legal actions requiring a person to attain the legal age limit is an application for land registration. A person who has reached a certain age or adult limit is declared competent to appear before a notary public. Regulatory pluralisms regarding legal age based on statutory regulations in Indonesia are as follows:

1. The Civil Code

According to the Civil Code, the competency element stipulated in Article 1320 of the Civil Code requires that parties as legal subjects who will make an agreement shall comply with the competency criteria according to the law, namely being mature and having the ability to carry out legal actions themselves, which means that these parties shall be able to mutually support their own rights and obligations. In Article 330 of the Civil Code, it is stated that:

> *"Immature means those who have not reached the age of twenty-one years, and have not entered into matrimony. If the marriage is dissolved before they are twenty-one years old, then they shall not regain the status as a minor. Minors, who are under parental authority shall be under guardianship, pursuant to and in the manner described in the 3 (third), 4 (fourth), 5 (fifth) and 6 (sixth) section of this chapter."*

Based on Article 330 of the Civil Code, people who are capable of committing legal actions are those who are 21 years old or married before the age of 21. This provision is based on quantitative and qualitative measures. This quantitative measure is based on the age or time span in which they live their lives, while the qualitative measure is determined by a person's marital status or whether a person is married or not. Thus, if a person is married before the age of 21 (twenty-one) years, he is considered an adult.

2. The 2014 Law No. 2 on Notary Public

The age limit to take legal actions or to sign an authentic deed is clearly regulated in this law, especially for appearers and a witness, which is contained in Article 39 of Law on Notary Public. It is stated that:

(1) The appearers shall meet the following requirements:
   a. attaining 18 (eighteen) years of age or married; and
   b. capable of doing legal actions
(2) The appearers must be recognized by the Notary or introduced to him by 2 (two) knowing witnesses attaining the minimum age of 18 (eighteen) years or married, and is capable of taking legal actions or is introduced by other 2 (two) appearers.
(3) The introduction as referred to in paragraph (2) is expressly stated in this deed. In this article, it has been explicitly explained that the minimum age for a person capable of taking legal actions to appear before a notary is 18 (eighteen) years. In addition, it also explains the minimum age limit for a person to be a witness. The law also requires a witness to be competent in carrying out legal actions. Thus, it is clear that the ability to determine the validity of an agreement is important.

3. The 1974 Law No.1 on Marriage

Article 47 paragraph (1) of the Marriage Law (hereinafter abbreviated to UUP) states: "children who have not attained the age of 18 years or have never been married are under the authority of their parents as long as their powers (parents) are not removed". According to the Marriage Law, a person is declared eligible for marriage when they reach the age of 18 years or more. A person who has not reached the age of 18 is still under the control of his parents. The ability of a person to perform legal acts is determined by whether or not the person is considered legally mature. The maturity of a person is a benchmark in determining whether or not a person is considered capable of committing a legal act. The maturity of a person refers to a condition that a person has been legally matured to be able to perform a legal action which is determined by age restrictions. Thus, legal maturity is a

requirement to consider someone is capable to carry out all legal actions. An adult condition that meets the requirements of this law is called "maturity". An adult is capable of performing all legal acts, for example making agreements, entering into matrimony, and making wills.[1]

Article 6 paragraph (2) of the Marriage Law states that to enter into matrimony, a person who has not attained the age of 21 (twenty one) years must obtain the permission from both parents. Furthermore, the Law stipulates the permissibility for marriage, as stipulated in Article 7 paragraph (1) and paragraph (2), which states as follows: Article 7 (1) Marriage is permitted when the male attains the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years. (2) In the case of irregularities in paragraph (1) in this article, dispensation may be requested from the court or other official requested by both the male or female parents. The law stipulates the minimum age limit for a person to have a marriage. It is explicitly stated in Article 7 paragraph (1) of the Marriage Law that the conditions for a marriage for the man are 19 years old and the women 16 years old.

The Marriage Law states different provisions regarding capability to perform legal acts. For example: Article 6 paragraph (2) of the Marriage Law also determines another person's ability to enter into matrimony. The provisions of Article 6 paragraph (2) of the Marriage Law is not explicit so that it does not provide legal certainty regarding the provisions on the age of a person to get married, these provisions can be interpreted as follows: 1) To get married, if the has reached the age of 21 (twenty one) years, he/she can enter into a matrimony without first obtaining permission from both parents; 2) Marriage can be carried out by someone, if the man has reached the age of at least 19 (nineteen) years and a woman has attained the age of at least 16 (sixteen) years.

4. The Law on General Election

Article 1 no.34 of the Law No.07 of 2017 (hereinafter written the Election Law) states: Indonesian citizen voters who are 17 (seventeen) years of age or older, is married, or have been married.[2] Likewise for the election of the Regional Representative Council (hereinafter referred to as DPD), according to this law, the participants are individuals who have met the requirements, including: a. Indonesian citizens who have reached the age of 21 (twenty one) years or more; b. Fear God Almighty; c. Residing in the territory of the Republic of Indonesia; d. Able to speak, read, and/or write in Indonesian; e. Have at least high school diploma or its equivalent (*madrasah aliyah*, vocational high school, vocational *madrasah aliyah*, or other diploma of equal strata); f. faithful to Pancasila, the 1945 Constitution of the Republic of Indonesia, the Unitary State of the Republic of Indonesia, and Bhineka Tunggal Ika; g. have never been sentenced to imprisonment by a verdict of a court with a fixed legal power due to committing a criminal act punished by imprisonment of 5 (five) years or more, unless the individual openly and honestly declares to the public that the person has served as former convict; h. physically and mentally healthy and free from narcotics abuse; i. registered as voters; and J. willing to work full-time. It can be concluded that the age limit to participate in the election is 17 years or more, married, or have been married, therefore the age limit is only for the benefit of participating in the election. Meanwhile, to be nominated as a DPD member at least 21 years of age, it means that the goal is only to become a candidate for DPD member. A legal rule is promulgated based on certain purposes, therefore, it is important to not justify a statement regulating age limit legal rules are mutually diverse and contradicting.

5. The Law No.23 of 2002 on Child protection

The Article 1 paragraph (1) stated that a child is a person in the case of a naughty child has reached the age of 8 (eight) years but has not reached the age of 18 (eighteen) years and has never been married. Therefore, from the provisions of Article 1 Number 1, it only states that those who have the right to protection from the Child Protection Law are someone who have not attained the age of 18 years, thus the rules regarding the adult age limit in the Law are children who are the aim of child protection, however if he is over 18 years of age, he is treated as an adult, especially when it comes to criminal law.

6. The Law No.39 of 1999 concerning Human Rights

The Article 1 point 5 stated: Article 1 paragraph (5) that: A child is every human being who is under 18 (eighteen) years of age and has not been married, including children who are still in the womb if it is for their interests.

7. Law No. 13 of 2003 Concerning Manpower

Article 1 point 26 that: A child is every person who is under 18 (eighteen) years of age. This provision states that the requirements for people who can be employed as workers are those aged 18 years or over. So that if there are companies that use the services of workers who are less than 18 years old, they will be subject to sanctions.

8. The Law No. 12 of 2006 on Citizenship of the Republic of Indonesia

This law regulates requirements and ways to obtain citizenship of the Republic of Indonesia. A person shall be previously considered capable of performing legal acts. Article 9 point a stated that: request for naturalization may be forwarded by the applicant upon meeting the following requirements: a. aged 8 (eighteen) or married; in addition to the provision of Article 9 stating that the age of 18 years as the age limits of legal capability, other

[1] Abdulkadir Muhammad. 2010. *Hukum Perdata Indonesia*. Bandung : PT Citra Aditya Bakti.p. 40
[2] Article 1 no.34 of the Law No.07 of 2017 on General Election

articles of the same Law are cohesively mentioned the age of 18 years as the legal capability limit. Thus, the objective and interest of adult age limits for labors is those who have attained the age of 18 years.

9. Compilations of Islamic Law

Article 98 paragraph (1) of the Compilation of Islamic Law explains the age limit for a person, namely: "The age limit for a child's maturity is 21 years, as long as the child is not physically or mentally disabled or has never been married." The above provisions means an adult is someone who has attained the age of 21 years or married, is not disabled or crazy, and can be responsible for him.

10. The Law No. 21 of 2007 on Elimination of Human Trafficking Crimes

The Law No.21/2007 explains the age limit for being underage. It is stated in Article 1 point 5 as follows: Article 16. A Child is a person under the age of 18 (eighteen) years old, including an unborn baby.

11. The Decree of the Minister of Home Affairs, Directorate General of Agrarian Affairs, Directtorate of Land Registration Number Dpt.7/539/7-77, That a person is called an adult in terms of:
    1. Political maturity, the minimum age limit is 17 years to be able to participate in the Election;
    2. Sexual maturity, the minimum age limit is 16 years for women and 19 years for men to be able to get married according to the Marriage Law;
    3. Legal maturity is a certain age limit according to the law which can be considered capable of performing legal acts.

Based on several provisions in the aforementioned statutory regulations, there is still no uniformity regarding a person's adult age, some impose a limit of 21 (twenty one) years, some 18 (eighteen) years, and some even 17 (seventeen) years. .

12. The Supreme Court

The efforts to uniform the adult age limit, the Supreme Court have anticipated by:

4. Issuing Circular Number 7 of 2012 concerning the Legal Formulation of the Results of the Supreme Court Plenary Meeting as Guidelines for the Implementation of Tasks for the Court. The Supreme Court Circular has already explained the provisions regarding the limits of a person's maturity. It was stated in the results of the Civil Chamber Meeting on March 14-16, 2012, that mature means capable of performing legal acts, namely people who have attained the age of 18 years or have been married. A person's maturity is also stated in the results of the Criminal Chamber Meeting of the Supreme Court of the Republic of Indonesia. It is stated in the results of the Criminal Chamber Meeting for Special Crimes, that the limit of a person's maturity depends on the case.

13. The Circular Letter of Minister of Agrarian and National Land Agencies Number 4/SE/I/2015 on the Perimeter of Adult Age in Acquiring Land Service

In the provision number 7, it states that the age of maturity for taking legal actions in the framework of land services is at least 18 years old or married. The National Land Agency as the provider of land services considers 175 different provisions regarding the adult age limit that the age limit to obtain services in the land sector in each region. In order to avoid confusion and to become one legal entity, the Head of the National Land Agency issues this Circular. Thus, it is expected that there will be no rejection of the application for land registration even though the applicant is under the age of 21 years old, because it has been specifically regulated in the Circular Letter Number 4/SE/I/2015.

Referring to its legal provisions, there found some conflicts among the applicable laws in Indonesia. In legal matters of the age limit for adults and the ability to carry out legal actions in a legal system, the legal principles to answer those problems are:

a. *Lex specialis derogate legi generali*s where special provisions override general provisions.
b. *Lex pestiriori derogate legi priori* where the new law overrides the old law.

In several legal provisions regarding age limits to perform legal acts, the Civil Code stipulates that in general the adult age limit is 21 (twenty one) years, but for special acts it violates the provisions of the adult age limit of 21 (twenty one) years. For, it applies the principle of the special provisions overriding the general provisions *(Lex specialist derogate legi generalis)*. Such as the legal act of entering into matrimony, the general provisions on the age limit for adults can be deviated because of committing a legal act of committing marriage. Meanwhile, the Civil Code and Law No. 2 of 2014 concerning the Position of Notary Public have different provisions in relation to the age limit for the ability to take legal actions. Toward this difference, the principle of the new law overrides the old law *(Lex Posteriori derogate legi priori)* is applied.

3.2. Legal Principle Underlying the Gradation of Authentication Power of Authentic Deeds to Private Deeds Due to the Inability to Meet the Age Limit for Notary Appearers

The precautionary principle states that in performing the function and position, a notary is obliged to apply the principle of precautionary in order to protect the interests of the community entrusted to him. The purpose of applying the precautionary principle is in order that the notaries are always in the correct signs. With the application of the precautionary principle, it is expected that public trust is maintained in other that people are willing to use

notary services. Any action must be taken and arranged under careful consideration. Criminal law problems in notarial practice are caused by the lack of the notary in making authentic deeds towards the data of the parties related to the subject or object brought by the parties to make an authentic deed, which causes frequent crimes such as false documents or false information committed by the parties in authentic deed made by a notary.

To perform their duties and positions, notaries shall implement the principle of precautionary in the process of making authentic deeds in regards to legal problems on authentic deeds made by notaries because there are parties committing crimes such as providing false letters and false information into the deeds made by Notary Public. In order to prevent crimes that could bring notaries into legal issues, it is necessary to re-stipulate the Law on Notary Position regarding notary guidelines and guidance to act more carefully, thoroughly and carefully in the process of making authentic deeds. Basically, a private power of attorney even though it is done with the consent of both parties does have a legal basis in accordance with the principle of freedom of contract which is known in article 1334 of the Civil Code. But from the perspective of authenticity one deed has a weakness because the private power of attorney only applies to both parties.[1] However, in connection with the existence of a deed as a means of authentication, the position of the private power of attorney is very weak and has no legal certainty. In principle, a deed is a letter as a sign of evidence, which contains the events that constitute the basis for a right or engagement, which was made from the beginning on purpose for evidence or authentication.[2] Thus, to be classified in the definition of a deed, the letter must be signed. Traditional signature functions as identification and statement of will.

Article 1 paragraph 1 of the Law on Notary Public Position states that a notary is a public official who has the authority to make authentic deeds and other powers as referred to in this law. An authentic deed, according to article 1868 of the Civil Code is: an authentic deed is a writing which in its form is determined by law, made by or in front of a public official having the authority for that purpose where the deed was drawn up. In the contrary to authentic deeds, under-hand writing which is freely made, as stated in Article 1874 of the Civil Code that is considered as deeds signed under hand, letters, lists, household affairs documents and other writings made without the intermediary of a public official.

The mistakes made by notaries in performing their duties cannot be separated from the existing sanctions. It can be in the form of criminal sanctions or civil sanctions. Civil applies to deeds made by a notary that lose their character as a notary deed; the deed loses its authenticity. Basically, a power of attorney under hand' private power of attorney, though it is made with the consent of both parties, does have a legal basis in accordance with the principle of freedom of contract which is known in article 1334 of the Civil Code. But from the perspective of authenticity one deed has a weakness because the private power of attorney only applies to both parties. However, if a lawsuit or intervention made by other parties, then the power under the hand will be a problem. Regarding the private power of attorney as a private deed which acts as evidence, if it is only under the handed deed, means it has a weakness for the authentication process. However, in relation to the existence of a deed as a means of evidence, the position of the private power of attorney is very weak and has no legal certainty. In principle, a deed is a letter as a sign of evidence, which contains the events that constitute the basis for a right or engagement, which was made from the beginning on purpose for authentication. To be classified as a deed, the letter must be signed. The requirement to sign a letter to become a deed stipulated in the Article 1869 the Civil Code, thus train tickets, receipts, etc., are not considered as deeds.[3]

Article 1869 of the Civil Code states that a deed that cannot be treated as an authentic deed, either due to the lack of authority or incompetence of the public official concerned, or because of a defect in its form, has the power to be under-hand writing/ private writing if it is signed by the parties.[4] Therefore, only giving a cross is not a signature because the individualization character does not exist.[5] The function of traditional signatures is identification and statement of will. Article 1874 of the Civil Code states that A private writings are deeds signed under hand/privately, letters, lists, household affairs letters and other writings that are made without the intermediary of a public official. With the signing of an underhand writing, the thumbprint is affixed with a statement dated from a notary public or other official appointed by law stating that the thumbprint is known to him or has been introduced to him, that the deed has been explained to that person, and that after that the thumbprint has been affixed in the writing before the official concerned, this officer shall prove the writing. By law, further regulations can be made regarding these statements and bookkeeping. Article 1874 point a. If the interested party wants, other than the matters referred to in the second paragraph of the previous article, the signed private writings may also be given a statement from a notary public or other official appointed by law, stating that the signer is known by him, or introduced to him, that the contents of the deed have been explained to the signatory, and that the signing is carried out before the official. In this case, the provisions of the third and fourth paragraphs of the

[1] Soerjono Soekanto & Sri Mamudji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, (Jakarta : Rajawali Pers, 2001), hlm. 13
[2] Herlien Budiono, 2007, *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan,* (Bandung :PT. Citra Aditya Bakti, 2007), hlm.102.
[3] Soerjono Soekanto & Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, (Jakarta : Rajawali Pers, 2001), p. 206
[4] Herlien Budiono, *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan*, (Bandung : PT. Citra Aditya Bakti, 2007), p.220.
[5] *ibid.*

previous article apply.

Private deeds are deliberately made for authentication by the parties without assistance from officials. So it is solely made by the parties concerned. The private deed is not regulated in HIR, but the S 1867 no. 29 regulated the provision for Java and Madura, while those outside Java and Madura are regulated in Articles 286 to 305 Rbg. Included the meaning of the private letter, according to article 1 S 1867 no. 29 (Article 1874 of the Civil Code, 286 Rbg) are deeds under hand, registers, and records regarding household and other documents made without the assistance of an official.[1] Article 1875 of the Civil Code: An under-hand writing which is recognized by the person before him or legally deemed to have been justified by him, creates complete evidence such as an authentic deed for those who sign it. To carry out a legal action requires a statement of the will from the person doing it, namely a statement *(verklaring)* in accordance with his will. An agreement occurs when an agreement is reached between the parties from a statement of the will of the parties concerned. Thus, it can be concluded that in principle, the form of a statement of will, both as an offer *(aanbod)* and acceptance *(aanvaarding)* is free and can be done in various ways, both verbal and written, that can be understood and accepted by the public.[2] Article 1867 of the Indonesian Criminal Code states that written evidence is carried out in authentic writing or by handwriting. Theoretically, an authentic deed is a letter or deed which from the beginning was deliberately made for authentication evidence. From the beginning, this deed is made as authentication deed. The private deed for the Judge is "Free Evidence" *(VRUBewijs)* because it only has the strength of material evidence after its formal strength has been proven, while the formal authentication power will only occur, if the parties concerned have known the truth of the content and method of making the deed. Thus, private deed is different from authentic deed, because if a private deed is declared fake, then those who use the underhand deed as evidence shall prove that the deed is not is valid.

Based on the above description, authentic deeds and private deeds have the evidentiary value of a deed which includes:

1. External Authentication Power

The power of external evidence means that the deed itself has the ability to prove itself to be an authentic deed; considering that since the beginning, since there was an intention from interested parties to produce evidence, it has gone through a process according to and fulfilling the provisions of Article 1868 of the Jungcto Civil Code Law Number 2 of 2014 concerning The position of Notary (or previously staablad 1860 Number 3 Reglement of Notary ambt in Indonesia), this power of evidence does not exist in the private deed/letter (Vide Article 1875 of the Civil Code).

2. Formal Authentication Power

The strength of formal evidence means the authentic deed proves what is stated in the deed is a description of the will of the parties, the will is described by or before the competent official in carrying out their duties, in the formal sense, an authentic deed guarantees the truth of:

- Date
- Signature
- Comparantes and
- Where the deed was made

The notary deed also proves the truth of what is witnessed, namely what the notary has seen, heard and experienced himself as a public official in carrying out his position, and private deed has no formal power, unless the signer of the letter/deed acknowledges the correctness of the signature.

3. Material Authentication Power

The strength of material evidence means that the deed has proven the truth of the evidence legally to everyone, who makes or orders the deed as a proof for himself or known as *"Preuve Preconstituee"* meaning that the deed has the material authentication power. This power of evidence in mentioned Articles 1870, 1871 and 1875 of the Civil Code. Therefore, the authentic deeds act as perfect evidence and bind the parties who made the deed. Thus, anyone who denies the validity of an authentic deed as evidence shall prove the reverse fact.

4. CONCLUSION

The conclusions have been drawing up in relation to the above descriptions of the research, as follows:

1. The *Ratio Legis* in determining the age limit for notary's appearers is an adult principle based on the law, namely the age limit which is considered capable of acting and being responsible for any legal actions. According to a psychological point of view, being adult means that each individual is able to control their emotions, while intellectually it is considered to have been able to quickly and accurately understand a situation and condition that has been faced. The Law on Notary Position states that the age of maturity is 18 (eighteen) years old or is married. At the age of 18 (eighteen) years, a person is considered competent to act so that he is

[1] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta : Universitas Atma Jaya Yogyajakarta, 2010), p. 218.
[2] *Ibid*., pp. 215-216.

able to be consciously and psychologically responsible for a legal act committed in front of a notary public.

2. The legal principle used in the gradation of the power of evidence of authentic deed to private deed due to the inability to meet the age limit for notary's appearers is the principle of legal certainty on the age limit for notary's appearers. Article 41 of the Law on the Position of Notary which refers to Article 39 clearly states that a violation of Article 41 degrades the deed to only have the power of evidence as a private deed. Notary deed is evidence that has perfect proving power, if all formal and material procedures have been fulfilled. If one of the procedures is missed, then in the process of evidence by the court, the deed is declared imperfect and the power of evidence is degraded into a private deed.

5. SUGGESTIONS

Based on the above analysis, the authors provide the following suggestions:

1. The notary shall be more careful and serious to perform their responsibilities in legalizing private deeds because it is possible that, applicants may not have good intentions, so that if they are negligent in legalizing the deed, it will cause serious legal problems that harm the parties involved.
2. The parties who use the services of a notary public may contribute to assisting the notary in expressing the truth based on good faith and honesty, so that the deed is perfect and in accordance with applicable legal rules, so as not to harm any party.

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_____, *Kebatalan Dan Pembatalan Akta Notaris,* (Surabaya : 2010, refika Aditama)

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The Montreal Declaration on Free Access to Law (MDFAL) of 2002: A Weak Reed for Global Realization of the Right to Access Legal Information

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Abstract
The beginning of 2000 witnessed emergence of global campaigns for realization of the right to access legal information. The campaigns were initiated by activists of the Free Access to Law Movements (FALM). In order to make the campaigns more formal the FALM drafted the Montreal Declaration on Free Access to Law (MDFAL) of 2002. Although the principles of the MDFAL of 2002 are good it suffers from a sort of 'birth defect' problems, one of which being the fact that the MDFAL of 2002 is not in the realm of international law. One can only assume that if the MDFAL of 2002 was in the realm of international law, realization of its principles would be more realistic than it is now. The aim of this article is to provide a critique of the MDFAL of 2002 which makes realization of the right to access legal information illusive.
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1.0 Introduction

Legal information is on the march as the countries now have constitutional provisions on the right to access information, the Right to Information (RTI) laws and the Legal Information Institutes (LIIs). The LIIs and the RTI give the right to access legal information a legal status which is to be enforceable. Again the Free Access to Law Movement (FALM) and the LIIs has ruled that access to legal information is important.[1] The LIIs around the world are taking up the challenge of opening up to the public and the recognition that enlightenment ideas of a public right to access public legal information is a *sine qua non* of 21st century administration of justice. Movements for realization of the right to access legal information reached a crescendo after the drafting and accepting by the LIIs of the Montreal Declaration on Free Access to Law (MDFAL) of 2002. The MDFAL of 2002 is predicated on the principles of promoting online publication of all public legal information available in a country for easy access by the public. To date the MDFAL of 2002 has 73 LIIs as participating non-governmental institutions actively involved in campaigns for access to legal information. There is a vibrant world, regional and national LIIs promoting online publication of legal information for public to access legal information.

Yet, in spite of all this progress, access to legal information in most of the countries has faced legal challenges on its enforcement. This means despite the centrality of the MDFAL of 2002 the right to access legal information faces claims of irrelevance and dictions of demise. This is caused by inter alia, lack of specific law covering specifically the right to access legal information at international level, regional level and in most of the countries, save for the United States of America (USA). This article has found out that the USA has specific law on the right to access legal information, which is the Uniform Electronic Legal Materials Act (UELMA) of 2011. The UELMA of 2011 has significant provision which essentially cover most of the principles of the MDFAL of 2002.[2] The UELMA of 2011 is therefore one of the best example of legislation on the right to access legal information at national level.

Absence of international, regional and national laws which specifically cover enforcement of the right to access legal information no wonder creates difficult in enforcement of the right. This is because realization of the right to access legal information depends on mercy of the Government to take purposive measure to ensure that the right to access legal information becomes a reality.

At international level realization of the right to access legal information is hindered by the fact that the MDFAL of 2002 is not binding as it is not recognized in the international law realm. At national level only the USA has specific law for the access to legal information which is the UELMA of 2011. In the rest of the countries in the world, enforcement of the right to access legal information is through normal RTI laws of the respective country. This makes enforcement of the principles of the MDFAL of 2002 illusive.

The aim of this article therefore is to provide a critique of the MDFAL of 2002 as a global document in

[1] Greenleaf, G, (2010), The Global Development of Free Access to Legal Information in Paliwala, A, (Ed), A History of Legal Informatics, LEFIS Series, University of Zaragoza Press, p 51
[2] Section 8(1) of the UELMA of 2011

struggles for realization of the right to access legal information. After the critique this article argues that it is difficult to reach any definitive global conclusion given the role of the MDFAL of 2002 in realization of the right to access legal information.

1.1 Methodology

This article is a result of doctrinal legal research. This means in collection of materials for this article the author used doctrinal research methodology, which involved primary and secondary data collection. In primary data collection the author read various legal instruments on the right to access information in general and the right to access legal information in particular. Since the article is pure doctrinal the author therefore made use of various legal instruments in legal information and the right to access information. In this regard the Universal Declaration on Human Rights (UDHR) of 1948, the International Covenant on Peoples' Rights (ICCPR) of 1966, the MDFAL of 2002, UELMA of 2011, the Nigerian Freedom of Information Act (NFIA) of 2011, the Right to Information Act (RIA) of 2009, the Promotion of Access to Information Act (PAIA) of 2000 and the Access to Information Act (AIA) of 2016 were examined to get legal position of the right to access legal information. As a secondary data method the author read various text books, monographs, articles, seminar papers and other relevant writings on the right to access information generally and the right to access legal information in particular for background information on the right to information.

The paper is divided into five parts. Part one contains an introduction which outlines about the article. Part two analyzes overview of information generally by giving meaning of information, the right to information and scope of the right to access information. Part three is on overview of legal information. Here, the article provides the meaning of legal information, global perspective on legal information right and justification for the right to access legal information. This part portrays one thing, that the right to access legal information is imperative for smooth administration of justice. In Part four, the article gives critiques on the MDFAL of 2002 as a global document for enforcement of the right to access legal information. The article submits that despite being an advanced document on the right to access legal information the MDFAL of 2002 is in dictions of demise. In critiquing the MDFAL of 2002 the article therefore point out its legal and factual weakness which make it irrelevant document to achieve the objectives of the FALM. In part five the article provides conclusion and recommendations. After explaining position of the MDFAL of 2002 in struggles for realization of the right to access legal information, the article gives summary of the arguments and a way forward.

2.0 Overview of Information

Information is very important concept today in the world. It has been argued that information is a basic condition for economic developments, together with capital, labour and raw materials.[1] There are various ways in which information is generated, imparted and obtained by its users. Users of information, on the other hand, need information for various activities and purposes. Some need information for studies, others need information for research, whereas others need it for problem solving. Yet, there are other users who need information for entertainment and while others need information just for knowledge. Users of information acquire various kinds of information depending, of course, on the purposes for which information is needed. Research shows that the most wanted information is that which is good, useful and which has value.[2] Information will be good, useful and valuable if it is timely accessed, accurate, complete, reliable and targeted to the right users.

