Journal of Law, Policy and Globalization

ISSN 2224-3240 (print)
ISSN 2224-3259 (online)
Vol.111
2021

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Journal of Law, Policy and Globalization

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IISTE is a member of CrossRef.

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

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Paper submission email: JLPG@iiste.org

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

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Vol 111 (2021)

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Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

Pandemics And Global Security Challenges: Covid-19 As A Threat to Human Security and Peace

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Abstract
This policy paper explores the political and socioeconomic dynamics and effects of the COVID-19 pandemic on global peace and security. It employs a human security approach to analyze the threats to global peace and human rights caused by socioeconomic disparities and sexual violence which have been worsened by the pandemic. It concludes with recommendations to stakeholders on how to promote peace and security during global health crises.
Keywords: Covid-19 pandemic, human rights, human security, health, sexual violence, development
DOI: 10.7176/JLPG/111-01
Publication date: July 31st 2021

1. Introduction

In the Cold war era security issues primarily focused on militarization, however, the 21st century ideology of security is more complex due to increased globalization (WHO, 2002, p.3). Security issues in contemporary times includes issues of economic disparities, public health concerns such as the emergence and re -emergence of communicable and infectious diseases (WHO,2002, p.3). Climate change (and its attendant challenges) is also now considered as a threat to global peace and security. Consequently, these global challenges have led policymakers, states, and security experts to shift away from focusing solely on military issues to the concept of human security.

2. Human Security in Contemporary Times

The human security approach acknowledges that security is a common good to be shared by all (Thomas, 2001, p .159). The United Nations Security Council has acknowledged social and economic inequality, poverty and health disparities as major threats to security because it may result in violence and civil strife. Economic disparities in contemporary times have increased human security threats (Thomas, 1999 p.225). In an address to the United Nations Security Council in 2000, the World Bank president noted that security issues are not just about military and borders but rather about poverty and human survival (Thomas, 2001 p.162). The World Bank acknowledges the importance of well-being for the development every nation. Human needs and the responsibility of states to protect the rights of persons are the main tenets on which human security is based. When people have unmet socio -economic needs, it becomes a motivation for civil strife and conflicts (Burton, 1990 p.36).

3. Health Rights and Social Justice

The right to quality health care is a basic human right enshrined in the 1948 Universal Declaration of Human Rights. It states that health rights are inalienable and therefore must not be constrained by a person's race, religion, political belief, economic or social condition.

Good health is a necessary condition for a person to enjoy every other human right (WHO, 2008). It is therefore part of human responsibility to safeguard our health and those of others.

Therefore, health inequality is a violation of a person's basic human right. Health care disparity is not only an issue of socioeconomic inequality but also an issue of racial and ethnic differences particularly in deeply racialized environments such as the United States of America (Braveman et. al., 2011, p.149). Racialization of the access to quality health care is a trigger for civil conflicts and riots; this is because the absence of equitable access to health care is a threat to the human security of the people. A threat to one's security is considered as an underlying factor for many violent conflicts. The unequal distribution of resources and group relative deprivation also serves as a trigger for conflict (Paffenholz, 2010. pp.272-285; Meuleman et. al, 2020 pp.593-611.).

Equally important is the concept of social justice which relates to the benefits and burdens of social and economic resources -it explains who benefits from and who is affected by the unequal distribution of social and economic resources as well as natural resources (Rawls, 1971 cited in UN Division for Social Policy, 2006, p.13). Socioeconomic inequalities are inevitable in the society however, it can be minimized. When a person or group suffer multiple forms of discrimination and socioeconomic exclusion, it has implications for their well-being and health status. For example, people who experience racism, gender discrimination and other forms of oppression,

are less likely to have access to quality health care. (Rogers & Kelly, 2011, pp. 397–407) noted that for health disparities to be eliminated the other forms of socioeconomic disparities must be addressed first.

4. COVID-19 as a Challenge to Human Security

According to the Global Partnership for the Prevention of Armed Conflict (GPPAC, 2020) the current global pandemic has exacerbated already existing social and environmental challenges such as climate change, food insecurity, unemployment, domestic violence, among others. All these coupled with lack of social welfare initiatives and quality health care especially for the most vulnerable have led to an increase in human insecurity and also pose a threat to peace.

Secondly, the UN Secretary General has called for measures on tackling domestic violence which had increased because of lockdown imposed due to COVID-19 lockdowns (UN News, 2020, https://news.un.org/en/story/2020/04/1061052). Human security challenges increased during the pandemic in conflict zones due to the already poor state of their health care systems (GPPAC, 2020). Many countries in the Global South with weak healthcare systems and existing pandemics, like the Ebola in DR Congo and HIV in most parts of sub-Saharan Africa, were further burdened by this new pandemic.