Information is to be communicated in time with right level of details and is communicated by appropriate channels, the channels which are understandable to users. This means information must reach the users within reasonable time. Delays in imparting information destroy the value of information since if it is imparted late the information may be useless to the user by the time the user receive it. The European Court of Human Rights (ECHR) has once noted that information 'is a perishable commodity and to delay its publication even for a short period may well deprive it of all value and interest.'[3] Timely communication of information includes the fact that information is current and up to date. Information has value as it brings clarity and creates an intelligent human response in the mind. It is valuable since it can affect behaviours, decision or outcome of the users thereof. Good information means information is accurate, free from mistakes and has clarity. It is information which is accurate and is free from bias. Information is useful if it answers all the questions relevant to that information.[4] Useful information then is that information which is capable of helping users in their desired activities. The RTI laws require public institutions to publish relevant and useful information for the public to access and use.[5] Information

[1] Arrow, K. J., (1979), The Economics of Information, in M. L., Dertouzo and J. Moses, (Eds), The Computer Age: A Twenty-Year View, MA: MIT Press, Cambridge, pp. 306-317
[2] Ibid, p. 310
[3] Darbishire, H., (2011), Proactive Transparency: the Future of the Right to Information? A Review of Standards, Challenges and Opportunities, World Bank Institute, Governance Working paper Series, Access to Information Programme, Washington DC, p. 16
[4] Martin, M., (2014), "*Right to Access to Information Law: Importance and Implementations*," Transparency International, Michelsen Institute, No. 10, p. 1
[5] Martini, M., (2014), Right to Information Law: Impact and Implementation, Transparency International, No. 10, p. 2

then, in order to be described as good, must be relevant to the context and to the subject for which it is needed.

2.1 Meaning of Information

There are various definitions of concept information which are drawn from various sources. This is so because the concept information is used differently in various contexts by various experts. Thus, several experts like Belkins, (2010), Bell, (2000), Brokes, (1980), Losee, (1997), Isazadeh, (2004) and Debons, (1983) have defined information as used in the discipline of information science while Aiyar, (2005), Singh (2005) and Majumdar (2005) have defined it in humanities and social science discipline. The definitions of Belkins (2010), Bell (2000), Brokes (1980) and Debons (1983) however, are not discussed in this article as those definitions have different purposes from that of this article. These scientists define information depending on the role it is given in a theory.[1] This can be proved by the way Isazadeh (2004) defines the concept information by giving formula and variables.[2] It is therefore submitted that such definition surely does not fit to the nature of this article.

Information consists of data that has been organized to help answering questions and to solve problems.[3] It is a product of data processing and it is data that has been given meaning by way of relational connection. Information is knowledge that one derives from facts placed in the right context with the purpose of reducing uncertainty. Aiyar (2005) defines information to mean data, text, images, sounds, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.[4] Generally, information is any material in any form relating to the administrations, operations or decisions of a public authority. Thus, information is instruction or knowledge derived from external source concerning facts, particulars or as to law relating to a matter bearing on assessment.[5] These definitions fit the theme of this article.

That aside, the African Commission on Human and Peoples' Rights Guidelines has come up with a clear definition of the term information. According to the African Commission on Human and Peoples' Rights Guidelines, information is defined as follows:

> "Information includes any original or copy of documentary material irrespective of its physical characteristics, such as records, correspondence, fact, opinion, advice, advertisement, memorandum, diagram, photograph, audio or visual record, and any other tangible or intangible material, regardless of the forum or medium in which it is held, in the possession or under the control of the information holder..."[6]

This definition does not have similarity, even a slightest one as the ones given by the scientists above. The definition given by the African Commission on Human and Peoples' Rights Guidelines has long stressed the social, as well as the physical dimensions of information and it emphasizes on the priority to be given to the contents rather than the forum or medium in which information is stored. It further provides controlling power of the state, as the most holder of information needed by the people, in ensuring that information is available the moment it is requested. The above meaning of the concept information is adequate for attempt to add more things in defining the concept may cause more controversy in understanding the concept itself. That notwithstanding, this article submits that information is very important to human developments.

In everyday English information is defined as knowledge which is communicated from one source to recipient thereof.[7] On this basis knowledge and its communication are basic phenomena of every human society. This then makes modern society to be characterized as information society. Information society is a term of a society in which creation, distribution and imparting of information has become the most significant economic and cultural activity.[8] It is a society in which information of various forms is becoming important commodity and measurement of prosperity than physical objects.[9] Information society is a term which describes the form of society being created in the information age based mainly on the increasingly interactive acquisition, storage, processing, transmission, distribution and use of information and knowledge.[10] This is what modern society is and thus, it qualifies to be described as information society.

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[1] Bogdan, R.J., (1994), Grounds for Cognition: How Good and Guided Behaviour Shapes the Mind, Hillsdale, p. 53
[2] Isazadeh, A., (2004), Information Society: Concepts and Definitions, Tabriz University, Department of Computer Science, Tabriz, p. 2
[3] Aiyar, R., (2005), Advanced Law Lexicon, the Encyclopedic Law Dictionary with Legal Maxim, Latin Terms and Words and Phrases, Vol 2, D I, Wadhwa and Compnay Nagpur, New Delhi, p. 2334
[4] Ibid, p. 2337
[5] Singh, L.P. and Majumdar, P.K., (2005), Judicial Dictionary, Orient Publishing Company, New Delhi, p. 771
[6] Guideline 1 of the Guidelines on Access to Information and Elections in Africa, (2017), the African Commission on Human and peoples' Rights Guidelines, Addis Ababa,
[7] Capurro, R., (2003), "*The Concept of Information*," Annual Review of Information Science and Technology, Vol. 37, Hochschule der Medien, Cronin, p. 343
[8] Arora, R., (1993), Information Source: Concepts and Need for Information, Library Information Science, p. 3
[9] Lloyd, J.T., (2000), Information Technology Law, 3rd Edition, Butterworth, London, 2000, p. 11 as found in Mambi, A.J., (2010), ICT Law Book: A Sourcebook for Information and Communication Technologies Law in Tanzania and East Africa, Mkuki and Nyota, Dar es Salaam, p. 6
[10] Aiyar, R., op cit, p. 2337

2.2 The Right to Information

International conventions which are binding upon states which have ratified them, serve as paramount international source of the right to information generally. These conventions in summary provide that persons have the right to freedom of expression, the right which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.[1] These provisions are said to be broad in construction and, although expressly they do not mention the right to access information the right to freedom of express has been accepted to include the right to access information. This then is the beginning of the international, regional and local efforts to formulate the right to access information or right to information as human right issue. This is proved by the efforts which were taken by the United Nations (UN) to advocate for access to information. For example Article 10 of the United Nations Convention Against Corruption (UNCAC) of 2003 which was adopted on 29th September 2003 contains a formulation of the right to information. Article 10 of the UNCAC of 2003 provides that;

> "Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision making process, where appropriate. Such measures may include, inter alia;
>
> (a). Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making process of its public administration, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
>
> (b). Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
>
> (c). Publishing information, which may be include periodic reports on the risks of corruption in its publications."

In 1993 the UN formed the Special Rapporteur on protection of cultural and intellectual property of indigenous peoples.[2] The Rapporteur was mandated to study cultural and intellectual property rights of the indigenous and to provide recommendations on the best way for realization of such protection. In March 2017 the United Nations Human Rights Council extended the mandate of the Special Rapporteur from what it has previously to new directive related to right to information.[3] The new mandate empowers the Special Rapporteur 'to gather all relevant information, whether it may occur, relating to violation of the right to freedom of opinions and expression, discrimination against threats or use of violence, harassment, persecution or intimidation directed to a persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression including, as a matter of high priority, against journalists or other professionals in the field of information.' These two international outlook and acuity developed the basis for implementing movements and legislation which have implications for the observance of the right to access information.

Generally, up to this point the article reveals the existence of deliberate efforts on the part of international institutions to give a considerable attention to human rights. Human rights such as the right of access to information are regarded as unduly political and not within the technical mandate of the Universal Declaration on Human Rights (UDHR) of 1948, the international Covenant on Civil and Peoples' Rights (ICCPR) of 1966 and the African Charter on Human Rights (ACHR) of 1981. Nonetheless, the article reveals that, the right of access to information as developed by the international instruments does not mean the right to access any information which is held by the Government. It is the right to access information, the information which can be accessed subject to certain restrictions as may be provided by laws of respective countries.[4] That has consequently led to the reformation by the international, regional and national instruments of the right of access to information which focuses on success and obstacles in the access to information. Though the above position shows advancement in struggles for the right to access information, much in the world remains a number of challenges, including countries without the RTI legislation, patchy implementation of the RTI legislation and, worst still, some countries which have continual resistance to the RTI movements. That is, in implementation of the RTI legislative movements and enforcement, the states have a role to play in levelling the playing ground with respect to disclosure and access to information, including developing the RTI policies, plans and strategies. However, factors such as lack of resources to finance the RTI legislative movements and campaigns are beyond the control of the state.

2.3 The Scope of Access to Information

The right to access information is the right of everyone to know, to have access to the information he needs to

[1] Article 19 of the UDHR of 1948, Article 19 of the ICCPR of 1966, Article 13 of the ACHR of 1981 and Article 9 of the ACHPR of 1981
[2] See the Commission on Human Rights-Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty Sixth Session, Item 14 of Provisional Agenda, Distr. General, E/CN.4/Sub.2/1993/28, 28th July 1993
[3] The United Nations Council (HRC) of Human Rights, HRC Resolution No. 34/18 of March 2017
[4] See for example Article 19(3) of the ICCPR of 1966

make use of.[1] The practical application of the right to access information underpins two distinctive principles which are publicity of acts and transparency of public administration.

The right to information does not exist in isolation but it is understood as a member of larger group of civil and political rights, a component part of the fundamental right to freedom of expression and opinion, which requires the Government to refrain from interfering with free flow of information and ideas.[2] In other words the right to information is also intricately to and necessary for the protection of all other human rights. This right is now receiving growing attention and treatment in international and regional legal instruments. The understanding of the rights to provide access to information, as well as to refrain from interfering with communication of information necessary to a citizen's ability to make choice are key components of freedom of expression and opinion. It is to be born in mind that all information which is held by Government and her agencies is in principle public information. As such information held by the Government may only be withheld if there is legitimate reason for not disclosing it. Grounds for withholding information should be clearly and specifically established by law with the goal of protecting legitimate aims. This article submits that in order to facilitate access to information processes for requesting information should be the least complicated and most efficient possible and the provision of information should be quick and complete.

Noteworthy, the reference in Article 19(3) of the ICCPR of 1966 to freedom of opinion and expression is not confined to the right to express one's opinion without legal restraint alone. On the contrary the drafting history and the express wording of Article 19(3) of the ICCPR of 1966 acknowledges that the freedom of expression embraces a wide range of social economic factors that promotes conditions in which people can seek, receive and impart information and ideas of all kinds and extends to the underlying determinants of 'freedom of expression and opinion' such as special duties and responsibilities for respect of the rights or reputation of others, protection of national security, public order and protection of public health or morals.[3] This article submits that freedom of expression and opinion includes and extends to effective access to legal information. Thus, it follows that the right to access information contains both freedoms and entitlements. The freedoms include the right to acquire relevant information as well as the right to be free to impact the acquired information free from censorship, restrain or legal penalty.[4]

Explaining the scope of freedom of opinion and expression after analysing international treaties and other elements of human rights discourse in particular the reporting procedures of the ICCPR of 1966 stated that;

> "Freedom of opinion and expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self fulfilment."[5]

Accordingly it is viewed that the UN approaches of defining the scope of the right to access information is appropriate starting from political and legal set up in that the entitlements under the right to expression and opinion are such that every state, no matter at what stage of development, may reasonably be expected to comply.

3.0 Overview of Legal Information

Information is of great important in every profession and legal information is no exception. This is so because law is enduring and changes from time to time. This requires judges, lawyers and general public to always be aware of all the changes in primary legal information. Accessing legal information is thus very important to judges, lawyers and the public at large. It is important to judges because it enables them to rightly apply laws in deciding various cases and administer justice according to all prevailing legal rules in the country. It is important to lawyers because it enables them to provide accurate legal advice to clients on proper laws of the country according to the need of the client. It is likewise important to the general public because knowledge of the law prevented them to be victim of law. This is so because there is a legal maxim that *ignorantia juris non execusat* (ignorance of the law excuses no one). Besides, decision of current cases depends on interpretation and application of statutes and case laws. Therefore, judges, lawyers and public have to access legal information for proper administration of justice. Relevant legal information then helps to create confidence to judges, lawyers and public at large in delivery of justice processes. To be able to apply relevant legal information judges, lawyers and the public must access legal information available. In variety of ways, legal information may be made accessible in two major ways: accessing hardcopy legal information and accessing softcopy legal information. Below is a discussion of legal information in perspective.

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[1] Borne, R., (2007), Access to Information: An Instrumental Right for Empowerment, Yale Law School, London, p. 33

[2] See Leader vs. Sweden, Judgment of 26th March 1987, Series A, No. 116, Para 74. In this case the European Court of Human Rights ruled that the right to receive information 'basically prohibits a government from restricting a person from receiving information that others may wish or may be willing to impart to him.'

[3] Sturmer, M., (2008), The Media History in Tanzania, Ndanda Mission Press, Mtwara, p. 165

[4] Omar, J., (1990), Regulating Broadcasting in Tanzania, A Thesis die Diploma in Journalism, Tanzania School of Journalism, Dar es Salaam, 26

[5] The UN, (2011), International Committee on People's Rights, General Comment No. 34, Article 19 Freedom of Opinion and Expression, Human Rights Committee, Geneva, p. 4

3.1 Meaning of Legal Information

In any area of study consideration of the history or origin of the subject matter is necessary for an appreciation of the background, growth and future of the subject matter.[1] Legal information is no exception. But before trying to give its historical perspective it is apposite to provide the meaning of the concept legal information.

According to Singh (2012) legal information or public legal information is any legal information produced by public bodies that have a duty to produce law and make it public. It includes primary source of law, such as legislation, case law and treaties as well as various secondary public sources, such as reports on preparatory works and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.[2] From this definition it means legal information is any material which contains law the same being a document or other source.

While that is the definition obtained from literature the LII of the world meeting in Montreal declared that;

(a). Legal information from countries and international institutions is part of the common heritage of human. Maximize access to this information promotes justice and the rule of law,

(b). Public legal information is digital common property and should be accessible to all on a non profit basis and free of charge,

(c). Organizations such as legal information institutes have the right to publish legal information and the government bodies that create or control that information should provide access to it so that it can be published by other parties.[3]

According to the MDFAL of 2002 legal information like case law, legislation and other Government documents form a greater role in awareness of duties and responsibilities to the citizens.[4] If law is accessible to all there is comparatively less chance to being its victim. Innovation of communication technology brought a big impact in access and communication of information, including legal information.

3.2 Justification for Access to Legal Information

The above legal position presents significance of information. It is therefore the responsibility of the Governments in various countries to create atmosphere that fosters access to information to ensure adequate disclosure and dissemination of information in a manner that offers necessary facilities and eliminate existing obstacles to its attainment. Without access to information to accurate, credible and reliable legal information especially recent legislation and case law judges will not be able to correctly and precisely decide cases according to law and long established precedents. The importance of receiving and accessing legal information in administration of justice is therefore beyond reprove.

A cardinal principle at the heart of the right to information is that of active proactive disclosure. The principle of proactive disclosure requires that those who hold information of public interest must routinely provide such information in easily accessible ways and they must consider the needs of intended users.[5] Proactive disclosure of legal information is thus a tool for access to justice and administration of justice.

The right to access legal information is not only important in order to be able to enforce legal rights it is also useful to know developments of administration of justice in a given country. Moreover, among the varied constitutional rights freedom of information imposes the most clear cut obligations on the Governments.[6] Article 19(2) of the ICCPR of 1966 requires Governments to respect and ensure the right to access information. This provision puts obligation to the Governments of the state parties to respect the right by not violating it indirectly through legislation, policies, judicial decisions or actions of its official or agents.[7] In order to fulfil the requirement of Article 19(2) of the ICCPR of 1966 the Governments must take direct and affirmative action possible to protect and respect the right to access information by preventing its violation. The Governments also must fulfil the right to access information by enacting legislative policies or judicial precedents.[8] Therefore, the Governments must take steps to ensure that individuals are able and free to access legal information like unreported precedents, legislation and other relevant legal information. Increasingly, the Governments must also fulfil their obligation by providing legal information in circumstances of public interests, particularly in relation to and concerning legal information.

The interpretation of the right to legal information, access to justice and administration of justice can be highly instructive of the Government's attitude towards facilitation of access to legal information. States should allow individuals access to legal information that have importance on their right to access justice and delivery of justice,

[1] Akintunde, S, E, (2017), A Brief Overview of Legal Informatics, Institute of Legal Informatics, Hanover, p. 2
[2] Singh, R, et al, (Eds), (2012), Access to Legal Information and Research in Digital Age, National Law University Press, Delhi, p. 29
[3] The Principles in the MDFAL of 2002, p. 1
[4] Singh, R, et al, (Eds), p. 29
[5] The AfCHPR , Guidelines on Access to Information and Elections in Africa, AU, 2017, p. 5
[6] Ibid
[7] Eide, A., (1989), *"Realization of Social and Economic Rights and the Minimum Threshold Approach,"* Human Rights Law Journal, p. 35
[8] Alston, P and Quinn, G., (2007), "The Nature and Scope of State Parties' Obligations in the International Covenant on ESCR, Human Rights Quarterly Law Journal, p 37

which in turn will allow them to exercise other legal rights. This article submits that legal information is important for learning about the exercise of legal right, access to justice and administration of justice system. Individuals have to access legal information so that they know about justice delivery system, legal rights and procedure and requirements to access justice. Individuals should also be aware of the legal position of the judges on a particular legal issue, something which creates uniformity and certainty of judicial decisions on one particular issue throughout the country. On the contrary the failure to access legal information constitutes a violation of obligation of states which they agreed when ratifying, acceding or succeeding the UDHR of 1948, the ICCPR of 1966 and the ACHPR of 1981. The UN Committee of Human Rights has stated for example in its General Comment No. 24, Paragraph 54 and in relation to the right to access legal information for a person to be able to take legal remedies against any judicial or administrative decisions. Moreover, states have the obligation to submit reports on measures that they have taken and progress made in achieving obligation assumed in the international laws.

Struggles for access to legal information have short history although its history can be traced as way back as Confucius and Socrates eras.[1] The first person to initiate or put struggles for access to legal information is believed to be John Horty. But credit for transformation of the struggles goes to Cornell Legal Information Institute (CornLII) which was founded by Tom Bruce.[2] The CornLII is the founder of free access legal information retrieval system. It was after foundation of the CornLII that movements towards formation of free access to law institutes in the world began. First step was formation of the British and Irish Legal Education Association (BILEA) in 1985. The BILEA was formed in order to promote collaboration in all aspects to legal informatics and information law.[3] After formation of the BILEA nearly all law schools in Britain and Ireland which supported access to law movements joined the BILEA.[4] Expansion of the BILEA led to the formation of the Law Technology Center (LTC). This spawned law courseware consortium which inter alia developed a number of e-journal including Journal of Information Law and Technology (JILT).[5]

The second step towards legal information movements was formation of two prominent organizations on legal information movements. These are the International Conference on Legal Knowledge and Information System (JURIX) and the International Association for Artificial Intelligence and Law (IAAIL).[6] These are traditional scientific conferences whose main activity is conference organization and publication of journals.[7] As a result of these the Legal Framework for Information Society (LEFIS) was formed. The LEFIS has brought together over 90 law schools throughout Europe with growing worldwide links with legal practitioners and the Information Technology (IT) professionals. The IT professionals are equally important in legal information movements because they are the tools for information system as the same are used for storing, communication, dissemination and retrieval of information. This is so because the public can use computers to access text of statutes or case laws. It means by using computers statutes can be communicated from parliament house after being enacted to the court houses and to the people.

The LEFIS then organized a number of conferences, and workshops and it published a series of journals on information and access to legal information. It also promoted a wide range of collaborative projects, and the most common collaborative especially on legal information is the Legal Information Institutes (LII).[8] The LII as one of a collaborative project of the LEFIS is very significant to this article.

The LII refers to providers of legal information that is independent of the Government, and provides free access on a non profit basis to multiple sources of essential legal information. The LII is a group of projects that provide free online access to public legal information, defined in the Montreal Declaration on Free Access to Law (MDFAL) of 2002.[9] The LII represents a reaction to a retrieve and protective attitude towards making legal materials available to lawyers.[10] Legal information which the LII offers to lawyers is freely available and without being curtailed by copyright laws.[11] The formation of the LII led to the formation of World Legal Information Institutes (the WorldLII).

The WorldLII is an umbrella organization of all modern LII in the world. As Greenleaf (2013) and Bing (2000) indicate the LII movements have been the basis for major worldwide transformation in access to justice for lawyers as well as for general public.[12] This trend and movements towards realization of access to legal information signifies the importance of access to legal information. Susskind (2019) suggests, and this article joins

[1] Paliwala, A., (Ed), (2010), "A History of Legal Informatics," LEFIS Series 9, Prensas Universitarias de Zaragoza, Zaragoza, p. 14
[2] Ibid
[3] Ibid p. 17
[4] Ibid
[5] Ibid
[6] Ibid
[7] Ibid
[8] Paliwala, A., (Ed), (2010), A History of Legal Informatics, LEFIS Series 9, Prensas Universitarias de Zaragoza, Zaragoza, p. 17
[9] Garvin, P,(Ed), Government Information Management in the Twenty-First Century, Butterworth, London, 2010, p. 213
[10] Kondos, G.R., (1973), 'Introduction to JURIS,' A Paper Presented in Abidjan World Conference on World Peace Through Law, Abidjan, p. 47
[11] This is permitted by Article 2(4) of the Berne Copyright Convention of 1888
[12] Paliwala, A., op cit, p. 43

hands with him, that avoiding access to legal information is akin to burying our heads in the sand. This then serves as an explanation as to why lawyers from the very beginning gave preference to a system which grant access to legal information. That is why nowadays there are websites in almost every country which provide legal information. It should be noted here that although lawyers are not avant gardists text retrieval was actually developed by lawyers and for lawyers, due to the need to access legal information.[1] It is to be noted that among the efforts towards text retrieval programmes was made by the Norwegian Research Center for Computers and Law (NRCCL), faculty of law of university of Oslo.[2] It is therefore fair to argue that uploading and downloading systems of materials on the internet which are very common in the world today are fruits of effort of the lawyers.

Taken together the LII are the most coordinated and among the largest providers of access to legal information, but are not backed up by any legal instrument except mutual understanding and consent among themselves.[3] More particularly from 2000 the LIIs expanded and as a result there were various LIIs found in various countries.[4] As by April 2013 there were 50 members of the LIIs. This expansion of the LII worldwide necessitated to the formation of the FALM in 2002. A desire to have access to law via the internet has been principal means by which the FALM and the LIIs were established.

To put this desire into effect several conferences were convened, the first one being hosted by Australia LII (AustLII) in 1997.[5] It came as a result of associations of the group of the LIIs which made initial attempts to establish collaboration and organization to further access to law globally. The first sustained attempt to build some form of international network took place at Cornell University in July 2000.[6] In the workshop participants from the USA, Canada, Australia, Britain and the South Africa attended.[7] During deliberation the expression WorldLII was firstly used, which had connotation of collaborative the LIIs worldwide. The workshop of 2000 resulted into the FALM Conference of Montreal of 2002.[8]

The FALM Conference of Montreal of 2002 adopted the MDFAL of 2002, popularly known as the Montreal Declaration on Free Access to Law (MDFAL) of 2002.[9] The MDFAL of 2002 defines legal information, creates obligations to the member states to support republication of legal information and calls up for formation and operation of the LII in individual countries, among other things. As for definition of legal information the MDFAL of 2002 defines legal information by providing that;

> "... legal information means legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties ..."

Membership to the MDFAL of 2002 is by invitation and consensus of the present members.[10] New member therefore is admitted to it if is nominated by current member and other members reach a consensus to admit the invited new member. Membership criteria are not fixed but involves adherence to and support of the MDFAL of 2002 and activities similar to but not necessarily identical with those of the LII.[11] Membership of the MDFAL of 2002 has ever since expanding beyond the initial members to include other national the LIIs from North America, South America, Europe, Asia and Africa.[12]

All these were done emphasize being facilitation of public access to law and to make law available for the people.[13] It is important for the people to know the law because *ingorantia juris non execusat*, which means ignorance of the law, excuses no one. Consequently, access to legal information, such as legislation and unreported case laws becomes an essential component of any modern legal system, irrespective of the fact that the MDFAL of 2002 is unenforceable.[14] Thus, the wide spread distribution and accessibility of the legislation and case laws contributes greatly to the transparency, openness and certainty of judicial decisions, something which is essential to the social functioning of administration of justice system. In fact the possibility of identifying legal information like legislation and unreported case laws contributes to ensuring the integrity of any judicial institution.[15] It is

[1] Bing, J and Trygve, H, (1975), Legal Decisions and Information Systems, Scandinavian University Press, Oslo, 76
[2] Ibid, p. 76
[3] Greenleaf, G., (2010), "The Global Development of Free Access to Legal Informatics," The European Journal of Law and Technology, Vol. I, Issue 1, Zaragoza University Press, Zaragoza, p. 44
[4] Ibid
[5] Danner, R.A., (2003), The IALL International Handbook of Legal Information Management, p. 206
[6] LII Workshop on Emerging Global Public Legal Information Standards, (2000), Cornell University Press, Cornell, p. 21
[7] Greenleaf, G, op cit
[8] Greenleaf, G., (2010), *The Global Development of Free Access to Legal Informatics*, LEFIS Series, University of Zaragoza Press, Zaragoza, p. 52
[9] Available at www.worldlii.org.worldlii/declaration, accessed on 25th October 2019
[10] The MDFAL of 2002, Paragraph 1, p. 2
[11] Danner, R.A., (2010), The IALL International Handbook of Legal Information Management, p. 206
[12] Greenleaf, G., op cit, p. 52
[13] Daniel, P., (2019), Open Access to Law in Developing Countries, Online Journal of ICT, Vol. 9, No. 12, 2004, accessed on 11th September at 1645 hours
[14] Ndamungu, O.I., (2020),Legal and Policy Approaches Toward Realization of the Right to Access Legal Information, International Journal of Research of Sharia, Muamalat and Islam, Vol.2, No. 5, p. 10
[15] Greenleaf, G., op cit

therefore important to have a sound system of free and open access to statutory materials and courts' decisions. In France, Canada and Australia for example, basic legal texts are accessible to anyone.[1] In the United States of America there is a specific law which ensures the access to legal information. This is known as the UELMA of 2011. It means in these countries there is access to legal information. Such open access to law, however, has not yet been implemented in majority of developing countries, where sometimes even accessing basic legislative text is difficulty.[2] In such countries then the right to access legal information is difficult something which jeopardize smooth administration of justice.

4.0 International Instrument on Access to Legal Information

The MDFAL of 2002 is a global document on the right to access legal information which was drafted in Montreal in 2002 by the LIIs from seven countries. Its major aim is to complement and reinforce the objectives of the FALM in the world. The MDFAL of 2002 was drafted without existence of any formal international legal instrument on the right to access legal information. Thus, the MDFAL of 2002 was drafted pursuant to mutual understanding of the LIIs from seven countries for the purpose of putting formal struggles for realization of legal information globally. The seven countries which participated in drafting of the MDFAL of 2002 are USA, Britain, Canada, Sweden, Finland, Norway and France. As by 2020, 73 LIIs have subscribed to the MDFAL of 2002, recognizing the competence of the FALM to enforce the right to access legal information in the respective countries. Expansion of the subscribers to the MDFAL of 2002 no wonder signifies the importance of the right to access legal information and thus, making the MDFAL of 2002 very important document. Howbeit, despite its significance this article argues that it is impossible to fully realize the right to access legal information through the MDFAL of 2002. This is partly attributed by the birth defects of the MDFAL of 2002 itself. Here under are the critiques of the MDFAL of 2002 as a document which was drafted for the purpose of global enforcement of the right to access legal information.

4.1 Critiques of the MDFAL of 2002

Freedom to seek and receive information is recognized as basic human rights by Article 19 of the UDHR of 1948 and Article 19 of the ICCPR of 1966. The right to receive information include as well the right to receive public legal information as it is provided by the MDFAL of 2002. This is because legal information is 'information' within the meaning of Article 19 of the UDHR of 1948 and Article 19 of the ICCPR of 1966. Again, people of countries throughout the world should be able readily to access law that governs them.[3] Providing such access is a responsibility of the Government and is necessary for proper administration of justice.[4] Thus, it is the duty of the Government to collect and provide access to official version of legal information, such as legislation and case laws. It is the duty also of the Government to preserve legal information for future uses.[5] Howbeit, legally and from the right to information perspective there is no obligation to collect information for it to be accessible by the public.

In the digital age many Governments provide online versions of primary sources of law, including statutes and case laws.[6] This makes it possible for the public to have equitable and continuous access to resources necessary for proper administration of justice, assuming wide and affordable internet service. This part of the article therefore aims at examining weedy points of the MDFAL of 2002, which in turn makes it weak document on which to learn for realization of the right to access legal information.

The MDFAL of 2002 was made by the FALM for the purpose of ensuring that public bodies disclose public legal information.[7] The MDFAL of 2002 is built on principle that public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access information concerned.[8] Beneficiaries of the right to access legal information are the people, corporate organization and organs of the Government that are entitled to know the law that regulates their conducts and activities.[9] Lawyers and general public are also among the beneficiaries thereof since these have the right to know the laws of the country for accessing justice.

Many nations which have adopted the MDFAL of 2002 have enacted legislation to give effect to it. In the USA there is the UELMA of 2011, Nigeria has enacted the Nigerian Freedom of Information Act of 2011, in

[1]Daniel, P., (2019), Open Access to Law in Developing Countries, Online Journal of ICT, Vol. 9, No. 12, 2004, accessed on 11th September at 1645 hours
[2]Ibid
[3] International Federation of Library Association and Institutions, (2010), IFLA Statement on Government Provision of Public Legal Information in the Digital Age, IFLA, p. 1
[4] Ibid
[5] Ibid
[6] Ibid
[7] This is one of the objectives of the MDFAL of 2002
[8] Mitee, L.E, (2017), The Right of Public Access to Legal Information: A Proposal for Its Universal Recognition as a Human Right, European Journal of Law and Technology, Vol. 8, No.3, p. 1438
[9] Ibid

Ghana there is the Right to Information Act of 2009, the Promotion of Access to Information Act of 2000 is the law for South Africa while in Tanzania there is the Access to Information Act (AIA) of 2016. Almost all of these laws, to some extent, comply with the principles of the MDFAL of 2002. However, history has shown that to give meaning to the right to access information, it must be enforceable and enforced. To meet this mandate, the Governments, international organization and civil society are now focusing on the best means to ensure well constructed and functioning enforcement system.[1] In most jurisdiction enforcement of access to legal information through the MDFAL of 2002 is challenging due to the fact that it is not enforceable international instrument.

The MDFAL of 2002 is not full-fledged international institution but a mere movement. Efforts were made in 2007 to turn it into association, the effort if succeeded the MDFAL of 2002 would be Free Access to Legal Association (FALA).[2] But this attempt did not materialize. On the face of it the MDFAL of 2002 which is affiliation of the LIIs is a universal platform with membership coming from all corners of the world (Europe, America, Australia, Asia and Africa). Yet, the MDFAL of 2002 does not have universal declaration status. Again, despite being global, growing and broader grouping since its establishment its membership is still small. As by 2009 members of the MDFAL of 2002 were only 30,[3] out of more than one 180 countries in the world. By 2013 the membership grew to 50 members.[4] The membership to date being drawn primarily from the LIIs based in academic institutions, although Government based membership is not denied, provided it does not impede others from obtaining public legal information from its sources and publishing it.[5] In other words, Government body cannot be a member to the MDFAL of 2002 if it provides free access to law in a way that monopolizes publication of that information or supports such monopoly publication.[6] The key test is whether publication of Government information is allowed.[7] If the answer to this is in affirmative Government body membership to the MDFAL of 2002 is allowed.

The major aim of the MDFAL of 2002 is provision of assistance by its members to organizations who wish to provide free access to law.[8] The MDFAL of 2002 therefore intends to provide mutual support to organizations already providing free access to law and who wish now to join the FALM. It is submitted by this article that the MDFAL of 2002 for that purpose is a mere advisory as it does not have legal force internationally or locally save for those countries which have already enacted the RTI laws. This is proved by the fact that the MDFAL of 2002 recognizes 'the primary role of local initiative in free access to law is publishing of their national legal information.'

The MDFAL of 2002 also does not deal with state but rather by institutions called the LIIs in those nations which are the members thereof. This can be viewed from the third and fifth objectives of the MDFAL of 2002 which state that 'all the LIIs must cooperate in order to achieve the goals thereof and to meet at least annually to invite other organizations to join the movement.' As the MDFAL of 2002 puts it, the aim is to cooperate in order to achieve those goals and, in particular, to assist organizations in developing countries to achieve those goals, recognizing the reciprocal advantages that all obtain from access to each other's law. The main activities of the MDFAL of 2002, in the light of those aims, have been sharing of software, technical, expertise and experience on policy questions.[9] This is contrary from Bing (2003) who argues in favour of state run legal information service that only provides a limited amount of free access to legal information.[10]

Despite some countries, significantly many by size although not by number are the subscribers of the MDFAL of 2002 that does not give them mandate to enforce the MDFAL of 2002 objectives. This means the objectives of the MDFAL of 2002 remain largely unenforceable by the LIIs which are the subscribers to the MDFAL of 2002.

The underlying reason for the MDFAL of 2002 was the desire to form the LII worldwide. One of the fundamental mistakes of the MDFAL of 2002 is that member states who initiated it made it that the struggles for free access to legal information deals exclusively with the rights of individual nation, no reference whatsoever was made in the document to collectiveness. Even state membership thereof was introduced later on in 2007.[11] Moreover, the MDFAL of 2002 has no force of law as it is a mere declaration with no effect to the nations, even to the countries which have subscribed it. Therefore, it is not possible to incorporate it in the realm of international law. Since the MDFAL of 2002 is not incorporated in the realm of international law majority of the nations in the world do not comply with its principles. Even international organizations like the UN and the AU have practically

[1] Neuman, L, (2009), Enforcement Models Content and Context, Access to Information Working Paper Series Washington DC, p. 1
[2] Greenleaf, G., (2010), The Global Development of Free Access to Legal Informatics, LEFIS Series, University of Zaragoza Press, Zaragoza, p. 59
[3] Greenleaf, G., op cit, 2010, p. 44
[4] Greenleaf, G, et al, (2013), "The Meaning of Free Access to Legal Information: A Twenty Year Evolution," Journal of Open Access to Law, Issue 1, p. 9
[5] Ibid
[6] Ibid
[7] Ibid
[8] Paliwala, A, (2010), History of Legal Informatics, Zaragoza University Press, Zaragoza, p. 23
[9] See statement in the MDFAL of 2002
[10] Bing, J, (2003), The Policies of Legal Information Service: A Perspective of Three Decades, in Bygrave, L, Yules (2003), Oslo: Institutt for rettinformatik/Norwegian Research Center for Computers and Law, p. 37055
[11] Greenleaf, G, op cit, p. 44

not recognized it, the FALM and the LII.[1]

The supposed basic inspiration for drafting the MDFAL of 2002 was the desire to ensure that public legal information is easily accessible by the same being published online by the LIIs. Paliwala (2010) affirms that the integral factor for the drafting of the MDFAL of 2002 was to encourage the LIIs to publish legal information in their respective countries. In support he refers to the statement in the MDFAL of 2002 which provides 'that independent non-profit organization have the right to publish public legal information and the Government bodies that create or control that information should provide access to it so that it can be published' and affirms that this explains why the MDFAL of 2002 has not found support of the UN and the AU. This article reveals that basing on these factors the MDFAL of 2002 has been a total failure.

The drafting of the MDFAL of 2002 did not last long. It was hardly drafted in a day, which was 3rd October 2002 in 4th Law via Internet Conference in Montreal.[2] The drafting of the MDFAL of 2002 did not involve any Commission of the UN as it is commonly for many international instruments.[3] With delegates from only seven countries being activists of the FALM participants entertained discussions about all aspects related to free access to and online publication of legal information.[4] Greenleaf (2013) on his side states that the drafters of the MDFAL of 2002 were aware of how far the FALM had developed and they felt that only a clear statement of separate issues involved free access to law could be dealt with. This means putting online all of the legal right to access law in 21st century had become part of global concern of the activists of the FALM. Thus, nothing resulted from the MDFAL of 2002 regarding obligation of nations to ensure compliance to the MDFAL of 2002 principles. More so no clear authority was given to the UN to supervise implementations and enforceability of the MDFAL of 2002. All of the MDFAL of 2002 conference starting with the declaration itself followed by the two other conferences and continuing with various strategies approved during the following years concentrated on statements of principles, legal concepts or general rules aimed at encouraging online publication of legal information and free access to law.

Two aspects should be taken into consideration. First, even after the FALM became known the nations which had inscribed in their constitutions and other fundamental documents most of the principles of the MDFAL of 2002 failed to respond to it. These countries are idle without taking deliberate steps to make sure principles of the MDFAL of 2002 becomes realizable. Tanzania for example subscribed to the MDFAL of 2002 in 2008 and remained idle until March 2019 when it established the LII of its own which is known as the Tanzania Legal Information Institute (the TANZLII).[5] Second, discussion and drafting of the MDFAL of 2002 principles and rules involved only few FALM representatives; hardly seven of them. These representatives who were involved in the preparation of the MDFAL of 2002 were committing atrocities of their own upon other nation globally. In addition, everything in the MDFAL of 2002 is set in singular, nothing is in collective. This article does not suggest that collective approach would have necessarily avoided subsequent weakness of the MDFAL of 2002. However, at the very least, it would have been a more exact repudiation of the MDFAL of 2002 bestiality and made eventual contribution to enforceability of the Right to Access Legal Information Convention (RALIC) for that and as the MDFAL of 2002 as it is, its realization is a mere wishful thinking of the FALM.

5. Conclusion

The year 2020 marks the 18th anniversary of the MDFAL of 2002. This anniversary can be celebrated for gigantic achievements brought about in struggles for realization of the right to access legal information since the drafting of this landmark document. The MDFAL of 2002 is beyond doubt a great inspirational document, a remarkable achievement, a worldwide referential document and the one with the highest world obligation. Although the MDFAL of 2002 principles have not been expressly referred to in international and regional legal instruments, its presence stirs up consciousness of countries to look at a possibility of implementation. Besides, its principles have been solemnly recognized as essential as there are regional and national LIIs as the pillars of the FALM for enforcement of the MDFAL of 2002 principles. However, despite numerous achievements, realization and enforcement of the right to access legal information has remained largely difficult. At the same time recognition of the MDFAL of 2002 as international legal instrument binding on nations remains unreality. The notion used above to describe the contributions of the MDFAL of 2002 towards realization of the right to access legal information remains a plight of the FALM activists. This is so because concerted efforts by various actors on access to legal information campaigns produce relatively mixed outcome. It is difficult to blame anyone. It cannot be argued that the difficult is because of recalcitrant Governments which do not enact specific laws for the right

[1] The UN has only 14 specialized agencies which are the ILO, the FAO, the UNESCO, the UNICEF, the WHO, the ICAO, the UPU, the ITU, the WMO, the IMO, the WIPO, the IFAD, the UNDIO, the UNWTO, and one related agency IAEA. The FALM, the LII and the MDFAL of 2002 are not among them

[2] See opening statement on the MDFAL of 2002 itself

[3] See for example drafting of ICCPR of 1966 which involved several UN Commissions and reports of Rapportours

[4] List of the legal information institutes representatives participated in drafting of the MDFAL of 2002 is available at page 2 of the MDFAL of 2002 itself

[5] Ndamungu, O. I, op cit, p. 15

to access legal information. This is not so because the Governments have no obligation to enforce the right to access legal information as the MDFAL of 2002 is not in the realm of international law. The developed countries cannot be said to be part of the problem. This is because the USA, being one of the developed countries in the world has benevolently put the principles of the MDFAL of 2002 in legal footing by enacting the UELMA of 2011. The problem therefore is largely with the FALM activists who have ignorantly refused to put the MDFAL of 2002 in the realm of international law. They mostly seem to expect the implementation and enforcement of the principles of the MDFAL of 2002 to be achieved through adherence to the customary international norm of observation of treaties in good faith. This norm is known as *pacta sunt servanda* principle as it is provided by Article 26 of the Vienna Convention on the Law of Treaties of 1969. It is argued that the *pacta sunt servanda* principle is not meaningful and relevant to all states and all institutions in states. As a result the realization of the right to access legal information through the MDFAL of 2002 is a failure. The failure is contributed largely by inborn weaknesses of the MDFAL of 2002 itself. Thus, the MDFAL of 2002 is a weak reed to learn on for realization of the right to access legal information.

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Implementation of the Precautionary Principle within Prerogative Power to Overcome the Threat of Financial Crisis

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Abstract
A crisis or depression, one significant unfortunate event, often happens without warning or preparation and cannot be ignored. Likewise, the threat of a financial crisis is a risk that concerns dangers in a state's economic and political stability. A financial crisis may cause a market and public panic that brings irrational actions. If not prevented or mitigated immediately, a financial crisis can cause a state's economic and political stability to collapse. It becomes very dangerous if the state does not have normative rules governing financial crisis prevention and mitigation. In this case, the president, as the head of the executive, must take a prerogative power to prevent or mitigate the financial crisis. This is the background of why a precautionary principle is needed in prerogative power when dealing with a financial crisis. The precautionary principle is used to deal with emergency hazards in the environmental fields, but lately, it has been widely used in many fields, including biotechnology and health. In general, the precautionary principle is understood as making decisions in encountering threats or situations that are dangerous and uncertain. With the background of Indonesia's empirical experience in overcoming the financial crisis of 1997-1998, this article will focus on the notion of implementing the precautionary principle within prerogative power and its prospects to overcome the threat of financial crises.
Keywords: banking crisis, financial crisis, precautionary principle, prerogative power, state of emergency
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1. Introduction

With the main background of the 1997-1998 financial crisis in Indonesia, it is interesting to examine whether the precautionary principle's conceptual elements have been applied. Precautionary principle has its own place in the legal system, in general, the precautionary principle is understood as an approach in making decisions to face dangerous and uncertain situations (Ellis and FitzGerald 2004). In its development, the European Union promoted the precautionary principle as the basis for making decisions on environmental policies and other areas, such as trade. In this regard, the European Union supports the idea that regulatory measures should be taken immediately, even when the threat of harm is uncertain, even when it is highly speculative. Applying this principle, in whatever form and scope, can significantly influence the strategies and policies that are the result of decision making, especially to assist decision making in difficult situations (Sunstein 2005b).

The precautionary principle's main objective is to act prudently in the face of threats of uncertainty before serious (or even irreparable) damage occurs (Lauridsen 2013). Initially, the precautionary principle is a basic principle in preventing environmental issues, namely protecting from possible hazards that have not been scientifically proven. In practice, the precautionary principle application has expanded not only in the field of environmental protection but includes the fields of sustainable development, health, trade, and food safety. In economics-sustainable development, the precautionary principle is seen as an integral principle of ethical ideas about justice and between generations, which sees development as a whole (United Nations Educational Scientific and Cultural Organization 2005).

The 1997-1998 financial crisis was the worst in Indonesia's history, preceded by the Thai financial crisis, which later spread to several countries in Asia. The problems at that time were very complex. Indonesia did not yet have adequate legal and institutional instruments to prevent or handle the threat of crisis. The applied laws and regulations in the financial sector were very limited and inefficient in its implementation. This situation creates problems and gaps between the governing regulations and an emergency need.

Without adequate legal and institutional instruments to guide the threat of crisis, the government tried to prevent it from worsening. To prevent the situation from worsening, the government tried to restore macroeconomic stability and a credible financial system. The government tried to resolve problematic financial institutions, strengthens viable financial institutions, manages assets, and undertakes corporate restructuring. The government also asked for assistance from the International Monetary Fund (IMF) and immediately restructuring private companies and banks (Martinez-Diaz 2006). One of the IMF's involvement was the process of closing 16 private commercial banks (International Monetery Fund 1997). This empirical experience shows how the government acted for the state's interest without an applicable legal framework to deal with the crisis's threat. The existing financial or banking regulations could not answer all the needs at that time. However, the absence of qualified legal norms should not be an obstacle to reacting and acting to deal with the crisis threat. In this case, the government was using its prerogative power as an executive for state good.

This article will discuss the notion of applying the precautionary principle within prerogative power, especially in overcoming the threat of a financial crisis. First, the article will discuss the precautionary principle. Second, the discussion will shortly discuss Indonesia's financial crisis of 1997-1998. Third, it will elaborate on the legal gaps that happened in Indonesia's financial crisis. Fourth, discussing the concept of how to apply the precautionary principle within prerogative power in overcoming the threat of financial crisis.

2. The Discourse of the Precautionary Principle

2.1. Transformation

The precautionary approach method was first used in London in 1854 by a doctor named John Snow, who investigated the relationship between water supplies and the cholera epidemic. From what he had investigated and studied, Snow created the first epidemiological map of the disease and its possible causes, presented to the Epidemiological Society of London on 4 December 1854 (Brody *et al*. 2000). What John Snow had done was a precautionary approach to uncertainty. Although the relation between polluted water and cholera was not scientifically proven, the London city government still decided to shut down its water pumps based on Snow's recommendation. A biological event regarding the relation between polluted water and cholera was only proven 30 years later by Robert Koch in connection with the discovery of vibrio cholera in Germany (Harremoes *et al*. 2001). While Snow was unable to prove his theory at the time, the results obtained from his research were sufficient evidence for Snow to recommend a course of action.

The precautionary approach was becoming a principle in resolving environmental problems. To minimize the risks faced in environmental problems, the German government came up with a notion called Vorsorgeprinzip. The Vorsorgeprinzip or the Vorsorge Principle is the main principle, fundamental for the German Government to address environmental problems. The idea is decisive action to minimize the risks faced in environmental problems. In Vorsorgeprinzip, there is the concept of Gefahrenvorsorge, which is translated into a risk precaution or understood as a precautionary measure in the context of "prevention of risk." The concept is to protect from possible hazards that have not been scientifically proven. Immediate preventive action is taken from hazards spatially or temporarily, including possible hazards that have not been scientifically proven and burdens on the environment that are not harmful in themselves but dangerous when combined with other pollutants. Overall, the idea of Vorsorgeprinzip is a preventive measure that tries to avoid serious damage (Cameron and Abouchar 1991). The term precautionary principle is actually a translation of the phrase Vorsorgeprinzip, which was echoed around 1970 in Germany and later used in German Environmental Protection in 1974. However, Cross argues that the precautionary principle was first used in 1965 on the German Administrators Committee (Cross 1996). while in the same period, Sweden has used the general precautionary principle in Swedish Environmental Protection Act of 1969 (Sunstein 2005a).

2.2. Various Definition and Perspectives

Until now, there has been no agreement from scholars regarding the standard definition of the precautionary principle. Many scholars are still debating the understanding of the precautionary principle. This can be seen from the many different definitions of the precautionary principle in international conventions, declarations, and documents. This complicates the determination of the exact definitions regarding the precautionary principle (Vanderzwaag 2002). Likewise, with references to damage or danger or threats from different precautionary principles, adding to the difficulty of making a formal definition. Such as the precautionary principle formulation concerning damage or harmful effects. In other references, there are precautionary principles that focus on serious damage, and some refer to serious and irreversible damage. There are even references that focus on global destruction. Besides, there are precautionary principles concerning cost-effective measures or even have other references for costs (Weiss 2003). In terms of practice, the precautionary principle has been included in international legal documents. The term precautionary principle has been used widely, referring to principles that have been generally applied by decision-makers and policies. In that case, the precautionary principle is understood as an action that may have to be taken against a hazard, even though the available evidence is insufficient to make the existence of the hazard a scientific fact. Thus, preconditioned conditions emphasize the principle of decision-making that can be justified, either on a moral or precaution basis (Sandin 2002). This section will discuss some definitions and perspectives from scholars regarding the precautionary principle.

The various definition, formulation, and reference are the precautionary principle's version of nature, perhaps a unique characteristic of the precautionary principle. Some scholars even make their own version from a different perspective. Wiener and Rogers, distinguishes the precautionary principle in three versions (Wiener and Rogers 2002). Version 1 described by Wiener and Rogers with the term uncertainty does not justify inaction or uncertainty does not justify delaying or inaction. Version 2 is described as more aggressive with the term uncertainty justifies action, or uncertainty is a justification of action, and version 3 is uncertainty requires shifting the burden and standard of proof or shifting the burden of evidence.

From the identification made by Dinnen, there are at least 19 versions of the precautionary principle definition.

At the basic level is the definition as a principle of public decision making. When there is a 'threat' of environmental or health damage, it will not use 'scientific uncertainty' as an excuse for not taking preventive action (Fisher *et al*. 2006). Apart from that, Dinnen agrees with the 3 (three) versions of the precautionary principle, according to Wiener and Rogers' understanding. In addition to definitions, in his research, Dinnen also expressed the different perspectives between European Communities and the United States of the precautionary principle. For European Communities, the precautionary principle is seen as one of the general principles in international law. At the same time, the United States believes that the precautionary principle is not a general principle in international law, but as an 'approach' that varies according to situations and contexts (Dinneen 2013).

Unlike the previous scholars, Gollier and Treich tried to describe an economic-based understanding of the precautionary principle. Gollier and Treich's research and understanding of the work is based on cost-benefit analysis, where there is scientific uncertainty about both costs and benefits (Gollier and Treich 2003). Besides, the irreversibility effect makes the precautionary principle more flexible and can be perceived as an incentive or even an obstacle to information generated by scientific advances in the decision-making process. In an asymmetric information situation, the precautionary principle can be used as a protection tool, especially for those who seek profit from the situation (Gollier and Treich 2003). Of all the understanding and definitions of the precautionary principle, Sunstein offered the simplest, namely, "it is better to be safe than sorry." Applying this principle, in whatever form and scope, can significantly influence the strategies and policies that are the result of decision making, especially to assist decision making in difficult situations (Sunstein 2005b). However, Sunstein remind that whoever most fearful and keen to avoid danger, often escalate risks through their efforts to rule out the danger. People lean to be fear and may take foolish precautions (Sunstein 2005a). Sunstein concludes that the precautionary principle will become far less helpful when we see that risks are inevitably parts of systems (Sunstein 2005a). Henceforth, Sunstein reconstructed the precautionary principle in three dimensions. The first involves catastrophic risks, the second involves irreversible harms, and the third involves margins of safety for risks that, while not potentially catastrophic, pose distinctive reasons for concern.

2.3. Uncertainty and precautionary principle

Since its adoption by the UN General Assembly in 1982, the precautionary principle's use and development have grown in popularity. In practice, the precautionary principle brings significant changes to the decision-making process to deal with critical situations and conditions that arise from a dangerous threat. Including if the risk of these dangerous threats is not visible or fully measurable because of inadequate scientific data. The precautionary principle provides guidance, helping decision-makers to decide and respond to the dangerous threat, even though there is the uncertainty caused by information and scientific certainty needed is not provided. Ideally, when implementing the precautionary principle, analysis and evaluation should be carried out in advance of all data related to the threats. There are important factors that must be done before deciding to respond, namely identifying the threat and damage that is likely to occur. In this case, identification is carried out through reliable scientific methods that consider the risk of uncertainty.

For decision-makers, uncertainty is a factor that must be understood with different meanings, depending on the context. Uncertainty can be caused by case variables, calculations, and causal relationships. Uncertainty also often arises when data is not valid and reliable. All the symptoms of each case (including the risk of uncertainty) should be managed and classified according to science. With a highly context-dependent variation, it makes uncertainty difficult to understand, this often creates fear and hesitation. Almost all understanding and perceptions regarding the uncertainty are always associated with risk factors. So important is the uncertainty that Keynes described as a roulette game, and Schomberg said that scientific uncertainty is essential in understanding how and why the precautionary principle is applied. Uncertainty will always overshadow every event, even when we are aware of the possible dangers that threaten us. In general, in the author's opinion, uncertainty is an unknown situation with a lack of conviction, which is critical to be considered in the precautionary principle.

In response to this, scholars think it is better to focus on risk. However, in most cases, scientific data are not sufficient to apply the precautionary principle. These circumstances can make decision-makers hesitate to respond or not, and uncertainty is not a justification for not respond. In other words, you are in “to be or not to be” circumstances. From the author’s perspective, uncertainty coupled with fear causes hesitation and interferes with your judgment.

2.4. Basics understanding of precautionary principle

To understand and define the precautionary principle, some scholars have tried to elaborate on the basics understanding of precautionary principles. Based on specific notions and exploration, most of them have the same basic understanding concerning the principle. The same basic understanding includes the elements:

First, there is a dangerous threat, which is in some versions, is understood to be irreversible, damaging, or a serious effects, as defined in the London Declaration, Rio Declaration, and the 1992 Paris Convention. It can be understood that the precautionary principle is a principle that applies to certain threats with extraordinary damage

effects. Second, there is uncertainty, or a lack of scientific evidence, which is understood as a situation where there is a lack of or no knowledge and a lack of information on a threatening hazard. The uncertainty can be in any situation, including causes of threats, impacts, cause-and-effect relationships, and long-term consequences (DeFur and Kaszuba 2002). Third, whatever the context, the action taken is more of a preventive nature. The cases' form and scope can significantly influence strategies and policies to be taken, especially in difficult and danger circumstances. The precautionary principle can be considered as a limitation or starting point for triggering preventive action (Wibisana 2011). Fourth, an obligation to respond. The threat and uncertain circumstances should not make the authorities release from their responsibility to respond to overcome the threat of danger.

Out of the description above, it appears that there is no definition of the precautionary principle that has been universally accepted. The divergences in law, social, cultural, and political values influence the scholars' perspectives. Although there is no universal definition of the precautionary principle, it does not mean the various versions and definitions have nothing in common. Bourguignon argues that the precautionary principle has a common denominator, namely to avoid adverse impacts in scientific uncertainty situations (Bourguignon 2015). From the author's perspective, the precautionary principle is unique and has at least three significant roles in common that most supporters of the precautionary principle generally fit. First, as an approach to avoid the serious damage or dangerous risks due to a threat. Second, as a response to uncertain critical situations. Third, as a guide in dealing with a catastrophic state.

However, the precautionary principle also has some controversial perspectives and, therefore, not without some criticism. As one critic stated by Sabhlok, the precautionary principle gives bureaucrats the freedom to only count benefits, ignore costs, or only count imagined cost while ignoring benefits (Sabhlok 2019). Furthermore, the principle reverses the burden of proof of harm for regulatory intervention and taking us to the dark ages (Sabhlok 2019). Therefore Sabhlok rejects the precautionary principle and suggests using the standard cost-benefit test. Another criticism of the precautionary principle was argued by Martin Peterson. Peterson argues that the precautionary principle should not be used by itself as a basis for decision making, since no formulation of the precautionary principle can be consistent with three fundamental principles of rational decision-making. Also, according to him, the precautionary principle is unreasonable qualitative decision rule (Peterson 2007).

Sabhlok and Paterson's can be both right, since the precautionary principle is unique and has its own way of looking at each different problem. This is indicated by the many definitions and versions of the precautionary principle used in international documents or provisions. In this case, any weakness of the precautionary principle shall lead toward a worthwhile notion of completing the precautionary principle in facing the uncertain, hazardous threat.

2.5. The development of precautionary principle

In the beginning, the precautionary principle was originally only to deal with health problems and environmental protection. Over time, with increasing human needs, the more sophisticated technology, and science, the precautionary principle has evolved into a principle not only for conducting risk assessments on health and the environment. The precautionary principles were also developed as an approach to the decision-making process, and their application is starting to expand, including Genetically Engineered Products.

During its development, the precautionary principle was also discussed concerning nanomaterials' engineering, that recommended for prohibition from food products by the United States National Organic Standards Council. The discussion concerned whether the food production is safe before being marketed and implicitly stated that the precautionary principle with certain criteria could be used as a guide in conducting research and policymaking (Kessler 2011). This means that the precautionary principle can function as a framework, as guidance in the decision-making process and the discussion provides an update of the precautionary principle. The principle develops into a general framework for the entire series of policies.

Interestingly, the latest development is expanding the precautionary principle concept to become a Universal Precautionary Principle (UPP), which recognizes the relationship between society and land, elevating people's welfare, culture, and the economy as values that are as important as environmental issues (Akins *et al.* 2019). The UPP is context-dependent in its implementation and consists of three domains: the Environmental Precautionary Principle, Sociocultural Precautionary Principle, and Economic Precautionary Principle. The UPP notion has the prospect to be a basic instrument for convention, resolutions, decisions, guidelines, strategic plans, and frameworks. Considering the UPP idea, the possibility is that the precautionary principle is used more wisely and strategically in a broader but more specific field.