Additionally, the precarious situations of forced migrants who are one of the most vulnerable populations in the world (estimated to be about 70 million globally) have been worsened by the pandemic (SSRC, 2020, https://kujenga-amani.ssrc.org/2020/09/03/covid-19-human-security-crisis-and-the-responsibility-to-protect/).Psychological stress increased and the mental health of many people also deteriorated. The stigma attached to being infected and the fear of infecting others is also a challenge during a pandemic. These psychosocial factors are also a challenge to the social and economic security of individuals and their households. The deaths of persons (especially household heads and breadwinners) due to the pandemic also poses a risk to the survival of their dependents- the most vulnerable in the society usually do not have health or life insurance which could help in such periods of financial distress.

Furthermore, the politicization of the pandemic is a threat to global security. A report by the Social Science Research Council (SSRC) in September 2020, indicated that the COVID-19 pandemic is an issue of global security due to the risk of weaponization of the disease by certain perpetrators of mass violence and atrocities. The report also noted the politicization of the pandemic by certain powerful states such as the US through their withdrawal of funding to the WHO thereby constraining their efforts to eradicate the disease. The UN Security Council has the responsibility to protect and end mass atrocities through their Responsibility to Protect (R2P) principle. Although the pandemic is not an issue of direct violence it has exacerbated socioeconomic inequality. It is worth noting that the Security Council has admitted that socioeconomic inequality is an underlying factor for conflicts (UN Security Council General Assembly, 2019). The disagreements between the US and China (China currently has the UN Security Council Presidency) have also perhaps impacted upon the security council's decision to take responsibility to act on this global human security crisis. Many world leaders and Nobel laureates have reiterated the fact that global peace and sustainable development cannot be achieved without focusing on human security (UN, 2020, https://news.un.org/en/story/2020/04/1061052).

Equally important, is the relationship between gender issues and human security challenges. Gender inequality is more pronounced during global crises such as environmental disasters, wars and pandemics. Pandemics affect all genders differently (de Paz et al., 2020, p.2). The COVID-19 pandemic has augmented the socioeconomic gaps that have always prevailed across genders (Noory, 2020 pp.111–117). Data available indicates that there are higher mortality rates for men than women in the low and middle-income countries; however, females bear the brunt of the care work and are therefore more exposed to the risk of being infected (Schaaf et. al., 2020, p.50). Women's vulnerability generally increased due to their burden of care and the unequal distribution of housework during the pandemic (GPPAC, 2020). It is therefore important to recognize and address the gender dimensions of the COVID-19 pandemic in policy actions.

5. The Concept of Positive Peace

Peace is not simply the absence of direct violence; it goes beyond that- This is best understood through Johan Galtung's (1969) positive peace and negative thesis. There are different clusters of definitions to peace, for analytical clarity, this paper adopts the operational definition of peace as social justice and the absence of collective violence between groups.

6. The Increase of Sexual Violence During Covid 19; Threat to Human Security and Peace.

Sexual violence against women is a widespread phenomenon. Every 1 out of 3 women has experienced sexual violence. (W.H.O, 2020). The act of sexual violence reaches an alarming rate in times of pandemics/plagues, COVID-19 is no exception. This is partly due to various restrictions of movements and isolation measures (UNDP,2020) introduced by governments in response to the spread of the disease, a phenomenon Mittal and Singh (2020, pp. 3-7.) termed as the 'quarantine paradox'. From Africa to Asia, from Europe to America, reports

show a significant spike in sexual-related offenses since March 2020. (Odhiambo, 2020, pp. 2-5). The associated challenges that come with sexual violence and harassment (i.e., mental, and physical injuries, sexual/reproductive problems, HIV, unplanned pregnancies, and other transmitted diseases) cannot be over-emphasized. Persoob, (2010 pp. 141-151.), argues that sexual violence against women is a violation of their human rights; it represents a threat to the survival of women and a denial of their self-worth, dignity, security, and the right to enjoy fundamental freedom. This form of violence meted against women endanger their lives and constitutes a threat to human security (Thomas et al, 2010 p. 479.).

Maguruza, (2017, pp.15-35) contends that human insecurity could kill more people than even hunger, genocide, and war. The unjustified violence against women is exacerbated by Covid-19 pandemic due to stay-at-home orders and restrictions. Nakyazze (2020, pp.92–95.), concluded that this global health crisis has unintendingly provided a convenient space for sexual violence to flourish, contributing to existing social injustices and human insecurity challenges the world is grappling with.

The philosophical assumptions of the human security approach advance the idea that all persons must live in freedom, and dignity, devoid of despair, violence, harassment of any kind and to enjoy equal opportunities to develop their full human potential and aspirations. (Oscar & Gasper,2004, p3). Human security recognizes freedom as the fundamental/core of life, therefore any tendencies (including sexual violence) against this freedom intolerably threatens human survival, livelihood, respect, and security. (UNDP, 2020, p.16). Women constitute about half of the world's population (UNDP,2020, p.16) and the continued harassment against women hinder their potentials and active participation in the socioeconomic and political development of their societies. (Persoob,2010 pp. 141-151,). Sexual violence is a form of injustice and therefore a threat to positive peace.

Positive peace is the ultimate peace that every society seeks to attain; meanwhile it is unachievable if sexual violence exists. Positive peace explores the need to eliminate the different forms of indirect violence i.e., sexual violence, that hitherto shortens life span, reduces the quality of life, and maintained unequal life chances. (Herath, 2019 p.104). Sexual violence as explained above is an obstacle that hinders the realization of global peace and security.