3. Indonesia's financial crisis of 1997-1998

A financial crisis or economic-banking crisis is a phenomenon that often occurs and can create unreasonable panic (Mill 2008). A financial crisis can cause a sovereign country to become bankrupt, even turn a state into a collapse in extreme circumstances (Rousseau 1968). Of the several crises that have occurred, handling financial or banking crises usually requires high costs and the impact caused by the crises. The financial crisis has a huge impact on

economic activity and can trigger a recession, so with the banking crisis will also make the recession worse (Claessens *et al.* 2010). In general, the crisis resulted in a significant reduction in various economic factors. After the crisis, the recession period is an empirical fact that the impact is so large that it affects the conditions of consumption, investment, industrial production, employment, exports, and imports.

Financial crises are often associated with substantial changes in the value and amount of credits and prices of assets; disruption in financial intermediation and the availability of external financing for the economy; balance sheet problems on a large scale (be it company, household, financial intermediary and government balance sheets); as well as what form and how much government support (liquidity and recapitalization assistance). Thus, the financial crisis is a multidimensional event, and it is not easy to characterize it using global indicators (Claessens and Kose 2013).

The post-crisis recovery is equally important, given that post-crisis recovery tends to be slow and time-consuming (long-term effect). A post-financial or banking crisis recovery tends to be slow due to the sluggish domestic market and tight lending.(Kannan *et al.* 2009) Even in the medium period, the economic growth tended to be depressed significantly after the crisis (Reinhart and Rogoff 2011).

One empirical experience is Indonesia's financial crisis of 1997-1998, a traumatic loss for Indonesia in facing an economic emergency that led to a banking crisis. The 1997-1998 crisis's impact was that the costs incurred to restore the banking sector was high, namely more than Rp. 600 trillion (Hadad *et al.* 2003). In fact, rescuing the crisis was one of the highest costs of handling the crisis in Asia, which reached 34.5% of the Gross Domestic Product.(JF 1999) According to Finance Minister Sri Mulyani, the estimated cost of rescue is up to 70% of the Gross Domestic Product (GDP) (Anon 2016).

The financial crisis that became a banking crisis that hit Indonesia in 1997-1998 was the worst in Indonesia's New Order history. The crisis began with the fall in the value of the Thai baht and the Thai government's failure to maintain the value of the bath. In a relatively short time, the fall in the bath value spread and was followed by the fall in the value of the currencies of several Asian countries, such as Malaysia, Indonesia, the Philippines, Korea, and Hong Kong triggered economic chaos in Asia.

After the Thai currency fall in July 1997, respectively Malaysia, Indonesia, Singapore, the Philippines, and Korea experienced asset deflation of 40% to 70% (Wolf 2002) and currency depreciation of 18% to 85% (Montes 1999). Pressure on regional markets has intensified in line with the impact of the devaluation of the Thai bath. Regional stock exchanges were also volatile, spreading to neighboring countries of Thailand (Malaysia, Indonesia, Singapore, and the Philippines), resulting in the fall of the Korean won (Baig and Goldfajn 1999). Of several countries in Southeast Asia, Indonesia experienced asset deflation of 40% to 70%, and the rupiah depreciated by 83.6%. The rupiah exchange rate against the US dollar experienced a free fall, from Rp. 2,432.00 on July 1, 1997, to Rp. 14,800.00 on January 24, 1998 (Montes 1999).

3.1. Financial crisis to become a banking crisis

In Indonesia's case, one of the triggers for the financial crisis to become a banking crisis was the closure of 16 commercial banks by the Indonesian government and the IMF in November 1997. At the closure of 16 failed banks, the government only guaranteed bank liabilities to small depositors, which was limited to Rp 20,000,000 - (twenty million rupiah) per depositor per bank. Failure to implement a blanket guarantee scheme has resulted in a collapse of public trust, caused tremendous panic, and led to massive withdrawals of deposits (bank runs). The government's response to the onset of the crisis is considered to have damaged international confidence in the rupiah (Sherlock 1998). The political turmoil and riots further exacerbated the situation in May 1998. After the May 1998 riots, public trust in banking fell dramatically, depositors rushed out and made banking conditions in Indonesia worse. As a result, the financial crisis was unbearable; this impacted the economic sector and developed into a banking crisis.

Overall, Indonesia's strategy for dealing with the 1997-1998 banking crisis was divided into 5 (five) stages: First, maintain the exchange rate and prevent banking crises through a tight monetary policy and provide a stimulus package. Second, banking rescue, to resolve liquidity and solvency problems with the Bailout strategy (BLBI). Third, increase public trust and prevent capital flights, with a government guarantee program in the form of a blanket guarantee. Fourth is banking restructuring, by establishing IBRA, restructuring credit, and carrying out bank recapitalization. The fifth is to restore and strengthen banking and financial systems by establishing LPS and OJK and creating a financial safety net. On the whole, the strategy's implementation is accompanied by a more comprehensive reform of laws and regulations, especially in the legal framework and working procedures for financial sector institutions.

Indonesia's financial crisis is an example of an empirical event of how a crisis that was originally quantitative in nature (inflation, a fall in the value of the currency) qualitatively turns into a banking crisis, which forced the government to intervene.

3.2. Legal gaps in Indonesia's financial crisis of 1997-1998

The legal gaps in the financial crisis of 1997-1998 covered the following matters and functions; First, Bank Indonesia had limited autonomy and contingent authority, which was fully under the Monetary Board's control. Second, the banking sector statutory provisions limit the authority and independence of Bank Indonesia. Based on Law 13 of 1968 and Law 7 of 1992, Bank Indonesia was not independent in banks' development and supervision. The position of Bank Indonesia, which was still part of the government, should facilitate coordination with the Minister of Finance, but this was not the case. Rigid banking sector provisions in the process have created problems of legal certainty (supervision and guidance system) and benefits. Even more, based on Law 7 of 1992, banking regulations were carried out for and on behalf of and based on the Minister of Finance decision. Bank Indonesia only implements and/or provides recommendations to the Minister of Finance.

Third, Law No. 13 of 1968 did not provide many alternatives for Bank Indonesia in mitigating problems with banks experiencing liquidity difficulties. Mitigating is limited by providing credit to banks to overcome liquidity problems it faces in an emergency (Bank Indonesia as the lender of last resort). Likewise, Law No. 14 of 1967 concerning Banking Principles does not provide an adequate legal framework regarding what actions to take if a bank experiences a dangerous situation or can endanger solvency or liquidity.

Fourth, the money deposit guarantee at the bank was not implemented properly. In 1973, Indonesia already had Government Regulation No. 34 of 1973, which regulates the guarantee of money deposits at banks whose operations are assigned to Bank Indonesia. However, from 1973 until the financial crisis's threat in 1997-1998, the implementation of Government Regulation No. 34 of 1973 was not heard. Besides, Government Regulation No. 34 of 1973 was not designed to face the threat of a banking crisis. This can be clearly seen from several provisions of the articles, which are limited to how to deal with banks' liquidity problems without regulating the problem of systemic bank failures.

Fifth, Banking law number 7 of 1992 did not yet have sufficient legal principles in banking rescue and restructuring. The legal gaps include how the institutional framework, coordination, communication between competent authorities, and supporting activities make policies. Financial sector policymakers need to improve the institutional framework between them. These institutions' role is very significant; all the policies they take will affect the market and impact the economy.

Sixth Prevention and or mitigating emergencies that are dangerous to the financial system and/or the banking system. A lex specialist law oriented to the sovereignty, necessary, concrete, and important conditions (conditions of necessity, concreteness, and urgency) was needed (Schmitt 2005). Considering the constraints and objectives of extraordinary circumstances, the government needs an extra-judicial rule of law. Those are manifested by forming a special agency to restructure the national financial or banking system. This special agency must have lex specialist and extra-judicial powers. The agency shall be authorized to take countermeasures that are more effective and efficient in a crisis. There can be concrete new legal provisions in an emergency, which are different from the law that applies under normal conditions. Allowing the executive body to gain more specific effective and efficient powers to prevent further damage and restore the situation. The framework for preventing and mitigating emergencies also includes coordination between institutions or authorities in the financial sector at the policy-making level.

How to fill the legal gaps has actually been a concern since the days of the Roman Empire. At that time, the jurists paid great attention into two things; the first is the authority or who has the right to fill or overcome it. The second is the method or how to fill the legal gap. The easiest and best way to fill the legal gap is to make the necessary laws. In other words, if the applicable law cannot provide the required legal norms, then a legal rule or regulation is formed to regulate the legal issue concerned. If the prevailing laws and regulations do not completely regulate a legal issue, then a new provision is added to the statutory regulation. Additional provisions can be in the form of addendums or amendments to legal or regulatory requirements. Law may remain in effect even though changes in one or two of its articles have a new meaning by concrete needs. However, sometimes there are no laws and regulations that regulate a legal issue, and it is not possible to make new laws.

In principle, the formation and/or addition of the law is carried out by the legislature. The formation and/or addition of the law requires a process and time. In contrast, decisions must often be made in certain emergency circumstances with limited time and objectivity. The function of the legislature cannot always act to compensate for these conditions. On the other hand, the legislature cannot foresee and determine the cases that may be faced. With the increasing need and emergency pressure to overcome the legal gaps, more effective and efficient action is needed besides the legislature. In response to this, the executive body's role will be significant because legal gaps can be filled with executive discretions for the state's and society's good.

4. Overcoming the financial crisis with the precautionary principle

As discussed above, in certain circumstances the law is utterly inadequate, but decisions and actions must be taken. To overcome this problem, it must be left to the discretion of the executive power, to be realized for the good of the state and society (Gross and Ní Aoláin 2006). Likewise, if there is a threat of a financial crisis and there is no

adequate legal framework to deal with it, the government as an executive body must make decisions and act immediately for the good of the state and society. Financial or economic crises have been identified as similar to violence or physical criticalness threatening the state and society, leading the executive body to require extra powers to overcome the threat. According to Locke, the prerogative is nothing but the power in the executive's hands to provide for the public interest, which is subject to unforeseen and uncertain circumstances, and when laws cannot provide certainty appropriately (Locke 2003).

This is what actually happened during the 1997-1998 financial crisis in Indonesia. Before the threat of the 1997-1998 Financial Crisis, Indonesia did not yet have laws and regulations that specifically regulate the mechanism of action that must be taken in facing the threat of a financial and/or banking crisis. The laws and regulations that were in force in the financial sector at that time were very limited and inefficient in their implementation. This situation creates problems and gaps between existing regulations and an urgent need. It was an issue that needs to be formulated as a set of rules to overcome the crisis.

At the beginning of the crisis, the Indonesian government took certain steps that were deemed good for society and the state. Despite this fact, the government was unprepared and less alert because Indonesia did not have a legal umbrella to guide it in facing the threat of a financial system crisis. All government efforts and actions were carried out based on discretion, which, although well-intentioned, was inefficient and tended to fail. First, this can be seen from the government's failure to read the Thai baht currency crisis signs. The signs of a currency crisis in Thailand actually began to be felt in 1996, becoming obvious between March 1997 and July 1997. Thailand's economy became sluggish when, in 1996, Thailand experienced a 5-30% housing vacancy rate (Lauridsen 1998). The recession is increasingly visible when the bad credit figures increase to impact banks and lending companies. Moreover, it turns out that these banks and companies also receive loans from abroad. Over the course of six years, Thailand's total debt increased from 34% of GDP to 51% of GDP in 1996 (Lauridsen 1998).

Second, from the government's initial response to issuing a package of economic policies. Before the first IMF's LoI, the package was issued without being accompanied by a policy formulation of crisis prevention and management regulations. At that time, the government was too focused on maintaining the rupiah exchange rate. On August 14, 1997, the government released the Rupiah exchange rate against the US dollar to the market mechanism. On September 3, 1997, the government issued an economic policies package covering the monetary and fiscal sectors and the real sector. The policy package took the form of trade liberalization and rescheduling of government projects.

Third, the government failed to prevent a banking crisis due to the collapse of depositor confidence after the closure of 16 national private banks. At the closure of 16 national private commercial banks, the government and the IMF only calculated the total assets of 16 banks, which only amounted to 3% of total banking assets. Judging from the small number of assets, the closure is not expected to impact depositor confidence and will not be rushed (Bank Indonesia 2010). The panic was unavoidable, the trust in banking was a collapse, and irrational actions have happened; customers withdraw their funds. The chaotic financial crisis was becoming a banking crisis.

With the problems of legal gaps in the economic and banking sectors, the government was required to respond quickly during the 1997-1998 financial crisis. The government did not have many options to stabilize the rupiah's value and make the banking sector healthy. Overall, the government has taken several actions, namely: 1) Sign LoI with IMF; 2) Revoked licenses and closed 16 private commercial banks; 3) Guarantee funds of up to IDR 20 million per depositor per bank; 4) Undertaking to restructure of troubled financial institutions that deserve; and 5) Improve the institutional, legal, and regulatory framework for the banking sector. The actions were not based on a legal framework for emergencies, urgent and occasional demand in its implementations. The absence of such a legal framework had impacted the technical coordination and exchange of information between Bank Indonesia and the Ministry of Finance and how to formulate appropriate policies for crisis resolution.

In the first LoI with IMF of October 31, 1997, the Indonesian government at last firmly stated it would improve the institutional, legal, and regulatory framework for banking operations. The laws and decrees governing central bank and banking operations, bank liquidation, legislation, judicial and administrative agencies for title registration, collateral perfection, foreclosure, and bankruptcy will be revised to incorporate international best practices. Furthermore, foreign ownership of Indonesian financial institutions will be facilitated for international banks and foreign investors.

From the description above, the government has actually done was for the good of the state and society, even without any appropriate regulatory or legal frameworks. It could be argued that the government was using its prerogative power to act. Furthermore, the steps were taken by the government actually reflect the considerations and elements of the precautionary principle. The financial crisis can be categorized as a dangerous threat with a severe effect from the basic understanding of the precautionary principle.

Likewise, there were high conditions of uncertainty, which are difficult to predict. On May 30, 1997, Indonesia's macroeconomic indicators showed a positive increase in performance. GDP increased by 7.8%, the inflation rate fell to 6.47%, foreign exchange reserves increased by USD 4 billion (World Bank 1997). At that time, Indonesia had fulfilled the five main factors to maintain high growth and improve equity in Asia. A healthy

macroeconomy that is considered capable of absorbing shocks, high domestic investment and savings, strong human resource development, attention to international competition, reduced interference to the market, and the last is government institutions and institutions' improvement. Indonesia got a BBB rating from Standard and Poor's but became BBB- on October 10, 1997 (Bank Indonesia 2014). However, no economist expected that strong macroeconomic conditions would collapse in just 3 months. From the basic understanding of the precautionary principle, this macroeconomic condition is also categorized as a situation of uncertainty that causes a threat of crisis and its impact in short to long term consequences.

Since there were a financial crisis threat and uncertainty, the third basic understanding of the precautionary principle related to the threat of a financial crisis is the element of preventive action. Preventive action must be taken immediately, whether by limiting certain actions or immediately taking certain actions. All those three elements are the government's responsibility to take action to overcome the threat of crisis. The action of government is an obligation for the good of the state and society.

From the author's perspective, the precautionary principle is unique and has at least three significant roles in common that most supporters of the precautionary principle generally fit. First, as an approach to avoid the serious damage or dangerous risks due to a threat. Second, as a response to uncertain critical situations. Third, as a guide in dealing with a catastrophic state.

5. Conclusion

As described above, this article is an initial study of how to apply the precautionary principle in dealing with the threat of a financial crisis. The author emphasizes that if there is a threat of a financial crisis and there is no regulatory framework, the government can act to use its authority for the good of the state and society by applying the primary understanding of the precautionary principle as a guide.

Using Indonesia's empirical experience in dealing with the threat of a crisis in 1997-1998, It can be seen that the precautionary principle can actually be used to fill legal gaps. However, it needs to be addressed wisely and carefully in its application, especially by the executive body, where an attitude of caution is very reasonable. The precautionary principle to be applied cannot be found only through the text but also requires reasoning and understanding of values and meanings, since it is rooted in society, manifested in values used as guidelines by the executive body. This is where it becomes important to understand the true value and meaning of the precautionary principle.

Applying the precautionary principle is considered important because its application is expected to complete existing legal norms. The precautionary principle in law is not the law in a concrete sense, but rather the basics in forming positive legal rules, complement the law and legal system so that the law can apply more dynamically.

The authors conclude that a basic understanding of the precautionary principle is very likely to be applied if there is a legal gap in facing the threat of a financial crisis. The precautionary principle can be used to oversee decision-making, as a guide, and as an element to develop government institutions' capacity to overcome a financial crisis. The author also finds that the executive's utilitarianism and prerogative authority theory greatly influences the development process to apply the precautionary principle as a guideline. In the end, the author suggests that the notion for applying the precautionary principle within the prerogative power of the executive body shall be explored and needs further study.

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Preventive Measures for Corruption Through Anti-Corruption Education at Higher Education Institution (A Case Study at State Polytechnic of Malang)

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Abstract
High level of corruption gives Indonesia adverse image among international communities. It may brings disadvantageous impact for various sectors. Effort of corruption eradication has so far focused on two aspects namely prevention and prosecution of corruption. The two measures will gives satisfying result if government bodies and society work together. To prevent corruption, there is a need for active participation of students by developing anti-corruption culture in our society. This study aims at encouraging university students to take active role as agent of change and pioneer for anti-corruption movements. For students of State Polytechnique of Malang, This is quantitative study by employing descriptive approach aiming at elaborating or describing events, circumstances, people or other objects which are interrelated. Data are gathered by conducting interview, observation and distributing questionnaire. For students of State Polytechnique of Malang, anti-corruption education aims at giving sufficient knowledge on corruption and its eradication efforts as well as internalizing values of anti-corruption. In addition, it also aims at developing anti-corruption culture and encouraging students to take active role in preventive measure for corruption in Indonesia.Based on several previous studies, the researcher comes to conclusion that anti-corruption education, which is part of Pancasila and Citizenship Education, might develop students' awareness to prevent corruption. It is expected that after graduating from State Polytechnique of Malang, they are able to put themselves as role model for people around them. On the other side, there are several instructional method used in State Polytechnique of Malang. Those are In Class Discussion, Case Study, Thematic exploration, Film Discussion and General Lecture.
Keywords: preventive measures, anti-corruption education, students, higher education.
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1. Introduction

Indonesia, as member of world communities are known for its high level of corruption. It results in negative image and loosing trust from other countries. Foreign businessmen do not trust on bureaucracy in Indonesia and it makes them relocate their business to our neighbouring countries. This condition is disadvantageous for all aspect of live. Therefore, corruption might be called as "social parasite" damaging government structure and causing problem for national development. It seems that it is impossible to eradicate corruption because it needs numerous concrete evidences and involves many parties.

Government of Indonesia has conducted efforts to eradicate corruption. One of them is by establishing Corruption Eradication Commission in 2002 under Law no 30 of 2002. It is an independent government body specializing in eradicating corruptions by preventing and prosecuting them. Corruption is an extraordinary crime that needs extraordinary effort to eradicate.

Corruption eradication efforts consist of two tasks, namely prevention and prosecution task which might not be successful without people's participation. Therefore, students of higher education should take part in corruption eradication efforts in Indonesia.

We cannot solely rely on law officers to fight against corruption. Students as well as university faculty should take part in efforts of early prevention of corruption. Education is a media to educate future generation to prevent corruption. As future generation, students should give contribution for their people and nation. One of long term solution for corruption eradication is by conducting anti-corruption education to students of higher education. It is because the students will take over the position of today's government officials.

In addition, the youths are still vulnerable of influence from others. therefore, it will be easier to educate the youths in order to prevent them from corruption habits of their previous generation.

The youths are conscious to fight against and transform unrighteous condition. In our history, students took part in national struggle and national leaders usually arise from youth movement. Before independence, it was the youth who spearheaded Indonesian struggle against Dutch colonialism.

The afore-mentioned information are what students have done to maintain their idealism to fight against unrighteous condition. In this present era, students face even more formidable challenges than those in the past. It is corruption that should be eradicated for causing adverse condition in Indonesia. students should believe that

corruption is common enemy to must be eradicated.

Students' involvement in corruption eradication efforts is not on the prosecution domain. It is expected that students take more active role in preventing corruption by setting up anti-corruption culture among their community. Students should be an agent of change and driving force for anti-corruption movement in society. Therefore, they should have sufficient knowledge on corruption and strategies to eradicate it.

Anti-corruption education for students aims at transferring sufficient knowledge on corruption and its eradication efforts, at encouraging students to take active role in preventing corruption, at internalizing values of anti-corruption and at developing anti-corruption culture among students. Universities which are responsible for producing high quality graduates have high concerns on anti-corruption education. Such kind of education facilitates students to understand corruption and prevent them to do corruption.

Research problems in this study are concerned with the function of anti-corruption education to arise students' awareness as preventive efforts to prevent corruption and with the model of anti-corruption education at State Polytechnique of Malang.

This is quantitative study which is a process of obtaining knowledge by using numerical data to analyse information on what is being studied. Kasiram (2008:149) in his book entitled Qualitative and Quantitative Research Methodology. The objective of quantitative research is to build nomothetic science which aims at formulating laws from its generalization. Subject of study, data and data sources as well as data collecting instruments are those that have been planned by researcher.

Because students are the subject of this study, then selection of methodology should employ descriptive approach. Punaji (2010) states that descriptive research is a study aims at explaining or describing events, circumstances, object, human object or others related to variables of study by using numerical data or description data.

According to Hidayat Syah, descriptive study is a research methodology used to finding out knowledge on research object at certain period of time. Data sources used are either primary sources in the form of subject of study and secondary data in the form of students' attendance list and underlying theories.

Data were gathered by interview and questionnaires. The data were then analysed in order to answer studied phenomenon in the form of numbers.

2. Literature Review

2.1 Anti-Corruption Education

Indonesian Dictionary states that definition of corruption is "evasion or fraud of government's or company's fund for personal gain". Law no 31 of 1991 jo Law no 20 of 2001 also states that corruption is unlawful act for the sake of benefit of oneself, others or corporation causing loss on state fund or economics".

Corruption leads a state into bankruptcy because it causes damage on economics, education system and health service.

Quoting David M Chalmers, Baharudin Lopa said that corruption deals with bribery and manipulation in economic sector and also other public sector. It was taken from corruption definition which is "financial manipulation and depiction injurious to the economy are often labelled corrupt" (Evi Hartanti; 2008).

Anti-corruption education is conscious and planned effort to realize critical teaching and learning process for anti-corruption values. Therefore, anti-corruption education is not solely media for knowledge transfer (cognitive) but also for building positive character (affective) and moral awareness to fight against (psychomotor) distorted behaviour related to corruption.

Directorate general of higher education states that the objectives of anti-corruption education at higher education is to nurture anti-corruption habit on students and to encourage students to function as agent of change who are able to give positive contribution for the people and country. Standards of competence to achieve are that students should be able to

(1) Prevent themselves from doing corruption (individual competence). This individual competence facilitates students to internalize negative mindset on corruption and positive one on anti-corruption, and to improve their awareness on various kinds of corruption act. Students should build anti-corruption attitude that prevent them to conduct even trivial kind of corruption.
(2) Prevent others from doing corruption by giving various kinds of warning. This anti-corruption attitude will spread to their surroundings; students should have courage to warn or stop other people doing any kind of corruption and be able to give information on corruption and anti-corruption efforts.
(3) Detect possible effort of corruption students of higher education should be able to detect corruption from its type, process, rules broken, corruptor, and its damage/loss. Then, students should also be able to give solution (problem solving).

Essentially, Anti-corruption education is part of character building education focusing on nurturing values of community life. Our founding father of education, Ki Hajar Dewantara stated that education is efforts to develop moral virtues (character), mind (intellect) and body of students. Those part should not be separated for the sake of

perfection of children life. The objective or learning outcome of anti-corruption education in higher education, which is in line with mission of Corruption Eradication Commission is to break chain of corruption in Indonesia. The rationale of anti-corruption education ((http://probopribadisembiringmeliala.blogspot.com) are

a. Corruption has been an accute problems in Indonesia. it could'nt be tackled by law enforcement only.
b. According to Paulo Freire, education is a way leading to permanent freedom in order that people are aware about oppression upon them. Therefore, there is a need for cultural action to free them from the oppression.
c. Fight against corruption is not effective and there has not been anti-corruption education.

2.2.Factors Causing Corruption

Erry Riyana Hardjapamekas (2008) states that there are several factors causing high level of corruption in Indonesia. Those are (1) lack of role model and leadership from national leaders, (2) low salary of government employees, (3) weak commitment on consistent law enforcement and implementation, (4) low integrity and professionalism, (5) no established internal mechanism at banking, financial institution and beureaucracy, (6)work condition, task and surrounding community and (7) lack of faith, honesty, moral and ethics.

In addition, Susila (in Hamzah, 2004) states that corruption is caused by weaknesses on regulations in which there are rules giving advantages on certain group of people, insufficient regulation and lack of socialization, light level of punishment, inconsistent application of punishment, lack of evaluation and revision on prevailing regulation.

Based on theory put forward by Kack Bologne which is called GONE Theory, it is stated that factors causing corruption are:

a. Greed: it is related to potentials greed in everyone.
b. Opportunities: it concerns with condition of organization or communities giving a chance for corruption.
c. Needs: it concerns with factors needed by individuals to live their life.
d. Exposures: it concerns with action or consequence faced by corruptors.

Concerning individual behavior, Isa Wahyudi elaborates that the causes of corruption are internal drive. It is willingness or intention to corrupt. Furthermore, the causes of corruption are: (a) human greeds, (b) weak morality, (c) consumptive life, (d) laziness to work (Isa Wahyudi: 2007).

2.3.Strategies and eradication of corruption

G. Peter Hoefnagels differentiates efforts to eradicate corruption or the called criminal policy into three. They are criminal law application, prevention without punishment, and influencing views of society on crime and punishment/mass media (Nawawi Arief: 2008).

According to Baharudin Lopa, preventing corruption is not hard if we are aware to put public interest more than private interest. It is crucial because no matter how perfect our regulation is, corruption will occur because people mental state is determinant factor. To analyse corruption, there are three strategies to prevent or to eradicate corruption. Those are

1) Preventive strategy
   It is implemented by focusing on factors causing corruption.
2) Deductive strategy
   This strategy is formulated and implemented in order to detect early potentials corruption.
3) Repressive strategy
   It is formulated and implemented in order to give proportional punishment fastly and accurately to those involved in corruption. Therefore, criminal law is one way to eradicate corruption.

2.4.Role and Involvements of Students of Higher University

In Indonesia history, students of higher education has crucial role. It was started in 1908 of Indonesian National Awakening, in 1928 of Indonesian Youth Pledge, in 1945 of Indonesian Independence Day, in 1966 of the birth of New Order era and 1998 of the birth of Reformation order. They are driving force of those occasion with their ideas, spirit and idealism.

Having high intellectual ability, spiritful enthusiasm, and pure idealism, students always take significant role in national history. Students are agent of change which has been proven. Thus, students are also expected to be driving force for anti-corruption movements because they are equipped with special basic competence such as, intelligence, critical thinking skills, and courage to speak the truth.

The role of youth in corruption eradication is crucial in Indonesia. Therefore, they should take active role in national development process especially corruption eradication program in order to realize Indonesia which are free from corruption and prosperous. Education is inseparable part of corruption eradication efforts in Indonesia. It is because anti-corruption character might only be developed through education. In this context, the youth might take role in corruption eradication by their studying hard and implementing their knowledge for their life.

The benefit of education might be implemented early such as by conducting social activities in the form of

collective work for society or demonstration to speak people aspiration. Thus, the youth might give contribution for our country in line with their function as agent of change. Character education is one of important kind of education for us.

There are two kinds of students' involvement in anti-corruption movement at university. The first concerns with students themselves and the second with students' community. For individual context, it is expected that students are able to keep themselves away from corruptive behaviour and corruption. For community context, it is expected that students might prevent their peers from corruptive action or even corruption. In order to take part in anti-corruption movements, students should show anti-corruptive behaviour. Therefore, students are able to internalize anti-corruption virtues and understand corruption and principles of anti-corruption movement. The virtues might be developed by joining seminar, campaign and course on anti-corruption. The values and knowledge should be implemented at their life. In other words, students should be able to show that they are free from corruptive behaviour.

3. Discussion

Agus Wibowo states that anti-corruption education is conscious and planned efforts to create critical teaching learning process on anti-corruption values. Anti-corruption education is not only knowledge transfer media (cognitive) but also character building (affective) and moral awareness to fight against corruption (psychomotor) (Wibowo,2 013;38).

Thus, we come to conclusion that anti-corruption education is conscious effort to develop awareness and to prevent corruption through formal or nonformal education. The objective of anti-corruption education is transformation of behaviour and attitude toward corruptive act, to develop awareness on the danger of corruption and to arouse willingness to fight against it.

Anti-corruption education is also intended to promote honesty, persistence to fight against corruption. Anti-corruption education should be managed in the form of dialogue in order to create collective awareness on the significance of eradication and prevention of corruption. Policy to implement anti-corruption education is new awareness to develop anti-corruption behaviour since early stages.

The ultimate objective is to develop resistance culture against corruption which is started from family in order to create deterrent effect, to develop shameful culture, to create honesty values, culture of being responsible and to prevent corruption.

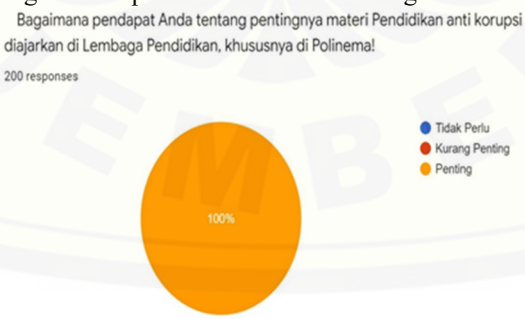
To gather data, the researcher formulates several question. The questions which are based on research questions are delivered to either students or lecturers.

The respondents are free to express their personal problems directly rather than stick on the questions from the researcher. Then, the researcher takes several explanations from the respondents for analysis.

The respondents are required to fill online link given to them. Main requirements to obtain accurate data are that respondents should answer the question honestly. Therefore, the researcher encourages them to answer the question honestly as reflected in introductory statements of questionnaire.

This study requires concrete data taken directly from respondents who are students of State Polytechnique of Malang.

There are 200 students filling out the questionnaires. The findings are shown in the form of diagram below

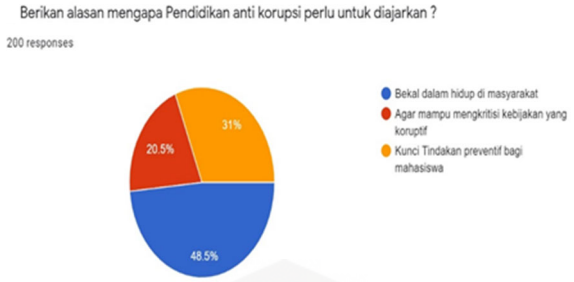


The findings show that 100% or all students of State Polytechnique of Malang states that anti-corruption education is crucial to be given in State Polytechnique of Malang.

Therefore, there is a need to create a sense of belonging to the institution as if it is their second home. Campus is intended to be a place for students to study freely and to give contribution without limitation. In addition, students might be given a chance to collect donation for those who need financial supports.

It will improve the quality of students relation. Other action that might be conducted is to give access for students to reach for their lecturers after school hour by using internet and to improves lecturers' role as facilitator and motivator. It is crucial for students to develop simple and economical way of life. Therefore, students should prioritize what they need more than what they want. Developing courage is also crucial because it will make

students to be able to find solution for their problem.



From the figure presented above, we know that the reasons why anti-corruption education is crucial for the respondents are

- 48,5% states that anti-corruption education it will give them what they need in the future.
- 20,5% states that they hope to be able to criticize policies on corruption.
- 31% states it anti-corruption corruption is preventive key for them.

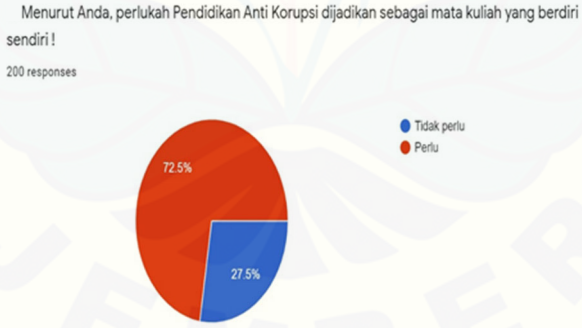
Students' role are crucial because they have idealism and high intellectualism. The two facilitates students to take important role for our nation. History shows that students are crucial for agent of change.

The result of anti-corruption education is character transformation. It is of course positive transformation. Those who corrupts chooses to stop after joining anti-corruption education. It is expected that students do not corrupt at their work later.

Concerning their daily life, it is expected that students function themselves to be driving factors with their intelligence, critical thinking skills and courage to speak for the truth. There are two domains for students involvements in anti-corruption movement. The domains are the one related to students themselves and the other related to students community. For individual context, students should be able to prevent themselves from corruption.

For students' community, students are expected to keep their peers and students organization away from corruption.

Therefore, students should have character of anti-corruption and its principles. Socialization, campaign, seminar, workshop and other activities are useful for developing anti-corruption culture. For instance, a campaign not to cheat is a way to develop anti-corruption behavior. Developing virtues of hard working, honesty and responsibility is also significant. Kantin Kejujuran is another example of how to develop honesty and responsibility.



From the survey presented on the figure above, we find out the students' opinion on the significance of anti-corruption education course which is separated from Civic Education. The percentages are

- 72,5 students believe that it is not necessary to be one independent course.
- 27,5% students believe that it must be independent course.

The anti-corruption education aims at developing critical attitude toward corruption. After taking anti-corruption course, students are able to recognize the danger of corruption. It will ruin national economy. Corruption prevents the achievement of economic goals. It also reduces public trust resulting in low investment because investors concerns to invest their fund.

Regarding book entitled Anti-corruption Education for Higher University, course materials are Definition of Corruption, Factors Causing Corruption, Massive Impact of Corruption, International Cooperation and Instruments of Corruption Prevention, Regulation of Corruption and Students' Role in Anti-corruption Movements.

There is no fixed arrangement for assessment of students' achievement for anti-corruption education course. The institution applying anti-corruption education course have authority for assessment. However, assessment for students' achievement aim at measuring learning achievement in the form of individual or group task, self-assessment, peer assessment, oral or written performance observation.

Corruption in Indonesia is so severe that it creates skepticism for all including students. Therefore, there

should be new design for anti-corruption education to make it attractive and effective. Course materials are important but the choice of creative instructional method is key to optimize quality of lesson and to create critical thinking and integrity ethics on the part of students. Lecturers should be communicator, facilitator and motivator for students. Directors of institution should also take part in creating campus as land of integrity to support the effectiveness of anti-corruption corruption education.

Concerning the characteristics of instructional system in State Polytechnique of Malang, instructional model of anti-corruption education should be integrated with outside instruction. Classroom instruction is not necessary to be one independent course. Curriculum model and its instruction is integrated into existing and relevant course in the form of character-building education under Personality Development Courses namely Religious Education, Pancasila and Civic Education. Outside-classroom instruction might be in the form of developing students' potentials to explore and find out reality of life and its problem. Through outside-classroom instruction, students are trained to find solution for anti-corruption problems. Developing anti-corruption values will be meaningful and useful if students recognize and find them directly. Campus might be empowered by coordinating with Students' Organization and other relevant students' organization in State Polytechnique of Malang. Imperative and normative policies from institution management are also crucial to encourage discipline, responsibility and honesty. Therefore, organization culture will be developed in such a way that supports anti-corruption movements. Instructional model of anti-corruption might also be visualized into pictures of character building education. By anti-corruption education, it is expected that individual will have integrity. Role model emerges from lecturers, director of institution and other.

Anti-corruption education is not one independent course in State Polytechnique of Malang. It is integrated in Pancasila and Civic Education course. Instructional methods that might be used as

1. In class discussion. It is class discussion. Lectures discusses concepts of corruption and anti-corruption. It aims at developing awareness and building students' framework.
2. Case study. It discusses latest cases on corruption focusing on causes of corruption and its impact and anti-corruption movement conducted by government or society.
3. Thematic exploration. In this instructional method, students are divided into groups to observe certain case of corruption or corruptive behaviour from various point of view such as socio cultural, economic or law point of view.
4. Film discussion. Film is used as visual media for instruction.
5. General lecture. It is conducted by inviting or presenting expert for experience sharing.

Selection of instructional method is crucial for presenting anti-corruption course. Teaching learning process will be effective if appropriate strategies of methods are employed. Inappropriate method or strategy of instruction will create boring situation and students will not be able to take the information in properly.

4. Conclusion and Recommencation

From the study conducted, the researcher draws conclusion that anti-corruption education which is part of Pancasila and Civic Education course should be able to arouse students' awareness as preventive action for corruption. It is expected that after finishing their study, students could be role model for people around them by using their knowledge obtained at university. Instructional models that might be implemented at State Polytechnique of Malang are In Class Discussion, Case Study, Thematic Exploration, Film Discussion, and General Lecture.

Anti-corruption education is early step to prevent future corruption. Students are able to recognize the danger of corruption. Anti-corruption course materials should be upgraded into independent compulsory course for all students of State Polytechnique of Malang. In addition, there must be example and role model from lecturers to implement anti-corruption culture.

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Protecting the Rights of Migrants: The Challenges and the Prospects

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Abstract
Migration is a fundamental human process often involving the precarious movement of people across borders. This has implications for human rights. Under the various international human rights laws, human rights are inherent to all human beings and are not tied to one's citizenship or nationality. Therefore, the very presence of all categories of migrants within a State's jurisdiction imposes obligations on the State to acknowledge their presence, and allow them to claim their human rights. Apart from the general human rights laws, other international laws were enacted to specifically protect the rights of many groups of migrants. Despite this, migrants encounter various challenges in the process of migration and in destination countries particularly the migrants that are of irregular status (undocumented migrants). Towards this end, this paper examines the major global international instruments for protecting the human rights of international migrants and the challenges that the migrants often encounter with the aim of identifying the factors responsible for the inadequate protection of migrants' rights. The article proposes that treaty bodies should systematically mandate States' Parties to integrate the specific rights of migrants into national plans of action on human rights, enforce immigration laws in line with the principles of human rights and the rule of law, and provide effective border security and regional engagement so as to discourage illegal migration.
Keywords: Migration, Human Rights, Protection, International Framework, Challenges, Prospects.
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1. Introduction

The mobility of people across international borders dates back to the creation of borders themselves, and the vulnerability of non-nationals is not a new phenomenon (Mavroudeas, Akar and Dobreva, 2019:32). While many migrants move to take advantage of increased opportunities out of genuine, free and informed choice, many others are compelled to move as a result of poverty, lack of decent work, social exclusion, generalized violence, persecution, human rights violations, armed conflict, xenophobia and environmental degradation (Mavroudeas, Akar and Dobreva, 2019:32). Thus, the World Migration Report of 2018 describes International migration as a complex phenomenon that touches on a multiplicity of economic, social and security aspects affecting our daily lives in an increasingly interconnected world. The report elaborates further that migration is intertwined with geopolitics, trade and cultural exchange, and provides opportunities for States, businesses and communities to benefit enormously while it has also helped improve people's lives in both origin and destination countries and has offered opportunities for millions of people worldwide to forge safe and meaningful lives abroad (McAuliffe and Ruhs, 2017). .

This has attracted a rapid increase in the number of international migrants from year to year as asserted in the United Nations (UN) report, that globally, the number of international migrants reached an estimated 272 million in 2019, an increase of 51 million since 2010. Currently, international migrants comprise 3.5 per cent of the global population, compared to 2.8 per cent in the year 2000 (UN DESA, 2019.) While most international migration occurs legally, some of the greatest insecurities for migrants, and much of the public concern about immigration, is associated with irregular migration (McAuliffe and Ruhs, 2017) which takes place when migrants resort to irregular migration channels including seeking out the services of smugglers or even falling prey to traffickers in the absence of regular migration opportunities (Mavroudeas, Akar and Dobreva, 2019:32).

Such irregular migrants often encounter a lot of challenges during migration and in countries of destination. There has also been active reporting in the media of gross human rights violations in the context of migratory phenomena, such as trafficking (in particular in women and children), and the extensive use of irregular migrant labor in the informal economy (Mattila,2000). Migration, therefore, came to be increasingly seen as a high-priority policy issue by many governments, politicians and the broader public throughout the world (McAuliffe and Ruhs, 2017:2). Along with increased attention being given by the international community to human rights issues in general is the specific issue of protecting migrants' rights (both regular and irregular). This points to the global recognition and extension of human rights protection to international migrants. Its premise is that the rule of law and universal notions of human rights are essential foundations for democratic society and social peace (Taran, 2000).

The vast majority of States have ratified international instruments reflecting the principle that all persons, including all migrants irrespective of their migration status, are entitled to have their human rights respected,

protected, and fulfilled (International Organization for Migration (IOM), 2017) as enshrined in the Universal Declaration of Human Rights (1948) and other basic international human rights laws. Specific global treaties explicitly extending those rights to different groups including international refugees, migrant workers, trafficked and smuggled migrants were also adopted. The treaties include the Convention relating to the Status of Refugees (1951), the Protocol Relating to the Status of Refugees 1967, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, 1990).

Other steps taken by the international community to address the challenges of migrants include efforts to improve global migration governance through formal UN mechanisms as well as through informal State-led mechanisms. The efforts include dialogues and consultations held at the global level especially the High-level Dialogue (HLD) on International Migration and Development that held in New York in 2013 and 2016 respectively. Both recognized and reaffirmed the need for international cooperation and action in managing migration and protecting the rights of migrants. The 2016 HLD resulted in the New York Declaration for Refugees and Migrants (UN, 2016) which acknowledged that States have "a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centered manner." Unfortunately, despite these efforts, evidence demonstrates that violations of migrants' human rights are so widespread and commonplace that they are a defining feature of international migration today (Taran,2000:7-52). There are too many instances in which migrants are subjected to violence, abuse, exploitation, discrimination, and other severe human rights violations (International Organization for Migration (IOM), 2017) either limited to the migration journey or experienced while in the country of destination (Global Migration Group, 2008:1-133). This in large part is due not to the absence of international instruments, but includes among others, the lack of the effective implementation of those instruments and appropriate international cooperation (International Organization for Migration (IOM), 2017).

This paper, therefore examines the laws that protect the rights of international migrants in order to identify the extent of protection offered, the challenges often encountered by the migrants, the prospects of migration and recommendations towards better protection of migrants' rights were made. The paper focuses principally on major global-level treaties that provide for general human rights and specific international treaties, dialogues and consultations that protect the rights of migrants.

2. The Legal and Normative Framework for Global Governance of Migration

Global governance of migration has been described as a process in which the combined framework of legal norms and organizational structures regulate and shape how States act in response to international migration, addressing rights and responsibilities and promoting international cooperation (Betts, 2011:4-5) including processes such as dialogues and initiatives that have taken place or that relate to governance at the global level (McAuliffe and Ruhs, 2017:137). According to the UN, the concept of governance is important in relation to migration and human rights, not least because migration is a phenomenon involving a wide range of actors including, but not limited to States, but also presents an important counter-balance to the concept of "management" which could be seen as more concerned with control or even containment of migration.

In relation to the protection of the human rights of migrants (regular or irregular), the first principle of IOM's Migration Governance Framework is adherence to international standards and the fulfilment of migrants' rights which requires that:

> humane and orderly migration requires compliance with international law. The obligation to respect, protect and fulfil the rights of individuals is paramount and applies to all individuals within a State's territory, regardless of nationality or migration status and without discrimination, in order to preserve their safety, physical integrity, well-being and dignity. Protecting the rights of individuals includes combatting xenophobia, racism and discrimination, ensuring adherence with the principles of equality and non-discrimination, and ensuring access to protection.

The second principle is, "formulating policy using evidence and a whole of government approach" and the third principle is, "engaging with partners to address migration." The objectives are: Advancing the socioeconomic well-being of migrants and society, effectively address the mobility dimensions of crises, and ensure that migration takes place in a safe, orderly and dignified manner.

Stemming from a State's authority over its territory and population, international law recognizes a significant role for unilateral State action in regulating migration (McAuliffe and Ruhs, 2018:125). Although States possess broad powers in this field, (defined by a restrictive conception of national sovereignty), which include authority to determine admission, residence, expulsion and naturalization laws and policies, yet this authority is also constrained by substantive and procedural norms relating to the exercise of State power. States have entered into treaties and agreements, and agreed to customary international law that restrict their authority to regulate migration, as an exercise of their sovereignty and in pursuance of their interests and duties (Aleinkoff, 2001:1-56). This results in a relatively strong track record of international cooperation on a range of issues closely related to the human rights of migrants. These include the global refugee regime, labor migration, and counter-trafficking initiative

(Office of the High Commissioner for Human Rights, 2012). This implies that although irregular immigrants violate the rules set by the receiving country concerning entry, they do not fall outside the protection obligation set by the host country. It also implies that the laws and norms for migration governance, relevant to the protection of migrants' rights are found in customary international law and diverse instruments, including multilateral treaties, bilateral agreements and domestic laws.

2.1 Global General Human Rights Instruments on Migrants Rights

Universal principles of human rights implemented in the rule of law provide the foundation for governance of nations for international migration (Cholewinski and Taran, 2009). Consequently, various States have undertaken significant obligations under international human rights laws towards protecting the rights of individuals and groups, including migrants. These laws impose duties on States to respect, protect and fulfil human rights. The basic document of the modern international human rights regime is the Universal Declaration of Human Rights (UDHR, 1948). The core principle of the international human rights regime is that human rights are universal, indivisible, inalienable, and interdependent. As set forth in the Universal Declaration of Human Rights, migrants are first and foremost human beings, included in the "everyone" language of Article 2:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The thirty eight articles of the UDHR (particularly articles 3, 4, 5, 11, 12, 13, 17-24), cover a wide range of human rights, including the right to life, liberty and security of person, prohibition of slavery or servitude, prohibition of torture or inhuman or degrading treatment or punishment, right to be presumed innocent until proven guilty, prohibition of retroactive penal legislation, right to respect for private and family life, home and correspondence, right to leave any country and to return to one's own country, right to freedom of thought, conscience and religion, and - right to freedom of expression, right to recognition and equality before the law, public hearing before tribunals, prohibition of arbitrary arrests, detention or exile, right to nationality, the right to marry and found a family, the right to work and social security, and the right to education.

In an attempt to put the rights listed in the UDHR into legally binding instruments, the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), were adopted. These covenants, together with the UDHR constitute the international Bill of Human Rights. Unlike the UDHR, however, both covenants have binding clauses obliging the State Parties to guarantee the rights to all persons within their jurisdiction. While all human rights are applicable to State action on migration, the principle of non-discrimination is among the fundamental rights that impose obligations on States as provided in article 2(1), ICCPR and article 2(2), ICESCR .This principle does not mean all distinctions between citizens and migrants are prohibited. For differential treatment to be permissible, in general, it must be "reasonable and objective" and the overall aim must be "to achieve a purpose which is legitimate" under human rights law (.United Nations Human Rights Committee, 1989). Their application is not restricted to nationals of the ratifying states. All migrants, including irregular ones, are entitled to the protection of these instruments. For example, article 12 of ICCPR provides that persons lawfully within State territory have the right to liberty of movement within the territory and freedom to choose their residence. Everyone is also free to leave any country, including their own, and no one can be arbitrarily deprived of the right to enter their own country. However, under article 22, States are permitted to impose restrictions that are based in law and consistent with the other rights in the Covenant, if the restrictions are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others. This means that States may not arbitrarily deny nationals the right to re-enter. The Human Rights Committee also held that "there are few, if any circumstances in which deprivation of the right to enter one's own country could be reasonable" (Fisher, Martin et. al., 2003:105).

Apart from the international Bill of Human Rights, other core human rights treaties articulate the fundamental importance of safeguarding human dignity. The treaties include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965). Articles 2-7 condemn discrimination based on race, color, descent, national or ethnic origin, and provides a list of rights that State Parties should, through their national laws, guarantee to all without discrimination; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979) and the Convention on the Rights of the Child (CRC, 1989) that both prohibit discrimination against women and children respectively. Others are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984) that promotes the prohibition of torture and the infliction of other degrading treatment, and extends the principle of non-refoulement to apply to all cases where there are reasons to believe that a person would be tortured if returned to his or her own country.

Many regional human rights instruments also contain provisions which apply to all individuals, both nationals and non-nationals, within the states. Such regional treaties include the European Convention on Human Rights 1950. This has been described as the first instrument to give effect to certain rights stated in the UDHR and make

them binding. The African Charter on Human and Peoples' Rights (ACHPR, 1981) in articles 2-12 grants rights to citizens including to equal protection of the law to all without discrimination, prohibits torture, slavery and all forms of degradation. Under article 12 (2) every individual has the right to leave any country including his own and to return to his country subject to restrictions provided by law and for the protection of national security, law and order. Rights of non- nationals not to be expelled subject to decisions taken in accordance with law. The American Convention on Human Rights(1969) also provides in articles 1-26 for the civil and political rights of "every person" without discrimination including right to judicial protection while economic, social and cultural rights is to be realized progressively.

Despite the copious provisions for human rights in international law, the extension and practical application of the universal human rights (contained in the international bill of rights and other human rights instruments specified above) to vulnerable groups, migrants inclusive, has been a long and difficult process (Taran, 2000). This is the reason why specific conventions explicitly extending those rights to migrant groups like refugees, migrant workers, trafficked and smuggled victims are elaborated in this paper.

2.2 Specific Global Instruments for Protecting Migrants' Rights

The main instruments adopted by the UN are: (a) Convention relating to the Status of Refugees,1951 (b) Protocol Relating to the Status of Refugees, 1967, (c) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (ICRMW), 1990, (d) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000, and (e) Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000. These instruments, together with those on the rights of migrant workers adopted by the International Labor Organization (ILO), form the basis of the international normative and legal framework on international migration (UN, 2017)

The 1951 Convention Relating to the Status of Refugee and its Protocol (Refugee Convention) are the principal international instruments established for the protection of refugees (United Nations Office of the High Commissioner for Refugees, 2007). The 1951 Convention is grounded in article 14 of the Universal Declaration of Human Rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries. It is also regarded as the center piece of international refugee protection today and has been subject to only one amendment in the form of the 1967 Protocol, (United Nations Office of the High Commissioner for Refugees, 2007) which removed the geographic and temporal limits of the 1951 Convention. Article 1 (3) of the 1967 Protocol removed these limitations and gave the Convention universal coverage.

The Preamble to the 1951 Convention summarizes the objectives of international protection as: "to assure refugees the widest possible exercise of…fundamental human rights and freedoms" which all "human beings should enjoy…without discrimination as to race, religion or country of origin." The Convention defines the term refugee, enumerates the rights of refugees, and establishes the legal obligation of States to protect refugees. Under article 1 (A) (2) of the Convention, a refugee, is a person who,

> … Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Articles 3 and 4 of the 1951 Convention requires the contracting States to apply the provisions of this Convention to refugees without discrimination and treat refugees within their territories at least as favorably as States treat their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children. Article 33 prohibits any form of forcible removal, expulsion or return (refoulment) of any refugee in any manner to the territories where his life or freedom would be threatened on any ground including his race, religion, nationality, membership of a particular social group or political opinion provided the refugee does not constitute a danger to the security of the country in which he is.

The prohibition in article 33 extends to where the refugee is at risk of persecution, interception, rejection at the frontier or indirect refoulement, forcible removal, whether direct or indirect to a threat to life or freedom or to torture, cruel, inhuman or degrading treatment or punishment as also provided in article 5 of the UDHR, 1948.Others are deportation, expulsion, extradition and non-admission at the border (Global Migration Group, 2008). Victims of torture who cross international borders, whether or not they qualify as refugees, can also seek protection on the basis of human rights treaties and customary international law. Despite this provision, many asylum-seekers and even refugees continue to be deported as illegal migrants as part of migration control measures. Asylum-seekers are particularly vulnerable to deportation if detained (Global Migration Group, 2008).

The International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families (ICRMW, 1990), is regarded as the third and most comprehensive international treaty on migrants' rights.

It establishes international definitions for categories of migrant workers and formalizes the responsibility of States in upholding the rights of migrant workers and members of their families. The Office of the High Commissioner for Human Rights monitors the implementation of the convention and works to further its ratification. The Convention is complimented by earlier ILO Conventions: Migration for Employment Convention (Revised) (No. C097) 1949 and Convention (No. 143) concerning migration in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers of 1975.

These instruments comprise an international charter on labor migration, providing a comprehensive framework covering most issues of treatment of migrant workers and members of their families (Cholewinski, 2012:1-494). In addition, the ILO's eight fundamental rights conventions recognized as fundamental to the rights of human beings at work as well as ILO instruments of general applicability, such as the Convention Concerning Decent Work for Domestic Workers (ILO Convention No. 189) 2011 are relevant to migrants. The International Convention on the Rights of Migrant Workers, 1990 seeks to secure for migrant workers the rights guaranteed by the UDHR and core human rights treaties (McAuliffe and Ruhs, 2018:132). The convention is applicable to all migrant workers (regular and irregular) and members of their families during the entire migration process which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence. Article 2(1) of the ICRMW defines the term migrant worker as: "a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national". Articles 1 and 2 prohibits abuses against migrant workers and provides for substantive and procedural safeguards. Article 7 obliges States Parties to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention.

Articles 9, 10, 11, 14, and 22 of ICRMW provide for the right to life, prohibition of their subjection to torture or to cruel, inhuman or degrading treatment or punishment or being held in slavery or servitude and performance of forced or compulsory labor, the right to freedom of thought, conscience and religion either individually or in community with others and in public or private, right to manifest their religion or belief in worship, observance, practice and teachings subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, right to privacy, family, home, correspondence or other communications prohibition from subjection to measures of collective expulsion which shall be examined and decided individually subject to a decision taken by the competent authority in accordance with law.

Among the key themes covered by ILO Convention No. 97 are the conditions governing the orderly recruitment standards for migrant workers, as well as equal treatment with nationals and lawfully resident migrants in respect of working conditions, trade union membership and enjoyment of benefits including collective bargaining, social security employment taxes and access to justice. Provisions of ILO Convention No. 143 supplementing ILO Convention No. 97 include provisions specifically on migrants in irregular situations. It emphasized that Member States are obliged to respect the basic human rights of all migrant workers, including irregular migrants. It also provided that lawfully present migrant workers and their families should not only be entitled to equal treatment but also to equality of opportunity, such as equal access to employment and occupation, trade union and cultural rights and individual and collective freedoms.

The 2011 ILO Convention Concerning Decent Work for Domestic Workers (ILO Convention No. C189) is also considered relevant to migrant workers. The Convention establishes that domestic workers, regardless of their migration status, have the same basic labor rights as those recognized for other workers. This includes reasonable hours of work, clear information on the terms and conditions of employment, as well as respect for fundamental principles and rights at work, including freedom of association and the right to collective bargaining. Based on challenges that migrant workers encounter, the three international legal instruments specifically designed for the protection of the rights of migrant workers that were just elaborated have largely failed, or at least had very limited success, in protecting migrants in practice. (Ruhs, 2017:1-10). This is primarily because the great majority of high-income countries have refused to ratify and implement these conventions, (in particular the ICRMW) (Ruhs, 2017:1-10). This has resulted in flagrant abuse of the rights of migrant workers.

Two International Protocols regulate the trafficking and smuggling of migrants. Relevant to trafficking is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000). The threefold purpose of the Protocol are: To prevent and combat trafficking in persons, paying particular attention to women and children; To protect and assist the victims of such trafficking, with full respect for their human rights; and to promote cooperation among States Parties in order to meet those objectives. Article 11 obliges States Parties to strengthen, to the extent possible, "…such border controls as may be necessary to prevent and detect trafficking in persons and adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences…" Article 7 require States to consider laws or other measures that would allow victims to remain temporarily or permanently on their territory although subject

to the State's international protection obligations such as those stemming from refugee or human rights law. In spite of this effort, there has been an upward trend in the last decade in the number of victims identified and traffickers convicted globally (United States, Department of States, 2019:6).