7. Lessons Learned from Previous Global Health Challenges -The Way Forward for COVID-19 and Future Global Health and Human Security Issues

The Ebola virus showed the weaknesses in the contact tracing and surveillance systems in many regions especially in sub-Saharan Africa (Afolabi et. al., 2020, p.28). Myths and stigmatization were major hindrances to formal health seeking behaviors; thereby increasing the spread of the virus (Afolabi et. al., 2020, p.28). Gender mainstreaming in health care policies and action plans have been implemented since the global HIV/AIDS and Ebola crises- these global health challenges exposed the gender disparities in the impacts of such health problems in societies, especially in the global South. Consequently, academics and other stakeholders have started to advocate for the need to include gender mainstreaming in all COVID-19 response plans and policies.

Unlike the Ebola pandemic, sub-Saharan Africa responded quickly to this pandemic. The Ebola virus pandemic exposed many socioeconomic challenges which have been partly addressed during the COVID-19 pandemic. For example, some African states instituted welfare programs such as the provision of food to help the most vulnerable in their countries. The government of Ghana implemented a free water supply policy for some months. This was part of its plan to increase hand-washing and personal hygiene practices as well as to reduce the economic shocks (Daily Graphic, 2020, https://www.graphic.com.gh/news/general-news/ghana-news-gov-t-extends-free-water-package-to-december-31.html). World leaders have implemented policies to reduce the socioeconomic shocks to its people, yet there are still major problems that threaten human security at individual, household, and community levels.

8. Conclusion

Global pandemics and human security challenges are intertwined. The inequity in access to health care and the unequal distribution of social and economic challenges which are compounded during pandemics pose a threat to peace and security. Stakeholders must consider how health crises can overwhelm socio-economic systems and threaten human security in their policies. The gendered dynamics must also be considered in any policy planning and implementation (especially in trying to contain the spread of infection during a pandemic). This will help address issues of sexual violence which was ignored in the Covid-19 response plans of most countries. There is the need to protect persons especially the most vulnerable. Human security threats can only be minimized globally if there is cooperation among states, multinational corporations, civil society, and academia. This would help to build resilient societies even in the face of a global pandemic.

9. Recommendations

The following recommendations are made to states and other stakeholders such as NGOs, and the United

Nations to implement:

- Provision of microcredit by states (especially to the vulnerable) to help reduce the socioeconomic shocks.
- Response mechanisms must be put in place which will encourage victims of sexual violence to report to the security authorities for help. For example, the use of code text or SOS alert systems via mobile devices, sign language or symbols they can use to alert and communicate for help.
- National health insurance schemes for equitable access to quality and affordable healthcare.
- Rapid data sharing and early warning systems across states to predict and respond to outbreaks.
- The lobbying of the UN Security Council to include health crisis and pandemics as a threat to global security-in order to take action to protect the most vulnerable populations.

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Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

Constitutionality of State Control Meaning on Mineral and Coal Mining Field

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Abstract
The constitutionality of state control meaning is the regulatory concept contained in Article 33 of the 1945 Constitution of the Republic of Indonesia. In this case, the context of control concerns on mineral and coal mining which will be further regulated by the laws and regulations. Act No. 4 of 2009 on Mineral and Coal Mining in Article 92 gives authority in the form of rights for the holders of Mining License (hereinafter referred to as ML) and Special Mining License (hereinafter referred to as SML) to own minerals, including associated minerals, or coal that has been produced if they have fulfilled exploration fees or production fees except for radioactive minerals. Such an arrangement shows that the authority of the ML/SML holder is a form of freedom to trade these mining materials so that it has the potential to obscure the constitutional rights of the state to control, and causes the position of the state is subordinated to business actors. Through normative juridical research types with various approaches, this research was conducted in dealing with legal issues, especially on examining the philosophical meaning of state control and the consistency of the constitutionality of the rights of ML/SML holders to the 1945 Constitution of the Republic of Indonesia. The result has disclosed that the actual meaning of the right of state control is the embodiment of positioning the people as subjects to gain prosperity. Meanwhile, the regulation giving the ML/SML holder the authority to legally own minerals and coal is contrary to the constitution.
Keywords: constitutionality, state control, authority, sub-ordination
DOI: 10.7176/JLPG/111-02
Publication date: July 31st 2021

1. Introduction

The Unitary State of the Republic of Indonesia through the 1945 Constitution of the Republic of Indonesia as the constitutional basis has explained in Article 33 paragraph (3) that the earth and water and the natural resources contained therein are controlled by the State and used for the greatest prosperity of the people. Collectively, the people are constructed by the 1945 Constitution of the Republic of Indonesia which mandates the state to carry out policies *(beleid)* and arrangement *(bestuursdaad),* regulation *(regelendaad),* management *(beheersdaad)* and supervision *(toezichthoudensdaad)* for the purpose of the greatest prosperity of the people. The issue of mineral and coal mining business activities will not be separated from the concept of mineral and coal mining authority. Both are complete and absolute unity that cannot be separated from one another. This whole and unanimous unity is clearly seen from the provisions in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia in the phrase of "state control" and "for the greatest prosperity of the people."