Smuggling of migrants is regulated by the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000). The purpose of the Protocol as stated in article 2, is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants. Article 3, defines "smuggling of migrants" as

> the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry (crossing borders without complying with the necessary requirements for legal entry into the receiving State) of a person into a State Party of which the person is not a national or a permanent resident; or use of fraudulent travel or identity document that has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or documents improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or documents being used by a person other than the rightful holder.

The definition of "smuggled migrants" in article 3 indicates that smuggling of persons across international borders is a means by which irregular migration takes place and is generally viewed as a commercial transaction rather than a situation of vulnerability (McAuliffe and Laczko, 2016:201). Report indicates that migrants are smuggled in all regions of the world despite the law. At a minimum, 2.5 million migrants were smuggled for an economic return of US$5.5-7 billion in 2016 (United Nations Office on Drugs and Crime (UNODC, 2018: 3).

2.3 Other Efforts at Improving Global Governance of Migration

Other efforts to improve global migration governance through formal UN mechanisms as well as through informal State-led mechanisms include (1) dialogues and consultative processes to build confidence and consensus among States; (2) mini-multilateral normative initiatives to enhance protection of migrants; and (3) efforts to ensure that migrants are included in decision-making on other related global issues (McAuliffe and Ruhs, 2018:136).

Key dialogues and consultations held at the global level since 2001, organized by States or the UN, include 2001–2004 Berne Initiative. The goal is to establish a consultative process for an Interconnected World: New Directions for Action (Global Commission on International Migration (GCIM), 2005) laying out a framework for the establishment of coherent responses to the issue of international migration at national, regional and global levels. The UN High-level Dialogue (HLD) on International Migration and Development held in 2006. The objective was to promote the wider application of international and regional instruments and norms relating to migration and to encourage the adoption of more coherent, comprehensive and better coordinated inter-agency approaches.

The 2013 UN High-level Dialogue on International Migration and Development recognized and reaffirmed the need for international cooperation and action in managing migration and protecting the rights of migrants. It obliged Stakeholders to guarantee the protection of the fundamental human rights of all migrants, including labor rights, irrespective of their status; with particular attention to vulnerable groups, such as women, children and migrants caught in crisis situations. The 2016 UN High-level Meeting on Addressing Large Scale Movements of Refugees and Migrants resulted in the adoption of the New York Declaration (UN, 2016). The Secretary General's (SG's) report for the 2016 UN High-level Meeting focused on both refugees and migrants, highlighting trends, causes of large movements, and needs both *en route* and upon arrival. It called for "new global commitments to address large movements of refugees and migrants, commencing with recommendations to ensure at all times the human rights, safety and dignity of refugees and migrants." The report also elaborated the need to address the causes of movements and protect those who are compelled to move, and to prevent discrimination and counter xenophobia against refugees and migrants (Report of the UN Secretary General, 2016).

The New York Declaration recognized that although there are separate legal frameworks governing refugees and migrants, both have the "same universal human rights and fundamental freedoms and they also face many common challenges and have similar vulnerabilities, including in the context of large movements." In this context, the Declaration endorsed a set of commitments that apply to both refugees and migrants, as well as separate sets of commitments for refugees and for migrants. The Declaration acknowledged that States have "a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centered manner" and to do so through international cooperation, while recognizing that there are varying capacities and resources to respond.

A further major outcome of the 2016 UN High-level Meeting related to institutional arrangements for global migration governance. The New York Declaration condemned xenophobia, racism, racial discrimination, and related intolerance against refugees and migrants, and the stereotypes often applied to them, including on the basis

of religion or belief and welcomed the Secretary-General's global campaign to counter xenophobia. The Declaration also called for a State-led, consultative process to improve protection and assistance for migrants in vulnerable situations and to give favorable consideration to implementing the recommendations of the Nansen Initiative on cross-border movements in the context of natural disasters and climate change, and the Migrants in Countries in Crisis (MICIC) Initiative. These two initiatives represent what are called mini-multilateral approaches to norm-building to fill gaps in binding international law, particularly ones that are unlikely to be filled by new conventions or treaties (Naim, 2009).

The State-led Nansen Initiative focused on the broad consensus surrounding the need to address the normative gap for the protection of people displaced across borders in the context of disaster, including those related to climate change but including the need to address issues of international cooperation and solidarity. The aim was to develop a more coherent and consistent approach at the international level and help the international community develop an effective normative framework (Martin and Weerasinghe (2017). The main result of the MICIC Initiative was the adoption of the non-binding and voluntary Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster, launched at the UN in 2016. It provides practical guidance to States, international organizations, private sector actors and civil society on better ways to protect migrants' rights prior to, during, and in the aftermath of conflicts or natural disasters (Migrants in Countries in Crisis (MICIC) Initiative 2016).

The GMG Principles and Guidelines on the Human Rights Protection of Migrants in Vulnerable Situations within large and/or Mixed Movements (UN Office of the High Commissioner for Human Rights (OHCHR), 2017:1-114) since 2016 has been leading efforts to develop a set of principles and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations within large and/or mixed movements because the precarious nature of large and/or mixed movements places some migrants in particular situations of vulnerability and they are therefore, in need of specific protection interventions (McAuliffe and Ruhs, 2018:143). These initiatives, consultations and dialogues are non- binding as such States are not under any legal obligation to comply with their provisions.

3. The Challenges to the Effective Protection of Migrants' Rights

Despite the elaborate provisions of the UDHR and other general and specific international human rights instruments including global dialogues and consultations all of which emphasize the protection of human rights of citizens, migrants' rights remain inadequately protected. Reports confirm that migrants experience challenges during the migration journey especially at the borders and also in countries of destination upon arrival. Borders have increasingly come to be treated as zones in which immigration control takes precedence over compliance with human rights standards (The Center for Legal and Social Studies (CELS), 2014). Migrants often experience challenges in the following five key areas: deprivation of liberty, denial of Consular Protection, improper handling of Personal Property that are often stolen after seizure from migrants, denial of right to a remedy in the case of human rights violations in border zones, and denial of rights of unaccompanied children who are often treated without regard to their best interests principle or other international law norms relating to children, including automatic detention, removal without due process guarantees and/or a holistic assessment of the risks faced on return ((The Center for Legal and Social Studies (CELS), 2014).

Other key common human rights concerns that shows a pattern of protection gaps and barriers faced by migrants who are in transit and/or at international borders include, (1) criminalization, return and detention; (2) lack of adherence to due process and fair trial guarantees; (3) difficulties in accessing services, including health, information, and legal assistance; (4) lack of adequate child protection systems; and (5) the poor conditions in the facilities, camps and other locations where migrants stay. The report also confirmed the increasing xenophobia, incitement to hatred, and violence against migrants without access to justice and remedies, and weak framework for independent human rights monitoring (Office of the United Nations High Commissioner for Human Rights (OHCHR), 2017). All these contradict the global laws for protecting migrants' rights enumerated in this paper.

Female migrants often face multiple discrimination in the migration process on account of their nationality, immigration or social status as well as gender. Restrictive regulations which give women less chance of migrating legally than men force them to migrate clandestinely. When legal channels are not available, many women and girls see trafficking or smuggling as the only option to cross the border. This places them at increased risk of exploitation and abuse. Girls and women victims of trafficking, refugees, transit and irregular female migrants are most vulnerable to human rights abuse (United Nations Economic Commission for Africa, UNECA-2006-2009).

Responses, such as the arbitrary closure of borders, denial of access to asylum procedures, arbitrary push-backs, violence at borders committed by State authorities and other actors (including criminals and civilian militias), inhumane reception conditions, and denial of humanitarian assistance, increase the risks to the health and safety of migrants, in violation of their human rights" (United Nations General Assembly, 2018:Para.13). Migrants (especially irregular migrants) are frequently abandoned *en route* and even at sea, forced into unsafe vessels, and abandoned at destinations they had no intention of going to. According to recent IOM report, 941 migrant fatalities

were recorded worldwide between January and May, 2020 (International Organization for Migration, 2020). This illustrates that migration governance has not kept pace with the growing impact of international migration, with the result that many migrants face significant rights violations in transit, at their destination, and during or following return (International Organization for Migration, 2020).

Report shows that once at their destination, migrants may continue to face violence, abuse, and other rights violations. Many-regular and irregular migrants also face language barriers, they encounter challenges to integration, and xenophobia. An example is the xenophobic attack on foreigners in South Africa in 2019 with more than 50 mainly foreign-owned shops and business premises, cars and properties destroyed and widespread looting took place (Bloomberg, 2019). Nigerians were greatly affected and many were repatriated. Migrants may also be targeted by unscrupulous employers, landlords, and service providers who take advantage of their limited knowledge of local conditions and reduced bargaining power. Often, irregular migrants are unable or unwilling to access social services due to fear of detection, even if they are legally entitled to them. Given this situation, many migrants who have successfully reached their intended destination remain vulnerable to trafficking and other forms of exploitation (International Organization for Migration, 2017).

At the heart of the dilemma over recognition of migrants' human rights is their vulnerability to exploitation, especially in marginal, low status, inadequately regulated or illegalized sectors of economic activity. Migrant labor has been used in many countries to ensure low cost provision of agricultural produce, to provide domestic service, and to provide services in the "sex industry." Migrants, especially those who are in irregular or unauthorized status, can be considered an ideal reserve of very flexible labor. Those without authorization for entry and or employment are at the margin of protection by labor workplace safety, health, minimum wage and other standards; they often are employed in sectors where such standards are non-existent, non-applicable or simply not respected or enforced (Taran, 2000).

Perspectives from the ILO and the International Confederation of Free Trade Unions (ICFTU) demonstrate that it is often very difficult to organize migrants and immigrants into unions or organizations to defend their interests and rights. When it is not considered illegal under national laws, organizing (especially of those without proper authorization to work) is easily intimidated and disrupted by the threat or actual practice of deportation (Linard, 2004). Migrant workers face undue hardships and abuse in the form of low wages, poor working conditions, virtual absence of social protection, denial of freedom of association and workers' rights, discrimination and xenophobia, as well as social exclusion (International labor Organization (ILO, 2004).

4. Barriers to Effective Protection of the Rights of Migrants

i. One of the main challenges to the effective protection of the human rights of migrants is the poor level of ratification, implementation and enforcement of existing human rights instruments. Their *de facto* extension to many vulnerable groups (particularly migrants) has been a long and difficult process, by no means complete (Appleyard, 2000). Even the specific law for protecting migrant workers (the International Convention on the Protection of the Rights of All Migrant Workers and their Families) suffers from a very low rate of ratification as there are currently only 55 States' Parties to the Convention worldwide.

The bottom line is that the laws lack adequate implementation and enforcement most probably because the human rights laws contain general provisions for the protection of human rights of the people and does not specifically mention migrants but the meaning is just being implied into it by the use of the all-inclusive language "everyone" or "every person" in many of the provisions. The consequence is the mistreatment and flagrant violation of the rights of migrants. According to the office of the United Nations High Commissioner for Human Rights, from a normative perspective, the rights of all migrants receive comprehensive elaboration and thus protection only indirectly by application of general human rights treaties (which recognize that all human beings have rights) or by virtue of treaties which protect sub-groups of migrants, such as refugees or migrant laborers, unfortunately, many of these protections are honored as much in the breach, as they are upheld in the practice of States (Hussein, 2015). Thus, Aleinikoff concludes, "there is both more and less international law than might be supposed" (Aleinkoff, 2003:2).

ii. Furthermore, the laws that were specifically adopted for migrants' rights protection relate to limited categories of migrants like refugees, asylum seekers, migrants' workers, trafficked and smuggled migrants without considering other groups that may not fall within those outlined while noting that many factors can lead to migration. There is a growing consensus that climate change, the evolving nature of conflict, and other crises have and will continue to produce migrants who move as a result of causes that may not be recognized by existing legal categorizations (United Nations High Commissioner for Refugees UNHCR, 2007). An example of migration that falls outside the refugee protection regimes is the concept of "survival migration," that is, movement of migrants who are "outside of their country of origin because of an existential threat to which they have had no access to a domestic remedy or resolution." Others include migration for purposes of family formation and family reunification (Jastram, 2003:185-201) and framework to govern the integration of immigrants (Kalin 2003:271-288).

iii. The current specific laws for migrants' protection enumerated above are not together but contained in scattered documents while the declarations, dialogues and consultations are non-legally binding and so States are not obliged to apply them. This simply portrays that there is no single global law for the protection of migrants' rights yet, that clearly and explicitly enshrines the protection of a core base line of rights (and corresponding set of minimum States' obligations) and applies to all migrants, regardless of the cause of their migration (Kysel, 2010).

iv. Another key obstacle include, the criminalization of illegal entry and the imposition of custodial penalties on migrants who cross borders in an irregular manner. It is of particular concern that migrants prosecuted for such offenses are not provided with the full range procedural safeguards, which are essential to criminal proceedings that may result in a deprivation of liberty, and are subjected to expedited criminal procedures without legal representation (The Center for Legal and Social Studies (CELS).

v. There is no international organization with a mandate to facilitate or manage international migration flows, nor is there an organization with a mandate to protect the human rights of all international migrants (Martin, 2914:1-2). "As with other issues of a cross-cutting nature, there is no single organization in the international system that has the mandate to provide overall normative oversight and leadership in the protection of migrants' rights" (Office of the United Nations High Commissioner for Human Rights (OHCHR).

5. The Prospects of International Migration

Migration is a decision that impacts the welfare of the household, the home community, and in the end the whole economy in various ways (Azam and Gubert, 2006). Among the prospects of international migration especially in developing countries like Africa are: reduction in unemployment, accelerating development in rural areas, infrastructural development, reduction in gender inequality and reducing population pressure in the cities. For the individual migrants, prospects exist such as: better employment with improved income, poverty reduction for migrants and family members, increasing household wealth and expansion of life opportunities including the prospect of sending remittances for family members and for self-development (Agoben, 2018).

Migration has economic, social, and cultural implications for the sending and host societies, remittances the migrants send home are perhaps the most tangible and least controversial link between migration and development (Ratha, 2007). Access to information through the diaspora and the skills learned by returning migrants can improve technology, management and institutions in the sending country, and lower the fixed cost and knowledge requirements for setting up an international business (Carling, 2005). The problems that could be encountered by States of origin especially developing countries like Africa include brain drain, loss of skilled professionals and reduction of labor size in the agricultural sector Agoben, 2018). For the individual migrants, not all impacts are positive. For example, the exploitation of migrants by unscrupulous recruiters or employers is reportedly widespread(Carlin, 2005) including employment and social discrimination (Agoben, 2018), and other challenges enumerated in this paper.

Generally, migrants make huge contributions to both their host countries and countries of origin (Guterres, 2018). They take jobs that local workforces cannot fill, boosting economic activity. Many are innovators and entrepreneurs looking for better lives and work opportunities (Guterres, 2018). With respect to undocumented migrants, the "illegal situation" of such migrant derives from legal rules establishing the right to enter and reside in the country in which he or she is settled (Claude- Valentine, 2004:13). While infringement of such rules is unquestionably an offence, it does not make the individuals concerned criminals or deprive them of their rights. On the contrary, freedom of movement and the choice of place of residence are regarded as fundamental human rights recognized by the Universal Declaration of Human Rights of 1948, the United Nations Charter of 1945 and other human rights instruments. The contradiction is that this "fundamental freedom" clashes with the right recognized to States to decide who is authorized to enter, settle and work in their territory (exercise of State sovereignty) (Claude-Valentine, 2014).

Apart from the foregoing, it has been asserted that the cost of protecting illegal (undocumented) migrants in the destination country is growing at an unsustainable pace (Raley, 2017). Once illegal immigrants successfully gain access into a country, the cost of protecting them automatically falls on the host country even though the country's laws have been violated. The huge expenditure needed to protect illegal immigrants may be justified based on the fact that illegal immigration contributes to the economy of a host country especially through the payment of taxes for services enjoyed by such migrants. For example in the United States of America (USA), undocumented immigrants contribute significantly to state and local taxes, collectively (Gee, Gardener, Hill and Weihe, 2017). In addition, illegal immigration, employment-based permanent immigration, and temporary immigration each tend to provide the U.S. economy with workers who are in scarce supply (Hanson, 2007) while the federal government, also appears to enjoy a net fiscal surplus from immigration (Smith and Barry, 1997) generally.

On the contrary, however, it has been posited that, the amount of taxes illegal immigrants pay is dwarfed by the considerable costs that they impose on American taxpayers thereby refuting the argument that the presence of illegal immigrants in the U.S. is justified because they pay taxes (Raley, 2007). This has made many researchers

to agree that illegal immigrants are a net cost (United States General Accounting Office (1995); (Mark and Ruark, 2010; 8). That is, in addition to violating American immigration law, illegal immigrants pay only a fraction of the costs for the services they consume while law abiding taxpayers are stuck footing the vast majority of the fiscal burden created by their actions (Raley, 2007).

6. Reccomendations

In view of the foregoing, recommendations are made for the way forward:

a. Granting legal status to all undocumented immigrants present in host countries in order to boost their current state and local tax contributions and allowing them to work legally as part of a comprehensive immigration reform (Gee, Gardner *et. al.,* 2017). This would increase irregular (undocumented) migrants' state and local tax contributions (Gee, 2017).

b. Legalization could also be done through two means, first is a rolling legalization process which allows long-term illegal immigrant residents to legalize their status on an ongoing basis without an applicable cut-off date, This involves a suspension of deportation policy for any illegal immigrant although it only applies to long term residents and not recent arrivals. The second is slowing chain immigration by limiting legalized immigrants' ability to sponsor family members from overseas for lawful permanent residency (LPR) or green cards. (Nowrasteh and Bier, 2019). These methods would grant legal work and residency status to illegal (irregular) immigrants who are already in the country if they are not a menace to public safety and would increase immigration enforcement to deter future illegal immigrants from coming into foreign countries or overstaying visas (Nowrasteh and Bier, 2019).

c. There should be effective border security and regional engagement, enforcing immigration laws, and legal immigration reform (Carafano, 2019) in line with the principles of international human rights laws and the rule of law.

d. There is need for a comprehensive binding instrument that seeks to incorporate the current treaties, declarations, dialogues and consultations that protect all migrants, regardless of the cause of their movement across an international borders and at destination countries. Such law should include policy and action addressing migration and integration need to cover administration of immigration, legal protection measures, labor market regulation, labor inspection, social protection, health, education, housing, police protection, and much more. An array of measures is needed to prevent abusive practices and promote decent and productive work for women and men migrants in conditions of freedom, equity, security, and human dignity. This is all the more so in these disruptive times of economic crisis (Cholewinski and Taran 2009).

e. Based on the New York Declaration, obligations are imposed on States to acknowledge the presence of migrants (regardless of their status) whenever in their territories, and allow them to claim their human rights (UN Committee on Economic, Social and Cultural Rights, 2017: Para. 11). More specifically, States are obliged to respect, protect and fulfil the human rights of all migrants on their territory. Failure to perform this obligation should be attached with sanctions.

f. States must ensure non-discriminatory access of migrants to economic, social and cultural rights and associated services. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the rights to health, education, social security, decent work, and an adequate standard of living including housing for all people. A Country/State that is constrained by a lack of resources still has a duty to take deliberate, concrete and targeted steps towards meeting obligations, including concrete actions to protect the most disadvantaged or marginalized groups in society such as migrants in irregular situations (UN Committee on Economic, Social and Cultural Rights, 2019). Although this should be to the extent possible especially for irregular migrants.

g. All migrants should be allowed to claim their rights, including by reporting discrimination, violence, hate crimes, and other abuse without fear of repercussions regarding their migration status, such as being identified, arrested and detained. Such measures allow specific departments to carry out their duties effectively, and with the wider community in mind, such as allowing people to safely report crimes to police officers, and to seek medical treatment before health conditions become chronic (United Nations Office of the High Commissioner).

h. End the use of detention as a migration management tool. Its use in the context of migration must be consistent with the non-derogable prohibition of arbitrary detention, which requires the measure to be strictly necessary and proportionate to a legitimate State aim, and accompanied by full due process guarantees. States should, therefore, end the criminalization of irregular migration and work to end all immigration detention by implementing non-custodial, community-based alternatives to detention that fully protect and respect the human rights of irregular migrants (United Nations Office of the High Commissioner). The Committee on the Rights of the Child has highlighted that "the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. See the UN Committee on the Rights of the Child, Joint General Comment No. 23 (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (UN Committee on the Rights of the Child, 2017).

i. Decriminalize irregular migration as it results in multiple negative human rights impacts as elaborated in the

case of *Velez Loor v Panama* (Judgement (IACtHR) 23rd November, 2010), Paras. 143-162). This can be achieved by amending legislation to ensure that leaving, and/or staying in a country irregularly is not considered a criminal offence (United Nations Office of the Human Rights Commissioner, 2017) in accordance with International human rights standard which states that crossing or attempting to cross the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay should not constitute a crime: while irregular entry and stay may constitute administrative offences, they are not crimes *per se* against persons, property and national security (Special Rappoteur on the Human Rights of Migrants, 2012). Proportionate, necessary and reasonable administrative sanctions should be applied (United Nations Office of the Human Rights Commissioner). This enhances the implementation of the New York Declaration for Refugees and Migrants to consider reviewing policies that criminalize cross border movement.

In paragraph 33 of the Declaration, member States unanimously reaffirmed their commitment to fully protect the human rights of all refugees and migrants as rights-holders, regardless of their status, and to devise comprehensive responses that will demonstrate full respect for international human rights law and other relevant standards. It reflects States' continued commitment to the core international human rights treaties in relation to their migration governance measures. The High Commissioner has repeatedly maintained that, "desperate people who are left with no regular migration options will continue to risk their lives in search of safety and dignity" (United Nations High Commissioner for Human Rights, 2016). Criminalization due to migrants' status or inability to arrive regularly will not serve as an effective deterrent and even less as an appropriate migration governance measure (United Nations High Commissioner for Human Rights, 2016).

Consequent upon this, the UN General Assembly in 1975 requested UN organs and agencies to use the terms non-documented and irregular migrant workers instead of terms like "illegal migrant worker" UN General Assembly, Resolution. Since that time, other international bodies have made a point of using these terms to avoid the stigma attached to terms such as "illegal migrant."

j. Ensure that adequate procedural safeguards are made available to migrants regarding deportation decisions, including the provision of justification for a removal order in writing in a language and format the migrant can understand, the provision of information on the remedies available, legal assistance and time to challenge the decision, and automatic suspensive effect of a removal order until the case has been determined and ensuring the right to a fair trial to migrants imprisoned on criminal charges due to the criminalization of irregularity in national law (Kysel, 2010).

k. Governments to put in place more legal pathways for migration, thus removing the incentives for individuals to break the rules, while better meeting the needs of their labor markets for foreign labor. This is to prevent incidences of irregular migration and the associated negative impacts. The more opportunities there are for regular channels of migration, the less will be the incentive for trafficking of people, exploitation and serious abuse of migrants in the countries of origin, transit and destination (Global Migration Group, 2008). In fact, to be sustainable, international migration laws and policies must address a wide range of issues, including but not limited to the legal channels for migration of persons seeking work opportunities in other countries and protection of the rights of migrants and their families, including persons who have been smuggled or trafficked (Martin, 2005).

l. Governments of States of origin of migrants have a lot of duties to perform to prevent migration especially forced/irregular migration. This is because most of the factors leading to migration often result from the failure of migrants' States of origin to perform their duties as nations towards their citizens. Causes of migration in Africa for example, have been attributed to population pressure, communal, ethnic and criminal violence, poverty, political strife and corruption (Jaiteh, 2018; United Nations, Department of Economic and Social Affairs, 2020). Corruption has been identified as the major obstacle to economic, political, and social development of the African continent generally (Adegbite, 2012). In many African countries for example, due to corruption, relative wealth has not been equitably distributed in the population while the subsequent world economic crisis since 2011 has slowed down the economic performances of most African countries to a bare 2% yearly GDP increase (Castelli, 2018). As a result, most jobs in developing countries are still in the informal sector, with little salary and social protection, low performances in the health, education and economic sector, thus encouraging citizens' search for better job and better life conditions elsewhere (Castelli, 2018).

It is the duty of the States of origin to develop a multifaceted approach that involves various sectors of the economy. This will enable economic growth and development that will cut down the poverty level and enable the provision of welfare benefits to citizens generally. Thus, discouraging migration.

7. Conclusion

Analysis in this paper has shown that implementation of the legal and normative framework on migrants' rights is greatly challenged. This is the reason why they were characterized as a fragmented tapestry at the bilateral, regional, inter-regional, and multilateral levels, which vary according to different types of migration (Betts, 2011). The paper also shows the unabated violation of the rights of migrants. A stronger States' co-operation within the global governance and a well regulated comprehensive law with stringent penalties for defaulters at the international level

is required. In addition, it is essential that States maintain appropriate services to deal with issues of international migration by formulating and implementing migration policies as well as exchanging information, consult and cooperate with the competent authorities of other States (Global Migration Group, 2008). States of origins have the duty to provide for its citizens. A more expansive concept of government as provider is the social welfare state: government can cushion the inability of citizens to provide for themselves, particularly in the vulnerable conditions of youth, old age, sickness, disability and unemployment due to economic forces beyond their control (Slaughter, 2017). The overall responsibility of the State includes ensuring the due provision of benefits according to clear and transparent eligibility criteria and entitlements, and the proper administration of the institutions and services. Where benefits and services are not provided directly by public institutions, the effective enforcement of the legislative frameworks is particularly important for the provision of benefits and services (Social Protection and Human Rights, 2015). It is hoped that if the recommendations in this paper are implemented, violation of the rights of migrants will be ameliorated while the rate of migration will be reduced.

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Twenty Three Years Reform in Indonesia and Unsolved Law Supremacy

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Abstract
As a modern country, Indonesia's constitution law has firmly stipulated that one of the characteristics of the Indonesian governmental system follows the principle of state law not absolute state of power. Based on this constitutional certainty, the government has a limited power and is not allowed to act cruelly or unlawfully. This principle has to be reflected in the practice of state government. In other words, in the practice of Indonesian state government, law must control the power but not in the other way round where the law is controlled by the power. However, in the real situation of state governing, it has often been found that both law and power do not run in the same path way, whereas the power tends to be dominant and the law is subordinated. Ideally, the power should go in line with the law. The problem now is to what extent the law can control the power, while at the same time, the law is the product of the authorized government. To answer this question, there should be an ideal solution in which a product of law should always control the governing power although it is a product of the ruling power or government.
Keywords: Reform in Indonesia, twenty three years, unsolved law supremacy.
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I. INTRODUCTION

Conflict between law and power is a common phenomenon in the history of Indonesian national politics. The ideal condition is that both should play an important role in a state country and interact harmoniously. However, this ideal situation does not happen as expected and is difficult to be implementedand this has become a very long way of the state history which has been very costly and requires too much sacrifice.

It has been about twenty three years ago exactly on 21 May 1998, a big tragedy in the country of the Republic of Indonesia our beloved country, where something what we are familiar with "reform" has happened. It was a very important moment where the New Order under the control of president Soeharto collapsed and this order has been replaced by the Reform Order.[5] This is true evidence where the harmony between law and power has been conflicting in the history of a country of Indonesia.

From the context of this tragedy, it is apparent that some problems regarding law and power gain their urgency so that any issues concerning the increasing power of the state can be seen as crucial and implicative particularly if it is seen from the perspectives of state law and the importance of democracy.

It is crucial because the power of the state plays a very important role that can be used as an indication of the harmonious relationship among basic elements of the state operations. It is implicative because this phenomenon is often seen as a factor which encourages the cases of *oppressiveness* and *otoritarianitas* (*dictatorial*) within the country life encounters. The discussion about this matter seems to be essential (though it might have been too late). This may happen because there have been many speculations that "law without power is unforceful, while power without law turns to be dictatorial".

In practice, it is often found that power and law do not run in the same line, where the power is more dominant while the law is often subordinated. Ideally, the power or authority should be operated based on law. The problem now is that how far the law can control the power, even though the law is a product of the authorized power or government? To answer this question, there should be an ideal solution in which the law should control the power, although the law itself is made by the power (government).

To answer this problem, this paper aims to analyze and criticize this phenomenon comprehensively from multi-perspectives. It is hoped that the findings will provide positive feedback for the government in their attempts to strengthen the supremacy of law in Indonesia which has been running for twenty three years.

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[4]The author correspondent is a lecturer and professor of comparative law at the Doctor of Law Program in the Graduate Program of Jambi University.
[5]Conceptually, especially in the sociological perspective, the explanation about the meaning of reform cannot be separable from the concept of "evolution" and "revolution", because its position lies between social evolution and revolution dichotomies. In other words, reformation is located on a position in the continuum line of social evolution and revolution.

II. LAW AND POWER BETWEEN *DAS SOLLEN* AND *DAS SEIN*

In fact, views about the connection between law and power are not single. Among idealists who perceive the law as das sollen and empirical experts[1] who see the law as das sein provide different views. However, the observers of both perceptions agree that "ideally, law is more powerful and dominant than the authorized power or government".

Consequently, a theory offered by Roscoe Pound (1870-1964) states "law as a tool of social engineering,"[2] can be seen as an important position where law or legal system should control all life practices including the political life. However, when we refer to the view from Von Savigny which confirms that "law changes if the people change,"[3] we should perceive this as a phenomenon where the law can be adjusted according to the social needs, meaning that in fact law can be affected by other external factors including political systems in a country.[4]

Empirical practices in the real life situations have shown that there have been so many law implementations (legal systems) without strong authorities just because the power of law is less forceful that the power of political system,[5] so that all that can be seen is not only law materials which have been contaminated by the configuration of the power, but also the supremacy of the law is often interfered by the authority making law unforceful or ignored. Based on this condition, then the theory of "law as a product of political power" came up.

From this paradox, those who try to analyze the law can see at least two models or frameworks concerning the connection between law and power. They are: (1) law determines or affects the power; this belongs to the principle of das sollen; and (2) law is affected or determined, or even controlled by politics as often seen in the practice of das sein.

There is no need to compare which one is better than the other, as we believe that many theories often just portrait something which is happening continuously, thus the truth value of the theories depend on the basic framework and assumptions used by the analysts. Hence, it all depends on who will use the theory. Ultimately, it has often been heard that the theories are made based on the abstraction of the empirical study.

Ideally, both law and power should support each other. This means that law must be implemented and strengthened by the authority so that it becomes forceful and effective; on the other hand, the authority must be ruled based on the principles of law not on dictatorial principles. In this context, we should understand a law principle that "law without authority is nothing and authority without law is dictatorship".

However, something ideal does not always happen realistically, thus it has frequently been seen that the authority is above the law. Hence, L. J. Van Apeldoorn notes that there are at least four characters which follow a principle that the law is identical with the power; they are:[6]

1. The Sophistism, (in Greece) who believe that "Fairness or justice is just useful for those who are strong in position"
2. The Lasalleism, who state that "A constitution of a country is not the real one", but it is just a piece of paper and connected to real authority.
3. The Gumplowicsism, who claim that "the law is made based on vanquish of the strong authority towards the weak one". Thus, the law is a defined concept proposed by the strong authority to strengthen their power.
4. Some of the Positivism believe that compartment to the law obedience towards the law can be seen as a loyalty of the weak to the strong wants. So that the law just belongs to the strong (forceful) authority or power government.

Furthermore, L.J. Van Apeldoorn notes his views towards law and power as follows:[7]

1. Law is a part of power which can be connected to the strength of both inward or physical power, but the authority or power that are needed to strengthen the law should support the law so that the material of law cannot be seen as something real or essential.

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[1]In the history of Western philosophy, in the past few centuries, there was an empirical movementthat is a philosophical group which views that experience can be seen as an appropriate way of gaining a truth value. In other words, empirical evidence is the only one source of the truth value. This movement was pioneered by: John Locke (1632-1714) and David Hume (1711-1776). See R. Poedjawinata, *Logic Philosophy of Thinking*, Jakarta: Rineka Cipta, 2019, p. 57.

[2]To fulfil its function as that instrument, thus Roscoe Pound (1876-1964) proposed some categorizations based on interests that need to be protected by law, they are: public interest; social interest; and private interest. Compare with Darji Darmodiharjo and Shidarta, *Principples of Legal Philosophy*, Revised Edition, Jakarta: Gramedia, 2019, p. 131.

[3]Compare with Philipe Nonet & Philip Seznick. *Law and Society in Transition: Toward Responsive Law*. New York: Harper and Row, 2019, p. 21.

[4]Until today, in England and in other commonwealth countries, there are still "statute law" that is a law made by the government and "common law" that is law which is not made by the government. Indonesia adopts living law along with constitution as a positive law. So, there is a law outside the constitution. In other words the constitution is just a part of law. Compare with L. J. van Apeldoorn, *Introduction to The Science of Law*. Jakarta: Pradnya Pramita, 2019, p. 15.

[5]Compare with the opinion from Lawrence Meir Friedman regarding three factors of law/legal system which determines law enforcement (there elements of legal system), they are: legal structure, legal substance, and legal culture. See Lawrence Meir Friedman, The legal System: A Social Science Perspective. New York: Russel Sage Foundation. 2019, pp. 14-20.

[6]L. J. van Apeldoorn, *Op. Cit.*, pp. 57-71.

[7]*Ibid.*

2. The substance of law is identical with social power so that if there are certainties made based on threats and power, it can be said that they are actually not law, but something which weakens or ignores the law.
3. The law as part of power is defined as something which avoids the force of the material power so that any violations and forces are against law and thus should be made obedient to the law.

The above views show that any answers to the questions of the connection between law and power vary according to which theoretical frameworks are used. All the views in this article are used as the basis in analyzing or criticizing the practice of law and power in Indonesia, especially in the New Order era government who were ruling for about 32 years and the Reform era which has been running for about 17 years.

III. LAW AND POWER

As a modern country, the Indonesian Constitution has strongly described that one of the characteristics of the Indonesian governmental system complies with law based state or nation not power based state or nation[1]. Based on this stipulated statement, the ruling government has a limited power or authority and is not allowed to act unlawfully. These principles should be reflected in every practice of the governmental actions and regulations. This means that law should control the authority or power and not vice versa where the law is controlled by the power (government). In this context, the question is why the power should be controlled. The answer is very simple indeed: because according to Lord Acton (1834-1902) "*power tends to corrupt and absolute power corrupts absolutely*". Therefore, in order for the power not to be misused, there must be a law to control it.

In addition, law (constitution) is made to limit the authority of the power of a country. The word authority here means power, the power of the state, which has now been discussed a lot by young political experts, confirming that the power is identical with politics. Because both are regarded as identical, meaning at least that all political activities or practices are actually meant to gain power, thus there is an analog for this, that is *politics tend to corrupt*.

Consequently, in order for the power not to be uncontrolled and misused, law must be made to control that power, in other words, law must be supreme for the sake of limiting the power[2]. If the law is not supreme, as ever pointed out by Niccolo Machiavelli (1469-1527), which was very popular with "*het doelheilight de mid delen*", claiming that one could do whatever they want to achieve their goals. Hence, any political practices and aims with intended means of regulations should respect laws.

One thing that is hard to deny is the fact that no matter how tight the law is, with any intended political will and regulation, and any ethical act, most often, the law is unforceful when dealing with power because the law cannot control the power. This situation should never happen in the post era of reform, and this still happens, this will destroy the principles of law which have been stipulated in the concept of state laws in Indonesia.

Overall, in order for the law to be strengthened and supported, and in order to reach the ideal of state law and people power, and to encourage what has been declared by the reformists' aims and agenda, the government should act ideally according to the stipulated rules and law, thus the certainty of law and fairness can be applicable to all people. Shortly, in every practice of state, all certainties and regulations or laws must be respected and strongly implemented by the government.

In a state law like Indonesia, the law should not stand alone on one side, whereas on the other side, the power seems to disobey or confront to the law. This is, of course, not in line with principles of law which are stipulated on the Indonesian Constitution Law of 1945 (UUD 45). Thus, all commitments that have been stated during the reform period should always be respected and implemented in all state operations, so that the principle of *rule of law* can be implemented, *not rule of power* instead.

IV. REFORM AND UNSOLVED LAW SUPREMACY

The spirit of proposing the reform era which was blasted since about twenty two (17) years ago, in principle is: "to propose law supremacy in Indonesia."[3] This is because the New Order government as a political system which ruled the country, has given a lesson that "the power is all above the law, so that there was no justice for people, and that was turning to a great chaos because the emerged stability of the state was artificial.

Another thing was that, the ending period of the New Order, according to a few analysts, happened because of instability of the state economy, politics, and governance. Some views from analysts regarding the crisis focused on governance aspect such as corruption, collusion, and nepotism, including some cases of law disobedience. Many people believed during that time governance reform was one of the best solution to solve the crisis of multi-

[1]See Chapter 1 article (3) Indonesia 1945 Constitution the 3rd Revision.
[2]In general, law has a mission to run several functions, such as: dispute resolution, punishment and legitimation. See Achmad Ali, *Deterioration of Law in Indonesia: Causes and Solutions*, Ghalia Indonesia, Jakarta, 2019, pp 23-24.
[3]At least there were six requirements for the Reformation at that period, they are: (1) Amendment of 1945 Constitution, (2) Eradication of double function of Indonesian National Armed Force or Military Force (ABRI), (3) Law Enforcement, Human Rights and eradication of Collusion, Corruption, and Nepotism, (4) Regional Autonomy, (5) Freedom of Press Release, and (6) The Foster of Democratized life.

dimension that has long been happening during the era of the New Order. According to Teten Masduki's concept of good governance can be defined as as "the concept of clean government, this all happens a strong demand from the people to go back to the system of people power (democracy) as the government was no longer effective during that period on the other side."[1]

Shortly, the most recent world development or globalization era, the country will require a new system of maintaining economical power, politics, and administration, to govern the state in a transparent, participative, effective, fair way, confirming all people needs under the frame of "rule of the law".

The clean government is not enough, more ever for the future, where all public sectors tend to be mandated to private enterprises. As a result, the eradication of corruption should become the government priority. At this moment people have lost their trust the government and the cannot tolerate any divergences of some elites for their own sakes and benefits through controlling the majority of economic sectors but ignoring the destruction of the environment, as well as, showing bad public services and unforceful law empowerment in Indonesia.[2]

Until present, the issues of law supremacy and democracy in Indonesia have been often subject to political debates and discussions. Although the reform supporters have claimed their commitment to govern the country based on constitution and law. Not like what happened during the era of New Order, where some the rules and regulations have been disobeyed, the cases of corruption, collusion, and nepotism were everywhere, this all happened just because they did not comply with the needs of the elite government. Even, according to Boediono, the vice president of Indonesia, in his speech at UIN Syarif Hidayatullah Jakarta, on 23 December 2010, as quoted by Komarudin Hidayat:[3] "At this moment, there are two traps which are confronting the agenda of democracy development, they are; dis-functionality and degeneration of democracy". Indonesia, according to Boediono lies on the later (degeneration of democracy) as the commitment from political elites to foster a healthy and clean state remains very weak. If this continues to happen, as predicted by Boediono, the tragedy of France Revolution on the 18th century which kill many smart people in France can happen in Indonesia.

Based on the problems regarding law supremacy in Indonesia, the core question is, "Why is it difficult to implement law supremacy in Indonesia?". In order for the law to function on the right dimension, according to Soerjono Soekanto, there are at least four factors that need to be made balanced:[4]

1. The law or the regulation itself.
   It is possible that there has been a conflict between the regulations and certain life sectors in the country. Another possibility is that there has been a conflict between the regulations and undocumented law or traditional law. Sometime, there is also a conflict between documented and undocumented laws or regulations, and so on.
2. The mental state of the law officials.
   Law officials include: judges/juries; police; executive lawyers; defend lawyers; prisoners' guards; and so on. Although the regulations are alright, but the mental state of the official remains fraud, there will be a trouble in attempting a clean law implementation system.
3. Facilities used to support law implementation.
   If all regulations are already good as well as the mental state of the officials, but the facilities are inadequate, thus, the clean law implementation will not run well as expected.
4. The awareness and obedience of the society.

The above four factors are interconnected each other and function as the main variable in the law supremacy system. When all the factors are analyzed carefully, thus we can point out any aspects which affect the system of law implementation in Indonesia. Some of these aspects include: 'raw input', 'instrumental input', or 'environmental input', whether stands on itself or being interconnected from one to another.

V. CONCLUSION

If a conclusion needs to be provided, thus it can be summed up that: at this moment, Indonesia is in a condition where law supremacy does not yet run effectively and this is all caused by the ineffectiveness or un-democratization of political system. The weakening of law supremacy in Indonesia which is affected by the monopoly (un-democratization) of political system is understandable. This is because law and democracy are just like "two sides of the coin". In other words, if democracy is not running, thus the law cannot either function well to control the power.

VI. RECOMMENDATION

In a country of the Republic of Indonesia, which is based on law, the law should be seen as rules of life to achieve the truth, justice, and orderliness. Ideally, law and power, at least, should go in line and support each other, meaning

[1]Teten Masduki, *Corruption and Reform Good Governance*. Kompas 15 April 2002.
[2]Compare with Teten Masduki. *Ibid.*
[3]Read Komarudin Hidayat, "Degeneration of Democracy", Kompas, 5 January 2011.
[4]Soerjono Soekanto, *Sociological Theory, About Personal in Society*, Jakarta: Ghalia Indonesia, 2019, pp 83-84.

that law should be strengthened through power so that it becomes more forceful and effective, and on the other hand, the power or authority should run based on principles of law not on dictatorship. If during the government before the era of reform, politics and economy became the main goals, thus in the era of post reform, law enforcement should be the main basis of the governmental system. This is because, to foster the country of Indonesia with justice, fair, welfare, unity, and people powered, the truth value that is used must be based on law principles.

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Fair and Equitable Treatment Standard in International Investment Law: The Customary Status

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Abstract
Fair and equitable treatment (FET) is an important standard in international investment law. However, this standard is not free of controversy among governments, scholars and in arbitral tribunals. The historical challenge of FET is its relation with international minimum standard of treatment under customary international law. In recent times, a new challenge arose asking whether FET itself has entered into the family of customary international law or not. This inquiry is important because if the standard has, in fact, become a part of customary international law, then even where States exclude reference to FET for foreign investors in their treaty arrangements, this level of treatment will come into effect by operation of law to such investors. This paper seeks to find an answer for this question. In this respect, the paper first went through the opinions of different scholars. As observed, a few of them supported such a recognition by basing their ideas mostly on the inclusion of FET in the majority of for instance BITs. While the rest of scholars has opposed such an idea by backing the conventional status of FET or pointing on the lack of uniformity of State practice plus the absence of opinio juris among countries. In the second step, the paper analyzed the arbitral cases dealing with such a question. It found, that except a few cases, the rest have not agreed to such a recognition. Finally, the paper looked for the requirement of State practice and opinio juris to see if FET has become part of customary international law. It found that although State practice is general and representative but it is not uniform and consistent. In addition, there was no opinio juris or legally binding believe to accept the customary status of FET. In short, the majority of scholars, arbitral practice, as well as the practice of state and opinio juris does not confirm that FET has entered into the corpus of customary international law.
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1. Introduction

The Fair and equitable standard (FET) has become one of the most important standards which provides protection through international investment instruments and is regularly invoked by the foreign investors as a basis for requiring compensation from host States. Unlike other standards, it is a non-contingent standard, which is so broad and vague. In addition, it is a unilateral obligation of host States. The first appearance of the standard was in Havana Charter of 1948[1] as a desirable basis for the treatment of investment in foreign countries. The broad usage of FET for the protection of foreign investors came through the network of bilateral investment treaties (BITs) from 1960's onwards. However, the FET standard became one of the most controversial issues in the international investment law since 1997 when the AMT tribunal[2] discussed the violation by a State of its FET obligation for the first time. Later on, the relationship of FET with minimum standard of treatment has been the most controversial one. Here, the main question has been whether FET is part of MST or is it with a reference to MST under customary international law or not. The answer to this question is not the focus of this paper.

However, now, there is a theoretical question that whether FET itself has become a rule of customary international law or not. This inquiry is important because if the standard has, in fact, become a part of customary international law, then even where States exclude reference to FET for foreign investors in their treaty arrangements, this level of treatment will come into effect by operation of law to such investors.[3] While if it has not become, the courts would not be able to bring it into play unless it was formally contained in investment treaties. Some commentators have supported the argument of FET as a rule of custom. For example, Schwebel

[1] Havana Charter for the Establishment of an International Trade Organization ('Havana Charter') (signed 24 March 1948).
[2] American Manufacturing & Trading, Inc. v Democratic Republic of Congo (AMT case), ICSID Case No.ARB/93/1, Award, 21 February 1997.
[3] Deng, Tingting. "The impact of the fair and equitable treatment standard on state sovereignty: from the perspective of international investment practice." PhD diss., City University of Hong Kong, 2012, p. 68.

asserted that FET embodied in treaties is received by now in customary international law.[1] Similarly, FA Mann claims that just because the relevant standard is embodied in the treaty, it replaces customary norms on the same subject.[2] However, Vasciannie is in favor of the view that FET has not passed into the body of customary law due to the lack of consistency of practice as well as opinio juris.[3] In addition, Dumberry in his findings proves that while the States possess a general, widespread and representative practice, nevertheless it is not uniform and consistent enough for the standard to have entered into a customary rule let alone the lack of opinio juris.[4]

This paper aims to answer the question over the customary status of FET. Therefore, in the second section, this paper will go through different conflicting arguments supporting or opposing such a recognition. In the third section, the arbitral cases dealing with such a question will be analyzed and in the last section, the States' practice and their opinio juris will be searched for to find out if the standard has entered into customary international law. Subsequently, a conclusion will be followed.

2. The Various Arguments over FET as a Rule of Custom

The main arguments for this transformation is the inclusion of FET in multilateral treaties as well as in the overwhelming majority of BITs. First, in the context of multilateral instruments, the basic rule established by the ICJ in the North Sea Continental shelf is of relevance. In this case, the ICJ laid one important criteria that the standard is of a 'fundamentally norm-creating character and there has been time enough for the rule to assume customary status.[5] This criterion does not seem to be satisfied with regard to FET particularly in relation to majority of multilateral instruments. For example, the international instruments containing FET such as Havana Charter[6], the Abs-Shawcross Draft[7], and the OECD Draft[8], all failed to achieve the treaty status. Thus, it can be argued that this failure of lacking enough state support to enter into force as treaties indicates the weak norm creating possibility for these instruments.[9] That is not to say, that some provisions within them may reflect the customary international law. The truth is that the customary status of those provisions represents State practice *and opinio juris* with or without those unratified instruments.[10]

The North Sea criteria is contrasted with the relaxed approach to the identification of customary norms in *Fisheries Jurisdiction* cases (*Merits*).[11] In this case, the ICJ seemed content to admit that a resolution and a proposal backed by large majorities at the First and Second United Nations Conferences on the Law of the Sea, correspondingly, indicated overwhelming support for a particular rule in customary law.[12] However, it seems that even if this method is accepted, the failed instruments mentioned above still looks deficient.[13] To take the example of the Havana Charter, the purpose of the charter was not to create a binding treaty obligation on FET, as it would be idiosyncratic to do so.[14] In the meantime, the Abs-Shawcross Draft in itself was not able to produce a customary rule on FET, as it also did not receive a formal support from States.[15] As for the OECD Draft, there is a point that FET could have developed as a rule CIL because of some degree of State scrutiny over the draft. This can be counter argued with three reasons. First, the OECD Draft seems to have represented only the developed countries not the developed ones as they lack express support for such a recognition. Second a lack of opinio juris among a great number of States confirming the OECD document as enshrining the standard in customary law. Third, this

[1] Schwebel, The Influence of Bilateral Investment Treaties on Customary International Law. 98 ASIL Proceedings (2004), 27.
[2] FA Mann, British Treaties for the Promotion and Protection of Investments, 5 BYIL (1982), 249.
[3] S. Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice', BYIL 70 (1999), 160-161,164
[4] Dumberry P (2017) Fair and Equitable Treatment: Its Interaction with the Minimum Standard and its Customary Status (Brill Research Perspectives in International Investment Law and Arbitration), pp.49-50.
[5] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands)*, [1969] ICJ Rep 42, [72]; on this issue see also Mark E. Villiger, Customary International law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources (2nd edn., Kluwer 1997), pp. 177-178.
[6] International Trade Organization, The Havana Charter (1948)
[7]The Abs-Shawcross Draft Convention on Investment Abroad (1957)
[8] OECD, Draft Convention on the Protection of Foreign Property (1967)
[9] See Vasciannie (above fn 6), p.155
[10] Ibid., at p. 154; on the possibility that some provisions in a multilateral treaty may have customary status while others do not, see also, for example, the *North Sea Continental Shelf* cases, at p. 39, para. 63.
[11] *Fisheries Jurisdiction* case *(UK* V. *Iceland) (Merits), ICJ Reports,* 1974, p. 3
[12] Ibid. p. 26, para. 58
[13] See Vasciannie (above fn 6) p. 155
[14] Ibid. at pp. 108, 155; See also UNCTAD, International Investment Instruments: A Compendium (1996), vol. I, p. xx.
[15] Ibid at p. 155

draft, with the passage of time, did not evolve from the status of a draft to that of a binding treaty making it difficult although not impossible to argue that, the FET in OECD text is a part of CIL.[1]

Similarly, these arguments also involve with regard to the more recent instruments such as the World Bank Guidelines,[2] the NAFTA Agreement[3] and the Multilateral Agreement on Investment.[4] These agreements though demonstrating some degree of political acceptance of the standard do not reflect broad consensus particularly among developing countries over the customary status of FET as a rule of custom.[5] To begin with, the World Bank Guidelines issued in 1992, it did not meant to be declaratory of customary law on the standard of treatment for foreign investors.[6] This is reflected in the World Bank Development committee notes explaining that it is reports on the Guidelines "does not aim at representing a codification of what are necessarily agreed upon, binding rules of international law. Rather it attempts to reflect at this stage generally acceptable international standards which meet the objective stated in the Development Committee's request, i.e., the promotion of foreign direct investment".[7] As for the other two instruments, NAFTA has a limited membership and lack a widespread cross-sectional support to claim that FET has entered into customary law. Similarly, Multilateral Agreement on Investment also faced with the lack of cross-sectional accord in addition to the fact that it was not able to gather support even from capital exporting countries involved in negotiating its term.[8]

Departing from multilateral instruments, this issue is more debatable with respect to BITs. First, the supportive argument here is that when a rule is repeated in a number of BITs, this in itself indicate an evidence that the rule has become a part of customary law.[9] Likewise, the inclusion of FET in the vast majority of BITs could lead to the claim that States, irrespective of the treaty obligation, accept the standard as legally binding. Therefore, only the significant similarity of the approach displayed in a vast number of BITs would provide the two requirements of State practice and *opinio juris* in support of the rule in customary law.[10] As, Tudor posits 'the FET standard became a customary norm of its time; quick in its formation and based essentially on a State practice derived from the treaties signed by an overwhelming number of States, which in the majority contain an FET clause. She moreover suggests that FET should be envisaged as a form of '*coutume sauvage*, made from a network of uniform BITs, an argument to cover the lack of opinio juris.[11] In other words, this implies that FET is a customary rule *in its own right*. Here, it cast doubt on the capability of MST for being too slow to meet the current international law challenges. One further robust support is the Diehl's argument who states that not only FET as such has evolved into a customary rule (parallel and distinct from MST), but furthermore that it 'ought to be recognized as a general principle of law'.[12] In addition, given that the impact of the standard is further extended by invoking the most-favoured nation standard, this claim possesses a solid factual foundation.[13]

However, there are several counter arguments to deny the customary status of FET. The first counter argument goes the opposite conclusion of the above argument highlighting the inclusion of FET in majority of BITs. In fact, as Weiler describes this inclusion of FET in BITs by States in a consistent manner can also mean that no such standard of protection exist under custom.[14] This takes us to conclude that if FET exited under custom, States would not need to include such protection in their BITs. Thereby, the mere existence of FET even with its

[1] Ibid. pp. 155-156
[2] World Bank Guidelines on the Treatment of Foreign Direct Investment ('World Bank Guidelines 1992).
[3] North American Free Trade Agreement ('NAFTA') (signed 17 December 1992, entered into force 1 January 1994).
[4] OECD Multilateral Agreement on Investment ('MAI') (draft-consolidated text of 22 April 1998).
[55] See Vasciannie (above fn 6) p. 156
[6] Ibid.
[7] Rubin, Introductory Note on 'World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment', International Legal Materials, 3 I (1992), p. 1369
[8] See Vasciannie (above fn 6) p. 156
[9] Ioana Tudor, The Fair and Equitable Treatment Standard in International Foreign Investment Law (Oxford UP 2008), pp. 65-68; Alexandra Diehl, The Core Standard of International Investment Protection: Fair and Equitable Treatment (Wolters Kluwer 2012), pp. 10–11, 125–153, 175–179; Alfred Siwy, 'Investment Arbitration – Indirect Expropriation and the Legitimate Expectations of the Investor' in Christian Klausegger et al. (eds), Austrian Arbitration Yearbook 2007 (C.H. Beck, Stämpfli and Manz 2007); Courtney C. Kirkman, 'Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105', (2002–2003) 34 Law & Pol'y Int'l Bus., p. 392; Todd Weiler, 'NAFTA Investment Arbitration and the Growth of International Economic Law', (2002) 2 Bus. L. Int'l, p. 188; I. Laird, 'Betrayal, Shock and Outrage – Recent Developments in NAFTA Article 1105', in T. Weiler (ed.), NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (Transnational Publ., 2004) pp. 70–74.
[10] Vasciannie (n 6) p. 157
[11] Tudor (n 27) p. 85
[12] Diehl (n27) pp. 124 – 179.
[13] Vasciannie (n 6) p. 157
[14] Weiler (n 27) p. 236

impressive number does not confer the FET a customary status.[1] In this point, the ICJ rule is clear as it notes that 'the frequency or even habitual character of the acts is not in itself enough, States must feel that they are conforming to what amounts to a legal obligation'.[2] Therefore, it is obvious that rules of CIL develop over time based on the uniform and consistent practice of a large number of representative States, which have the conviction or believe that such practice is required by law meaning the opinio juris.

The second counter argument takes a historical ride to the development of FET in the context of BITs. Here, the opposed argument to FET as a rule of custom can be taken with respect to the position of developed and developing countries towards such a recognition. To begin with, this duel between the two groups of countries can be observed before and after the efforts of achieving a New International Economic Order (NIEO). Before the NIEO, bilateral treaty practice containing such a standard was favored by developed countries for the fact that there was doubt about the standard of treatment to be accorded to foreign investors. Hence, it is hard to accept that there was consensus between the two groups and likewise FET had passed into customary law. While, after the NIEO, the question is that with the increasing number of FET in BITs, has the FET in recent years become a rule of customary international law? Theoretically, the answer could be in affirmative, however, after all these developments; one can still face with the lack of a clear indication on the part of developing countries to consider themselves obliged as a matter of international law, to offer FET to investors. Likewise, it is argued that for these countries politically as well as economically, it is prudent to provide FET in bilateral arrangements.[3]

One more argument adding to this point is the issue of unequal bargaining power where the content of the modern BITs are largely determined by developed countries and while the developing countries has the option either to accept with limited modification or to reject the treaty in their entirety. However, what about the BITs between developing countries or the countries in transition? For BITs between developing countries at first it can said that these countries might have accepted FET as rule of custom. However, it is posited that it may need some indication from developing countries that the standard has been incorporated not out of convenience or prudence, but because it is required by the prevailing law. As for the countries in transition, even they have entered in numerous BITs embodying the standard, this by itself, does not provide a clear evidence showing their support towards FET as a rule of customary international law.[4]

Finally, the last argument concerns the customary status of FET between developed countries. It is argued that the requirement of state practice and opinio juris might be fulfilled with respect to these countries. For example, the practice of these countries in the form of both multilateral instrument and BITs is unequivocally in favor of the standard. This argument can also be undermined by the fact that the standard would be binding only between two developed countries and it would be unnecessary to determine whether a custom has in fact evolved among developed States as a group.[5] In summary, the legal doctrine answers this question negatively, arguing that despite FET being present in manifold bilateral and multilateral investment treaties, the subjective element of customary international law namely the *opinio juris* remains contentious. Therefore, the better view is that FET has not become part of customary international law.