These two phrases are sacred phrases that must be the soul of the implementation of mineral and coal mining in Indonesia. The phrase “state control" is the soul of “having authority" over mineral and coal mining, while the phrase "for the greatest prosperity of the people" is the soul of the purpose of organizing mineral and coal mining of a business. Thus, the essence of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia is the absolute and unanimous soul in the implementation of mineral and coal mining organically carried out by the legislation under the 1945 Constitution of the Republic of Indonesia. According to the theory, there are several definitions of the welfare state that can be defined as a social welfare system giving a large role to the state or government (to allocate some public funds to ensure the fulfillment of the basic needs of its citizens). Thus, it can be concluded that the welfare state protects the community, especially the weak groups such as the poor, disabled, unemployed etc. On the other hand, it is important to put an equal position and situation among each individual in society, thus one party and another can make an equal agreement. Everyone is blurred about the developing concept or knowledge of justice. Thus, society shall be educated to obtain the principle of fair equality.

The provision on Article 92 of the Act on Mineral and Coal Mining stated “holders of ML and SML shall be entitled to own minerals, including associated minerals, or coal that have been produced after they have paid exploration or production royalty, except for radioactive associated minerals.” This provision guarantees freedom for ML/SML holders, after paying the production fee to own and trade the mineral products they have produced. Legally, by paying royalties, it means there has been a transfer of ownership from the state to the

ML/SML holder, so that the ML/SML holder has the right to trade it, including exporting it.

Based on the above description, the provisions of Mineral and Coal Mining Law indicate disharmony as a legal problem with the substance of the 1945 Constitution of the Republic of Indonesia Article 33 paragraph (3), which immediately brings new legal problems. Thus, the author presented these legal issues in the form of a problem formulation formulated in the following questions: (1). What is the philosophical meaning of State Control over Mineral and Coal Mining? (2). Is the right of the holder of a Mining License and a Special Mining License to own minerals including associated minerals, or coal produced if they have paid the exploration or production royalty as stipulated in Article 92 of Act Number 4 of 2009 contrary to the provision of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia?

2. Method

This research aims at revealing the truth in a systematic, methodological and consistent manner, including legal research. Legal research is different from social research because law is not a social science category. Law is *sui generis* (Philipus M.Hadjon, Tatik Sri Djatmiati, 2005: 1), meaning that law is a separate kind of science. Characteristics *sui generis* shows that the legal science is characterized by (a) empirical analytical, namely describing and analyzing the content and structure of law; (b) systematization of legal phenomena; (c) interpreting the substance of the applicable law, and (e) the practical meaning of legal science is closely related to its normative dimension (Herowati Poesoko, 2007: 27). Therefore, the research method is different from social research in general.

This research belongs to normative legal research (Peter Mahmud Marzuki, 2005: 29-36) namely the process of legal research carried out to produce arguments, theories, new concepts as prescriptions to answer legal issues carried out by reviewing and analyzing statutory provisions, courts decisions and other legal materials. The answer expected in legal research as a result of the analysis is right, appropriate, or wrong. Thus, the results obtained in legal research have contained value. Normative legal research is based on analysis of legal norms. In the context of normative legal research, Abdul Kadir Muhammad further argues that normative legal research is legal research that examines written law from various aspects, namely: theoretical aspects, historical aspects, philosophy, comparison, structure and composition, scope and material, consistency, general explanations and article by article, the formality and binding power of a law and the legal language used. However it does not examine the application or implementation aspects.

Regarding the objectives of the research, the methodology applies four approaches, namely the Statutory Approach, the Conceptual Approach, the Comparative Approach, and the Historical Approach. The Statutory Approach is an approach taken by examining all laws against other laws, laws and the Constitution or between regulations and laws regarding mediation, especially industrial relations mediation. The result of the study of such an approach is an argument for solving the legal issues occurs.

The Statutory Approach is used because it is possible that there may be confusion in various laws and regulations, inconsistencies and even conflicting norms between the 1945 Constitution of the Republic of Indonesia and other laws and regulations regarding the Meaning of State Control over Mineral and Coal Mining. The legislative approach applied for conducting an assessment and analysis of the consistency or conformity between the 1945 Constitution of the Republic of Indonesia, especially Article 33 paragraph (3) with Article 92 of Act No. 4 of 2009 on Mineral and Coal Mining. The Conceptual Approach is an approach carried out by examining the views and doctrines develop in the science of law originating from the opinions of experts or legislation. Thus, the ideas giving birth to legal notions, legal concepts and principles that are relevant to the legal issues occur will be found. The conceptual approach is carried out because it is possible for conceptual developments to occur regarding the principles of controlling the state. It is expected that with these four approaches, the results of the analysis will be able to answer all legal issues concerning legal consistency, legal conflicts and the principles of the State Control meaning in the minerals and coal mining sector, which will provide a contributive prescription to revise or to create new legal products. Comparative Approach is an approach carried out by making comparisons. It is carried out by comparing the concepts studied and analyzed in legal research with the concepts in the context of similar legal issues, both within the scope of the national legal system and other legal systems across countries. The Historical Approach is an approach carried out through the process of forming laws that contain or regulate legal issues that are the object of study and analysis in legal research. This historical approach is usually carried out by reviewing and analyzing the minutes of the formation of legislation governing legal issues as the object of research study.

3. Results and Discussion

3.1 The History of Understanding the Meaning of State Control

The value of the State Control meaning has changed from the Dutch colonial era, the Old Order era, the New Order Era to the Reformation era. As stated in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, namely the earth and water and the natural resources contained therein are controlled by the State

and used for the greatest prosperity of the people. This mandate is the basic law in the management of Agrarian Resources in Indonesia. The concept of The State's Right to Control is also sourced from Article 33 Paragraph (3) of the 1945 Constitution. The state is given the right /authority to control Agrarian Resources, because the earth, water and space, including the natural resources contained therein, are national assets (Article 1 Paragraph (2) of Act No. 5 of 1960, Concerning Basic Regulations). The Basic Agrarian Law (hereinafter referred to as BAL) and the State are organizations of power for all Indonesian people (Article 2 Paragraph (1) of the BAL. The authority that stems from The State's Right to Control is definitively limited by ethical obligations, which are used to achieve the greatest prosperity of the people, in the sense of nationality, welfare and independence in society and an independent, sovereign, just and prosperous Indonesian legal state (Article 2 Paragraph (3) of the BAL).

Article 33 of the 1945 Constitution is the main basis for the state's authority to control land, water and the natural resources contained therein. As a derivative, Act no. 5 of 1960 on Basic Agrarian Provisions and other legislation sectors also regulate and strengthen the State Rights to Control. In the midst of conflicts between norms and legislation in the field of natural resources, good control is needed to ensure that law sectors continue to adhere to the spirit of Article 33 of the 1945 Constitution. In this case the role of the Constitutional Court is significant to study, especially in relation to the basic considerations of the Constitutional Court in interpreting State Rights to Control; and the views and preferences of the Constitutional Court on the relationship between the state, the people and corporations in the map of land tenure and natural resources in Indonesia.

Basically, State's Rights to Control is not only considered as a normative concept regulated in Article 33 of the 1945 Constitution and the Basic Agrarian Law alone, but also as a cognitive concept that develops along with the transformation of political views and the socio-national situation of Indonesia. The circumstances behind the State's Rights to Control have mostly been contained in legal regulations. In fact the State's Rights to Control is interpreted in different contexts by each regime ruled in Indonesia.

3.2 Definition of Meaning

In defining a meaning, there are three approaches applied in this study, namely the conceptual, componential, and operational approaches. The conceptual approach states that every word/lexeme has inherently contained a meaning that can be in the form of ideas, concepts of things or processes. The componential approach states that each meaning of a word/lexeme consists of a number of components that make up the meaning of the word. The operational approach states that the meaning of a word/lexeme is only clear when the word/lexeme has been used in the context of a particular sentence. A meaning is also defined as a purpose of a word having different meaning. A misuse of word may become difficulties in the use of language. Thus, the word shall be properly used based on its meaning to be understandable.

3.2.1 Lexical Meaning

According to the *Kamus Besar Bahasa Indonesia (KKBI)* dan *Wiktionary*, "*makna : arti, maksud pembicara atau penulis; pengertian yang diberikan kepada suatu bentuk kebahasaan* [mean: meaning, speaker or writer's intention; the meaning given to a linguistic form]."

Menurut Wikipedia the Free Encyclopedia:

- *Makna atau arti adalah hubungan antara lambang bunyi dengan acuannya* [Meaning is the relationship between the sound symbol and its reference];
- *Makna merupakan bentuk responsi dari stimulus yang diperoleh pemeran dalam komunikasi sesuai dengan asosiasi maupun hasil belajar yang dimiliki* [Meaning is a form of response to the stimulus obtained by the actor in communication in accordance with the associations and learning outcomes they have].

Meaning is also explained as essence, limitation, definition, meaning, idea, intent, value, understanding, taste, significance, interpretation, *takbir, takrif, takwil*. The difference is influenced by the composition and relationship of free loose words (whole/single words that are not in the sentence) with other free words in the sentence.

3.2.2 Opinion of Experts

According to Purwadarminto, meaning is meaning or intent. Ullman (1972) opined that when a person thinks about the meaning of someone's words as well as the reference or vice versa, meaning will be born. Thus, meaning is a combination of meaning and words. It can be different from the exact word or is not always the same. Meaning is what is meant or what is intended (Hornby in Sudaryat,2009: 13). Dajasudarma, (1999: 5) explains that meaning is a link between the elements of the language itself. While Ferdinand de Saussure (In Abdul Chear, 1994:286) argues that meaning is a concept that is owned by a linguistic sign.