3. The Arbitral Practice on FET as a Rule of Custom

Arbitral practice has also embraced the controversial position regarding customary status of FET taken by some arbitral tribunals that has followed with criticism later on by the State Parties, other tribunals and as well as by some writers on this issue. The idea of presence of FET in numerous BITs has also influenced the arbitral practice to rule that FET as such has become part of customary international law. For example, the *Pop and Talbot* tribunals in its second award of 2002 stated "Canada's view on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated, however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties". [6]Here, for the tribunal the fact that the FET standard was present in the majority of BITs essentially catered the element of State practice needed to prove the existence of a rule of customary international law.

[1] See C. Schreuer & R. Dolzer, Principles of International Investment Law (Oxford UP 2008), p. 124; see also Dumberry (n 7) p. 49
[2]North Sea Continental Shelf Cases (n 8) 44 [77].
[3] Vasciannie (n 6) pp. 157-158
[4] Ibid. at 159-160
[5] Ibid at 161-162
[6]Pope & Talbot Inc. v. Canada, UNCITRAL, Award in Respect of Damages, 31 May 2002. (62).

However, this reasoning is controversial and questionable for different reasons. As discussed in the previous part that for FET to enter as customary rule, it should fulfill the prerequisite of State practice and opinio juris. Even, if there is considerable State practice adopting FET in treaties, this by itself will not indicate that States do so based on a sense of legal obligation. Instead, it is as a means facilitating investment in their respective countries that States conform to do so. Therefore, the tribunal noticeably ignored the requirement to demonstrate opinio juris to establish the existence of a customary rule. Moreover, the tribunal did not point to the actual content of these BITs.[1] These criticisms were also reflected in *ADF*[2] as well as *Mondev*[3] cases where the tribunals referred to the clear disapproval of the NAFTA parties with the reasoning of the tribunal.[4]

Another tribunal, which seems to have clearly supported the customary status of FET, is the Merrill & Ring[5] tribunal. Unlike, *Pop and Talbot*, this tribunal provided its reason based on the evolution of MST rather than pointing on the inclusion of FET in BITs. In other words, the tribunal simply said that 'against the backdrop of the evolution of the minimum standard of treatment' it was 'satisfied that fair and equitable treatment has become a part of customary law'.[6] This tribunal however, did not opt to discuss in detail neither State practice nor the opinio juris under the CIL. For further explanation, the tribunal reasoned, "a requirement that aliens be treated fairly and equitably in relation to business, trade, and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as opinio juris. In the end, the name assigned to the standard does not really matter. What matter is that the standard protects against all such acts and or behavior that might infringe a sense of fairness, equity and reasonableness. Of course, the concepts of fairness, equitableness and reasonless cannot be defined precisely: they require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair, inequitable or unreasonable".[7]

Some tribunals such as *Mondev* and *Cargill*[8] have taken unclear or cautious approach towards recognition of FET as a rule of custom. First, the Mondev tribunal admitted that 'it is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties'. For more clarification, the tribunal at the outset, observed the contention of the US as respondent, which had contended that FET and FPS in NAFTA including other BITs intended to incorporate principles of customary international law.[9] Then, the tribunal concluded this way, "thus the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?"[10]

The above conclusion of the tribunal is rather unclear and may have two possible interpretations. First, it can mean that the tribunal supported the position hold by the United States that FET refers to the MST found under custom. Second, it may mean that the FET itself has already entered into the corpus of customary international law. Nevertheless, the award contains a few passages that possibly indicate that the tribunal favoured the later position. For example, in one place the tribunal, mentions that the 2000 existing BITs 'almost uniformly' contain an FET clause and points that, 'such a body of concordant practice will necessary have influenced the content of rules governing the treatment of foreign investment in current international law'.[11] Also, in one more place

[1] On this point, see also Dumberry (n 31) p. 54
[2] *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1, Award, 6 January 2003.
[3] *Mondev International Ltd. v. United States*, ICSID Case No. ARB (AF)/99/2, Award, 2 October 2012.
[4] *ADF* (n 40) [112]: '[t]he Pope and Talbot Tribunal did not examine the mass of existing BITs to determine whether those treaties represent concordant state practice and whether they constitute evidence of the opinio juris constituent of customary international law.' For the United States, the Pope Tribunal was therefore 'not in a position to state whether any particular BIT obligation has crystallized into a rule of customary international law.' Ibid. [125]; *Mondev* (n 39) [110]: 'In their post-hearing submissions, all three NAFTA Parties challenged holdings of the Tribunal in Pope & Talbot which find that the content of contemporary international law reflects the concordant provisions of many hundreds of bilateral investment treaties. In particular, attention was drawn to what those three States saw as a failure of the *Pope & Talbot* Tribunal to consider a necessary element of the establishment of a rule of customary international law, namely opinio juris. These States appear to question whether the parties to the very large numbers of bilateral investment treaties have acted out of a sense of legal obligation when they include provisions in those treaties such as that for 'fair and equitable' treatment of foreign investment'.
[5] *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Award, 31 March 2010.
[6] Ibid. [211]
[7] Ibid. [210]
[8] *Cargill, Inc. v. Mexico*, ICSID Case No. ARB (AF)/05/02, Award, 18 September 2009.
[9] Mondev (n 41) [111]
[10] Ibid. [113].
[11] Ibid. [117].

generally mentioning that the content of 'current international law was shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce and that those treaties largely and concordantly include an FET clause.[1] The Chemtura tribunal also agreed a similar position with regard to rule of BITs stating that "the determination of NAFTA Article 1105 cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution".[2] Therefore, considering the different statements by the tribunal, it can be suggested that the *Mondev* tribunal actually agreed that the inclusion of FET by States in their BITs in a uniform manner had led to the formulation of a rule of custom.[3]

Coming to Cargill case, the tribunal embraced both possibility and difficulty of FET as norm of customary international law indicating that the FET clause were common in BITs, but also accepted that the actual wording varies. Thus, on one hand the tribunal said that it is 'widely accepted that extensive adoption of identical treaty language by many States may in and of itself serve – again with care – as evidence of customary international law'. On the other hand, it suggested that 'significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom. Therefore, the tribunal concluded that it did not believe it prudent to accord significant weight to even widespread adoption of such FET clause. it further pointed that 'it may be that widespread adoption of a strict autonomous meaning to fair and equitable treatment may in time raise international expectations as to what constitute good governance, but such a consequence is different than such clauses evidencing directly an evolution of custom'.[4]

Courageously, some tribunals have given FET a customary recognition by supporting the convergence theory. For example, in Occidental, the tribunal opined, 'the treaty standard is not different from that required under international law'. The tribunal also mentioned that 'this means that a minimum fair and equitable treatment must be equated with the treatment required under international law. The reasoning of the tribunal is questionable as it first equates FET with the minimum standard under customary international law and later looks to tribunals applying the additive interpretation of FET to determine the applicable standard. Moreover, this convergence approach leads the tribunals to conclude that as a matter of customary law, states owe duties to foreign corporations the benefits beyond the customary international law and therefore overstates the protections afforded to investors under customary international law. The convergence approach may also cause other governmental actions such as negligence in negotiations, discrimination in the provision of financial assistance, approval of investment that is contrary to government policy and even simple breaches of contract to be in violation of customary international law.

In another side, some tribunals have rejected the idea that FET has itself become part of customary international law. One such example is the *ADF* tribunal, which took the position saying, "We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The investor, for instance, has not shown that such a requirement has been brought into the corpus of present day customary international law by the many hundreds of bilateral investment treaties now extant. It may be that, in their current state, neither concordant state practice nor judicial or arbitral case law provides convincing substantiation (or, for that matter, refutation) of the investor's position".[5] Here, the tribunal expressly refuted the claim made by the investor that FET had become part of customary law. The tribunal also had stated that the Mondev ruling was just 'implying that the process was in motion, and that tribunal had not backed that FET was in fact a customary rule.[6] Similarly, the tribunal in *Glamis Gold v. United States* rejected the claimant's argument that 'BIT jurisprudence on the FET has converged with customary international law in this area' and found this as an 'overstatement'.[7]

In short, only a few tribunals such as *Pop & Talbot*, and *Merrill & Ring* have expressly agreed with the customary status of FET. Other tribunals such as Mondev and Chemtura though not clearly also seems to have adopted such a position. On the other side, tribunals for instance *ADF* and *Glamis Gold* tribunals have rejected

[1] Ibid. [125].
[2] Chemtura Corporation v. Canada, UNCITRAL, Award, 2 August 2010 [121].
[3] Alexander Orakhelashvili, 'The Normative Basis of "Fair and Equitable Treatment": General International Law on Foreign Investment?' (2008) 1 Archive des Völkerrechts, p. 78; Laird (n 27) pp. 70–7467, 69, 70. See also Stephan W. Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W. Schill (ed) International Investment Law and Comparative Public Law (Oxford UP 2010) p. 153.
[4] Cargill (n 46) [276]
[5] ADF (n 40) [183], [185].
[6] Ibid. [183]
[7] Glamis Gold Ltd v. United States, UNCITRAL, Award, 14 May 2009 [609].

such a recognition. As can be observed, the tribunals supporting this status mostly based their reasoning on the existence of FET in the overwhelming majority of BITs or the evolution of custom represented in the modern formulation of FET. However, the reasoning of these tribunals arguing that the multiplicity of treaty instruments on the given subject can produce the customary law regulation on the same subject is defective, as they have not properly embarked on the double requirement of State practice and *opinio juris*. An ICJ rule in the case of Ahmadou Sadio Diallo, which dealt with the issue of diplomatic protection, supports such an argument. The court received the argument that the regulation of diplomatic protection in treaty regimes had caused the change in customary law on this subject, and thereby the State of the nationality of the company's shareholders could exercise the diplomatic protection for the breaches of the rights of the company by substitution. The court did not accept to see the modification of customary international law in this way. In other words, for the court, the adjustment of the subject matter in treaty regimes was not enough as evidence.[1]

At the end, something should be said about the overall role of arbitral decisions themselves with regard to recognition of a standard as rule of custom. In this matter, for example, the NAFTA governments have repeatedly insisted that the decisions of arbitral tribunals are not themselves a source of customary international law. Thus, ISDS awards that merely set forth arbitral views about customary international law are not relevant.[2] For example, Canada during the *Chemtura* case in its counter – Memorial citing Sir Hersch Lauterpacht noted, "Decisions of international courts are not a source of international law. They are not direct evidence of the practice of States or of what States conceive to be the law. Arbitral decisions are relevant to the determinations of custom only to the extent that they contain valuable analysis of State practice. They may provide a useful tool for determining the content of customary international law in this way. They do not in themselves constitute the practice of States". For Canada, the cases cited by the Claimant, do not contain an analysis of either State practice or *opinio juris*.[3]

4. The Findings through State Practice and Opinio Juris

For FET to be truly recognized as a rule of custom, it should fulfill the requirement of State practice and *opinio juris.* In other words, on the one hand, it needs to be shown that a significant number of States have entered into numerous BITs that contain the standard similarly drafted. On the other hand, they have to show there is *opinio juris* among these countries. These two requirements also known as 'double requirement' or the 'traditional approach'[4] is the base of overall determination of any rule of customary international law as well. As the ICJ provided that to establish a rule of customary international law, it is "an indispensable requirement to demonstrate that State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked. And should moreover have occurred in such a way as to show a general recognition that a rule of law or obligation is involved".[5] In practice, as the ILC Special Rapporteur Wood explained the above-mentioned double requirement is 'generally adopted in the practice of States and the decisions of international courts and tribunals, including the ICJ and it is widely endorsed in the literature'.[6]

This double requirement both must be shown for a well-established rule of customary international law. On the one hand, State practice is crucial, as custom cannot be established only through opinio juris[7] and hence deriving custom 'purely from opinio juris can create utopian laws that cannot regulate reality'.[8] In other words, opinio juris absent of State practice is 'nothing more than rhetoric'.[9] On the other hand, the existence of opinio juris is important to distinguish between real international obligations and mere non-legal motivations[10] such as

[1] Ahmadou Sadio Diallo, Preliminary Objections, General List No 103, Judgment of 24 May 2007, paras 88-90.
[2] See *Mesa*, Mexico Second Non-Disputing Party Submission, para. 10 ("Mexico concurs with Canada's submission that decisions of arbitral tribunals are not themselves a source of customary international law ...."). Also, *Mesa*, Canada Response to Non-Disputing Party Submissions, para. 11 ("Canada has explained at length in its pleadings as to why decisions of international investments tribunals are not a source of State practice for the purpose of establishing a new customary norm.").
[3] *Chemtura*, Canada Rejoinder, para. 167.
[4] See A.E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', (2001) 95 AJIL, 758, notably described this approach as one 'focusing primarily on state practice in the form of interstate interaction and acquiescence', with opinio juris being 'a secondary consideration invoked to distinguish between legal and nonlegal obligations'.
[5] North Sea Continental Shelf Cases (n 8) 43 [74].
[6] International Law Commission, 'Second Report on Identification of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-sixth session, Geneva, 5 May–6 June and 7 July–8 August 2014, UN Doc. A/CN.4/672, p. 8
[7] Villiger (n 8), p. 288; H.W.A. Thirlway, International Customary Law and Codification (Sijthoff 1972), p. 56.
[8] Roberts (n 60), p. 757
[9] Y. Dinstein, 'The Interaction between Customary International Law and Treaties', (2006) 322 Rec. des cours, 294.
[10] Villiger (n 8), p. 48.

'courtesy, political expediency, will or compromise, precautionary measures, expressions of intent and aspirations or preferences.[1] Moreover, opinio juris is essential to show how the accumulation of uniform and consistent State practice can transform into a legal rule binding on all States.[2] As pointed by the ICJ in the *North Sea Continental Shelf* cases, 'acting, or agreeing to act in a certain way, does not itself demonstrate anything of a juridical nature.'[3] Therefore, it is necessary to prove that something that States typically and often do transforms to something that they feel they have to do it under international law.[4] In this respect, Dinstein succinctly stated that *opinio juris* 'underpins the transition of State practice from the normal to the normative'.[5] Overall, in the words of Kammerhofer, 'the reason why both elements can be seen to be necessary is that without *usus* it would not be customary and without opinio it would not be law.[6]

To begin with, the State practice first must be general[7] and or according to ICJ, 'widespread'[8] and 'sufficiently extensive and convincing'.[9] It means this requirement is relative and there is no need for a particular number or percentage of States to show general practice.[10] However, it cannot be left in abstract, what indeed matters is the degree of representativeness of the States actively engaged in that practice.[11] In a recent study made by Dumberry, from a collection of 2000 BITs, only 50 did not include FET while 25 others had FET in their preambles. While only less than 5 percent of all BITs in his study did not cover FET.[12] Even here, no country has systematically excluded FET clauses from its treaties while the few states which have done it, it has been only with their minority of BITs. For example, the States in Eastern Europe particularly have adopted BITs with no FET clauses. On the other side, such kind of clause excluding FET are not common in practice of developing countries. Therefore, this requirement of States practice seems to be fulfilled.[13]

The second requirement is that State practice must be representative. The ICJ in the *North Sea Continental* cases mentions the condition of 'very widespread and representative participation' in the formation of a rule.[14] In addition, ILA final report clarifies that 'it is not simply a question of how many States participate in the practice, but which States.[15] As, in the early stages of the development of FET, the standard was supported by developed countries and developing countries embraced the standard by the passage of time particularly after 1990s, as well.[16] Now, the FET is included in multilateral instruments such as Energy Charter Treaty (ECT)[17] in Europe, NAFTA[18] in North America, Latin America[19], Asia,[20] and Africa.[21] The standard is also embodied the BITs of developing countries as such in model BITS of both developed and developing countries.[22] Taken the considerable presence

[1] International Law Commission, 'Formation and Evidence of Customary International Law, Elements in the Previous Work of the ILC that Could be Particularly Relevant to the Topic', Memorandum by the Secretariat, Sixty-fifth session Geneva, 5 May–7 June and 8 July–9 August 2013, UN Doc., A/CN.4/659 [19].
[2] Karol Wolfke, Custom in Present International Law (2nd ed., Nijhoff 1993, p. 44.
[3]North Sea Continental Shelf Cases (n 8) 44 [76].
[4] International Law Commission, 'Third Report on Identification of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2014, A/CN.4/682 [6].
[5] Dinstein (n 65), p. 294.
[6] Jörg Kammerhofer, 'Customary International Law Needs both Opinio and Usus', paper presented at the conference 'The Role of Opinio Juris in Customary International Law', Duke-Geneva Institute in Transnational Law, Geneva, 2013, p. 2
[7] ILC Memorandum (n 67) 10–11 (noting the different expressions used by the ILC); ILC Second Report (n 62) 34.
[8] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Rep. 2001, 40 [205].
[9] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)*, Judgment, ICJ Rep. 1984, 299 [111].
[10] Maurice H. Mendelson, 'The Formation of Customary International Law' (1985) 192 Rec. des cours, p. 219-224.
[11] International Law Association, 'Statement of Principles Applicable to the Formation of General Customary International Law', Final Report of the Committee on the Formation of Customary Law, Conference Report London (2000) 17 [25, 26]; ILC Second Report (n 62) [34].
[12] See Dumberry (n 7), p. 66
[13] Ibid. at p. 68
[14] North Sea Continental Shelf Cases (n 8) [73]
[15] ILA Final Report (n 77) [25].
[16] See Schreuer & Dolzer (n 33), p. 16; Stephen Schwebel, 'The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law', in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner (No. 693, ICC Pub. 2005) 647. p. 28. See also, for instance: OECD, International Investment Law: A Changing Landscape, A Companion Volume to International Investment Perspectives (2005) [78].
[17] Energy Charter Treaty Art. 10 (1).
[18] NAFTA (n 21) Art. 1105.
[19] Art. 2, Colonia Protocol in the context of Mercosur.
[20] ASEAN Treaty for the Promotion and Protection of Investments (Article IV).
[21] Common Market for Eastern and Southern Africa (COMESA) (Article 159(1) (a).
[22] Vasciannie (n 6) pp. 129-130.

of FET in various multilateral instruments and BITS across the regions of the world, it can said that the practice of State to contain FET in their BITs is representative.

The third requirement is uniformity and consistency of State practice, which has also been endorsed by several ICJ cases.[1] Unlike the other two above-mentioned requirements, this is a controversial one as some writers and scholars have conflicting opinions towards such a reality. This controversy is mainly related to different language and wording of FET in BITs. For example, for Tudor, FET's language differences 'refer to the level of the treatment to be accorded to the Investors, not to the standard within its content.'[2] Similarly, Diehl believes that these drafting differences 'do not touch upon the core of the FET standard.[3] In the opposite side, many scholars believe that how can one truly speak of uniformity when there exist five or six different FET models.[4] As, there are two prominent formulation of FET the one being linked with international and the other the unqualified or autonomous FET. Therefore, these clauses can hold different meaning and further impact the liability threshold when arbitral tribunals interpret them.[5] Furthermore, the ILA noted that 'if there is too much inconsistency between States in their practice, there is no general custom and hence no general customary international law'.[6] In addition, it discussed over virtual uniformity[7] both internally and collectively.[8] As for collective uniformity, 'different States must not have engaged in substantially different conduct, some doing one thing and some another.[9] For all these reasons and in conformity with Dumberry's findings on this issue, it can concluded that FET is not uniform within the practice of States in the context of BITs.[10]

Apart from State's practice in their treaties, it is also important to discover the practice of States outside the treaty framework. Here, also, it must be shown that States are providing FET uniformly and consistently in their own practice outside the treaties. This may include a situation where States are not party to any BIT or States are parties to BITs not containing the standard. The domestic laws would be a clear example of such a situation. It has been suggested by some writers that FET is found in the domestic laws of most developed and developing States.[11] However, some other writers have disapproved this argument. For example, Vasciannie's study on the domestic legislations of a number of capital importing States shows that the 'overwhelming majority' of these States do not provide FET protection to foreign investors.[12] Likewise, Parra's study of national legislations in 51 developing countries, found that only three of them contained FET standard.[13] Moreover, according to Dumberry's examination of 165 foreign investment laws from 160 States, 10 expressly has referred to the standard.[14] In short, only the investment laws of a small number of States have provide for FET. However, against this background, one should not conclude that FET is absent in these States. FET may exist, for example, within these State's constitution. In an opposite situation, the fact that FET exist in a State's legislation is no guarantee that investors for sure will obtain the FET protection.[15]

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[1] Colombian-Peruvian Asylum Case, Judgment, ICJ Rep. 1950. 276; Military and Paramilitary Activities in and around Nicaragua, (Nicaragua v. United States) Merits, Judgment, ICJ Rep. 1986, [186]; Fisheries Jurisdiction
Case (n 14) [50].
[2] Tudor (n 27), p. 77.
[3] Diehl (n 27), pp. 134–5.
[4] Andrew Newcombe & Luis Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer 2009), p. 271, fn 188; Marcela Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' (2006) 10 Max Planck Yrbk. UNL p. 656; Tarcisio Gazzini, 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8 J. World Invest. & Trade 698; Abdullah Al Faruque, 'Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal' (2004) 44 Indian JIL, p. 304; Cai Congyan, 'International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules', (2008) 7 Chinese JIL, pp. 664, 667; Orakhelashvili (n 52) p. 77.
[5] See also Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Wolters Kluwer 2013). 40ff.
[6] ILA Final Report (n 77) [22].
[7] North Sea Continental Shelf Cases (n 8) [74].
[8] ILA Final Report (n 77) [21].
[9] Ibid.
[10] See Dumberry (n 7), p. 71.
[11] For example, Tudor (n 27), p. 104 (In the case of the FET standard, the situation as it stands today is that most developed and developing countries do recognize in their domestic laws that FET is to be applied to foreign investors. This is the case even though the term FET itself may not be employed as such but the content of FET, namely procedural and substantive guarantees for foreign investors, is found in national provisions'); Diehl (n 27), p. 174.
[12] Vasciannie (n 6) 160.
[13] A. Parra, 'Principles Governing Foreign Investment, as Reflected in National Investment Codes' (1992) 7 ICSID Rev. 435–7.
[14] Patrick Dumberry, 'The Practice of States as Evidence of Custom: Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws', (2015–16) 2 McGill JDR pp. 66–81.
[15] See also Dumberry (n 7), p. 74

Another example could be the State's contract with the companies and individuals encompassing such a standard. Again, according to Dumberry's above-mentioned study, there exist no any such contract to refer to such standard.[1] However, it is doubtful with regard to confidential State contracts to be considered as a relevant evidence of State practice because of the publicity requirement towards the formulation of custom.[2] Furthermore, there seems to be no arbitration award mentioning FET in States contract or the investor's claim alleging the presence of FET in such a contracted to eventually be respected by the host states. More generally, in the absence of BIT or BIT containing no FET, there is no arbitration case requiring States to provide such a protection.[3] Thus, based on the findings both through investment laws of States as well as States contracts with investors, there is no indication to conclude that States outside the treaty as well provide a uniform and consistent protection of FET to investors.

Finally, the second general component of a customary international law is *opinio juris*. Same with the State practice, some writers as mentioned earlier have argued that the presence of FET in a great number of BITs is representative of the *opinio juris* of States as well.[4] However, as stated by the ILC Special Rapporteur Wood, 'when the parties to a treaty act in fulfilment of their conventional obligations, this does not generally demonstrate the existence of an *opinio juris*.'[5] Likewise, as explained by Schechter, 'the repetition of common clauses in bilateral treaties does not create or support an influence that those clauses express customary law because to sustain such a claim of custom one would have to show that apart from the treaty itself, the rules in the clauses are considered obligatory'.[6] Therefore, States simply performing their conventional duty has nothing to do with custom.

Furthermore, looking for the historical disagreement between the developed and developing countries on the issue of MST and accepting FET afterwards as a conventional standard, it is difficult to accept the proposition of FET included in BITs as a norm of custom. As Vasciannie rightly argued that, 'it would be difficult to posit that there was consensus between developed and developing countries that the FET standard had passed into customary law'. He further pointed that 'one would be hard-pressed to identify supportive *opinio juris*, particularly on the part of developing States'.[7] Apart from this argument, there seems to be no indication both in treaty text or travaux preparatoires to show that States has a sense obligation to Provide FET to foreign investors.[8] However, it should not be understood that a BIT might not contain clauses that States have *opinio juris* towards them at all. In this respect, Dumberry's study found that there were some examples of such an opinio juris, though in other contexts in BITs but not with regard to FET.[9]

Based on these findings, a number of observations can be made with respect to existence of State practice and opinio juris towards FET in the context of BITs. First, for State practice, the entire requirement of it as enshrined by the ICJ is not fulfilled. To put it the other way, the State practice is general and widespread as well as representative, however, it is not uniform and consistent. Moreover, the practice of States outside the treaty framework, as was observed in the States' legislation and States' contracts with investors, indicates that there is no uniform and consistent FET protection within them. As for *the opinio juris*, it was found that States simply fulfilling their obligations has nothing to do with custom. In addition, there is nothing in the treaty text, preparatory works or anywhere else to demonstrate that States provide FET out of a sense of obligation towards foreign investors, let alone the historical controversy over such a recognition. Therefore, it can be concluded here that except generality and representativeness of State practice, generally there is no support of uniform and consistent State practice within BITs or outside treaty framework as well as opinio juris to argue that, FET has become a rule of customary international law.

5. Conclusion

The quest of this paper was to find the answer for the controversial question of whether FET has itself become part of customary international law or not. The answer to this question is important because if the standard has, in fact, become a part of customary international law, then even where States exclude reference to FET for foreign investors in their treaty arrangements, this level of treatment will come into effect by operation of law to such

[1] Patrick Dumberry (n 102), p. 66-81
[2] See ibid; see also P. Dumberry, The Formation and Identification of Rules of Customary International Law in International Investment Law (Cambridge UP 2016), p. 152.
[3] Ibid.
[4] See p. 3, fn 25
[5] ILC Second Report (n 62) 43
[6] Oscar Schechter, 'Compensation for Expropriation' (1986) 78 AJIL 126.
[7] Vasciannie (n 6) pp. 157–158.
[8] Dumberry (n 7), p. 75
[9] Dumberry (n 105) 325ff.

investors. While if it has not become, the courts would not be able to bring it into play unless it was formally contained in investment treaties.

For this purpose, the paper first went through the conflicting arguments among scholars to find the answer. According to some scholars such as Schwebel, FA Mann, Tudor, Diehl, FET has itself entered into the corpus of customary international law. The main reason for them has been the inclusion of FET in majority of international investment agreements. However, in the other side, majority of scholars such as Vasciannie, Schwebel, Schreuer Weiler and Dumberry opposed such a recognition. Their main reason is that there is lack of consistency and uniformity of FET practice by States as well as the absence of opinio juris. Furthermore, if FET exited under custom, States would not need to include such a protection in their BITs. In short, the legal doctrine answers this question negatively, arguing that despite FET being present in manifold bilateral and multilateral investment treaties, the subjective element of customary international law namely the opinio juris remains contentious.

Secondly, the paper analyzed a number of arbitral cases dealing with the question of customary status of FET. As observed, only a few cases such as *Pop & Talbot*, and *Merrill & Ring* have expressly agreed with the customary status of FET. Other tribunals such as Mondev and Chemtura though not clearly also seems to have adopted such a position. On the other side, tribunals for instance ADF and Glamis Gold tribunals have rejected such a recognition. In fact, the tribunals supporting this status mostly based their reasoning on the existence of FET in the overwhelming majority of BITs or the evolution of custom represented in the modern formulation of FET.

Lastly, the paper scrutinized the two requirements for the formulation of a customary international law namely State practice and opinio juris with respect to FET standard. Here also, the entire necessary elements of it as enshrined by the ICJ is not fulfilled. In other words, except generality and representativeness of State practice, generally there is no support of uniform and consistent State practice within BITs or outside treaty framework as well as opinio juris to argue that, FET has become a rule of customary international law. Therefore, the answer to the question raised at the beginning is no as FET itself has not become a customary standard.

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