Meanwhile, Ogden and Richard (in Sudaryat, 2009: 14) defined meaning in fourteen details, namely: 1) Has an intrinsic trait, 2) Has a relationship with other objects and is difficult to analyze, 3) Other words related to words in the dictionary, 4) Connotation of words, 5) Is the essence of an activity described in an object, 6) is the place of something in the system, 7) is a practical consequence of an object in our future experience, 8) is a

theoretical consequence of a statement, 9) an emotion that arises from something, 10) is an actual relationship and a symbol, 11) consists of a) A symbol that we interpret, b) Something we suggest, c) An event that reminds us of an appropriate event, d) An effect that petrifies certain memories when we get a stimulus, e) The use of symbols according to the actual referenced; 12) The use of symbols according to what is meant, 13) Belief in using symbols as we mean, 14) Interpretation of symbols (relationships, believing what is referred to and trusting the speaker regarding what is meant).

According to Dudung and Mulyadi the nature and meaning of values are in the form of norms, ethics, regulations, laws, customs, religious rules and other references valuable to someone. Values are abstract, are behind the facts, give rise to actions, are contained in one's morals, appear as the end of a psychological process, and develop towards more complex ones. According to Zainurrahman, there are at least two branches of discipline in linguistics that study meaning, namely semantics and pragmatics.

3.2.3 Meaning of State Control in the Dutch Colonial Era

Before the independence of Indonesia, the Dutch East Indies state had private property rights (domains) on land. The lands which were privately owned by the Dutch East Indies state were categorized as state lands. In the 1870s, the Dutch East Indies colonial government enacted several agrarian laws *(Agrarisch Besluit)* declaring state ownership of land or *Domeinverklaring (Agrarisch Besluit* (S.1870-118), S.1875-119a, S.1874-94f, S.1888-58). *Agrarisch Besluit* which contains *Domeinverklaring* was promulgated in line with the increasing opening of Dutch commercial plantation businesses, such as coffee, tobacco, tea plantations, etc, in the Dutch East Indies. With the existence of the *Domeinverklaring*, the Dutch East Indies state became the owner of the land that was not under private rights according to Dutch law. In other words, land for which has no evidence of rights becomes the state land, including land of indigenous peoples. *Agrarisch Besluit* which contains *Domeinverklaring* clearly violates the principle of customary law which does not have the concept of written evidence for communal ownership of customary land (Sumardjono, 2005: 60; von Benda Beckmann, 2008: 12; Burns, 1989; 38-39). However, as long as it does not conflict with *billijk en rechtvaardigheid*, means that propriety and justice (according to the Western version of law) are the benchmarks for whether or not customary law may apply. It means that customary law is not fully applicable, depending on whether or not it can meet these requirements.

During the Dutch East Indies era, the existence of customary law was recognized under Article 131 I.S. As a result, all customary lands fell into the property of the Dutch East Indies state so that the Dutch East Indies government could use them for their colonial interests. In the colonial era of the Dutch East Indies era, the state had ownership rights *(domein)* over the land.

3.2.4 The Meaning of State Control in the Old Order Era

The old order era was marked by the leadership of President Soekarno. The old order era had its own concept of the right to control the state. The legal basis for the Indonesian state property rights is found in Article 33 paragraphs (2) and (3) of the 1945 Constitution:

(2) Production branches which are important to the state and which affect the livelihood of the people are controlled by the state

(3) The earth and water and the natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people.

The two paragraphs of the Constitution grant the state a right called the Right to Control. The Right to Control or sometimes called The State's Right to Control is the only material right explicitly granted by the Constitution to the Indonesian state. The State's Right to Control over the earth, water, natural resources, as well as vital production branches must be used for the sake of prosperity of the Indonesian people.

The concept of State's Rights to Control actually comes from the concept of customary law which has been practiced by indigenous people long before the formation of Indonesia as a state. In customary law, public interest takes precedence over personal or individual interests. In other words, customary law is based on the concept of protecting public interests or communal interests (Kusumadara, 2000: 6). Thus objects or properties that are important for the public interest, such as water, natural resources, land, as well as science, must be jointly owned or at least jointly controlled by the community. Although customary law recognizes individual rights to objects, it still prioritizes the principle of protection public interest and the principle that a property has a social function (Kusumadara, 2000: 30).

After independence and the establishment of the Indonesian state, the Indonesian government viewed the state as the embodiment of the Indonesian people. Therefore, public or community interests were transformed into state interests. Article 33 of the 1945 Constitution was prepared based on this concept. The Indonesian People interest over the earth, air natural resources, and other branches of vital productions is transformed into the interests of the state as long as the goal is to prosper the people. Furthermore, the constitutional provisions of The State's Right to Control are applied in all Indonesian laws and regulations.

3.2.5 The Meaning of State Control in the New Order Era

The New Order was marked by the leadership of the President Soeharto as the Second President of the Republic of Indonesia coming from the military. The Suharto government expanded the role of the state from only being the holder of power to being the owner of land, especially lands that did not have certificates or did not have other evidence of rights. The government called these lands the Land of the Free State (Ismail: 1994: 4) which means they can be used freely by the state, especially for development purposes. The New Order government always claimed to uphold the Constitution and the Basic Agrarian Law, but the Suharto government often issued regulations that implicitly or explicitly expanded the state's authority to own land in Indonesia. It can happen easily considering that the Suharto government has the support of the military who controls the parliament and government from the center to the regions. Below are some examples of land regulations that expand the state's authority to own land in Indonesia.

In 1967 the Suharto government promulgated Act no. 5 of 1967 on the Basic Provisions of Forestry. This Law uses the term "State Forest" for the forests located on land whose ownership rights cannot be proven or private property rights. In addition, this Law also includes customary forests belonging to customary law communities into the category of State Forests (article 2 and General Elucidation of the Basic Forestry Law). The New Order government considered communal property rights has different legal status from the private property known in the Western civil law system. So that the Government gives more legal protection to private rights, including property rights, rather than communal rights *(beschikkingsrecht* or customary rights) which are not known in the Western civil law system.

3.2.6 The Meaning of State Control in the Reformation Era

The Reformation Era was marked by the fall of the New Order government in 1998. In this era, the birth of the State Institution of the Constitutional Court and the Corruption Eradication Commission was also marked. Indonesia entered the era of the Reformation government, which was marked primarily by a climate of social and political freedom, reduced dominance of the central government, and the development of regional autonomy. There have been 5 (five) Presidents during the Reformation era, namely Habibie, Abdurrahman Wahid, Megawati, Susilo Bambang Yudhoyono and Joko Widodo. Although there have been many laws and regulations regarding land issued during the Reformation era, both new and amended, the government's concept of state rights to land is still similar to the concept of government before the Reformation era.

The Constitutional Court as a sign of reformation spirit tried to change this order by placing the state not as the owner of land and natural resources, but as a regulator and supervisor of land and natural resources control. The Constitutional Court viewed that State's Rights to Control was more of a public right than a private right, as well as individual and collective land rights. The Constitutional Court opined that the phrase "being controlled by the State" in the 1945 Constitution contains a higher or broader meaning than the concept of ownership in the civil law. The State Control is a public law concept related to the principle of popular sovereignty espoused in the 1945 Constitution. Sovereignty covers the fields of politics (political democracy) and economics (economic democracy). By linking the concept of state control and the sovereignty of the people, Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution implicitly state that the owner of the earth, water, natural resources contained therein and the branches of production that are important and control the lives of people owned by all the people of Indonesia.

The Article 33 of the 1945 Constitution on the definition of "The State's Right to Control" or is called as "Right to Control the State" is still debatable. Actually the provisions formulated in paragraph (2) and paragraph (3) of the 1945 Constitution are exactly the same as those formulated in Article 38 paragraph (2) and paragraph (3) of the 1950 Constitution. It means that for 60 years of Indonesia's independence, there has been not uniformity on the interpretation of Article 33. The relations of the state control rights and the greatest prosperity of the people will realize the state's obligations as follows:

- All forms of utilization (earth and water) and the outcomes obtained (natural wealth) must significantly increase the prosperity and welfare of the community.
- Protect and guarantee all the rights of the people contained in or on the earth, water and certain natural resources that can be produced directly or enjoyed directly by the people.
- Prevent all actions from any party that will cause the people to lose the opportunity or their rights to enjoy natural resources
- The three obligations above explain all guarantees for the purpose of the state's right of control over natural resources while at the same time providing an understanding that in that right of control, the state only performs management *(bestuursdaad)* and processing *(beheersdaad)*, not to do (*eigensdaad).*

The interpretation of the state control concept of Article 33 of the 1945 Constitution can be observed in the Constitutional Court's Decision on cases of judicial review of laws related to natural resources. The Court in its legal consideration of the Decision on the Case of the Oil and Gas Law, the Electricity Law, and the Water Resources Law interprets "the state's right to control" does not meand the state owns, but it means the state only formulates policies *(beleid)*, makes regulations *(regelendaad)*, arrangement *(bestuursdaad)*, management

(beheersdaad), and supervision *(toezichthoundendaad)*. Thus, the meaning of State's Rights to Control for vital production branches that affect the livelihood of many people, as well as for natural resources, does not deny the possibility of individuals or the private sector to take a role, as long as the five roles of the state/government as mentioned above are still fulfilled and as long as the government and local government is not or has not been able to implement it. The interpretation of Dr. Mohammad Hatta which was later adopted by the Seminar on the Elaboration of Article 33 of the 1945 Constitution in 1977 which stated that the state business sector is to manage paragraphs (2) and (3) of Article 33 of the 1945 Constitution and in the field of financing state enterprises, it is financed by the government, if the government does not have sufficient funds to finance, the government can make internal or foreign loans, and if it is still not sufficient it can be held together with foreign capital on the basis of production sharing. One of the authorities of the Government in the management of mineral and coal mining is to determine the Mining Area after coordinating with the regional government and consult with the House of Representatives of the Republic of Indonesia [vide Article 6 paragraph (1) letter e of Law 4/2009]. Law 4/2009 has determined that Mining Area (hereinafter referred to as MA) consists of Commercial Mining Area (hereinafter referred to as CMA), People's Mining Area hereinafter referred to as PMA), and State Reserve Area (hereinafter referred to as SRA) [vide Article 13 of Law 4/2009].

According to Daud Silalahi, MA was determined based on spatial planning in which the activities shall always be based on environmental conservation efforts. It is also in accordance with Article 1 number 29 of Act no. 4 of 2009 which states, Mining Areas, hereinafter referred to as MA, is an area that has mineral and/or coal potential and is not bound by government administrative boundaries which are part of the national spatial plan. Therefore, according to the Court, the Government, in determining the MA, in addition to having to adjust to the national spatial layout and being oriented towards environmental conservation, must also ensure that the division of the three types of mining areas (CMA, PMA, and SRA) should not overlap each other, both within the same administrative area or between different administrative areas. In determining a MA, the Government must distinguish which area is a CMA, a PMA, a SRA, and the SRA will also have to be further detailed anything relate to Special Mining Business Area. This kind of management aims, in addition to avoid the emergence of overlaps on the licensing of mining activities and the designation of an area based on the national spatial plan, as well as to ensure the fulfillment of the roles and responsibilities of the state, especially the government, in order to ensure the protection, promotion, enforcement and fulfillment of economic and social rights of citizens by dividing the MA in the form of a strict and clear territorial separation into the form of CMA, PMA, and/or SRA. It is in line with Article 28I paragraph (4) of the 1945 Constitution and the United Nations Convention on Economic, Social and Cultural Rights which have been ratified by Law Number 11 of 2005 concerning Ratification of the International Covenant on Economic, Social and Cultural Rights [State Gazette of the Republic of Indonesia of 2005 Number 118, Supplement to the State Gazette of the Republic of Indonesia Number 4557]. In addition, it can also avoid the occurrence of: (1) conflicts between the actors of mining activities in the MA, (2) conflicts between the actors of mining activities and the people who are in the MA and those affected, and (3) conflicts between the mining activity actors and/or communities residing within the MA or those affected by the state, in this case the Government.

3.3 Characteristics of Land Rights Transfer

A characteristic is a distinguishing feature of something. It is defined as qualities or traits. It is a certain quality or feature of something. It is a distinctive or conspicuous feature of a thing. According to the KKBI, characteristic means having a special feature in accordance with a certain character. Its synonym is the word character which means inner nature that affects all thoughts, behavior and character possessed by humans or other living creatures. According to *wiktionary,* characteristics mean being special and being the main characteristics of someone, something etc.

3.3.1 Land Rights Transfer in the Dutch Colonial Era

The *"domein verklaring"* principle was used in the colonial era, which only provided benefits to the Dutch colonial government. There were Six *verklaring* listed in *Agrarisch Besluit* (Staatsblad 1870 Number 118) as implementing regulations for *AgrarischWet* (AW 1870). Grammatically, *"Domein"* means territory or land belonging to the state and *"verklaring"* means a statement. Thus, *"Domein Verklaring"* means a statement that a land whose owner cannot be proven is considered the state land. The purpose of *Verklaring Domein* is to control customary land for which there is no written evidence, so that it will be difficult to prove and can be controlled by the Dutch Government. The state is confident to have absolute land ownership rights. The state even revoke someone's land ownership rights whose legal existence is clearly recognized by the state. This type of spirit and view was applied by the Dutch colonial government when enacting AW 1870 in the Dutch East Indies (Indonesia).

To obtain land from the indigenous people for the benefit of investors, the Dutch colonial government used and applied a general perspective or principle set out in AW 1870 and relegated to a regulation known as *Agrarische Besluit* (AB). This general principle is known as *Domein Verklaring*. In article 1 of *Agrarische*

Besluit, domein verklaring means "all land which other parties cannot prove as *eigendom* rights (property rights), become the *domein* (owned) of the State. The *domein verklaring* was initially applied only to the Java and Madura area and later by the colonial government was also enforced outside Java and Madura (Boedi Harsono, 2003). The in the village, whether property rights, pledges, *waqaf* and so on, since it is not *eigendom*, it belongs to the state. It also happens to *erfpacht* land, *opstal* etc., beacuse these lands are not *eigendom* either. The lands that are not free are called *onvrij Staatsdomein*. On the other hand, lands such as the peaks of Mount Merbabu and forests are *vrij Staatsdomein*, or raw land. Thus the state rights of the land can be lost, if the land has been renamed to *eigendom* rights or agrarian *eigendom*.

3.3.2 Land Rights Transfer in the Old Order Era

In the beginning of old order era, the regulation on land rights transfer was initiated by the issuance of Government Regulation Number 8 of 1953 L.N. 1953 Number 14 on Controlling State Lands, it explained that "State Lands" are lands fully controlled by the state, except if the land control along with other laws and regulations at the time the Government Regulation enforced has been submitted to the Ministry, Department or the Autonomous Region, the state land control is under the authority of the Minister of Home Affairs.

The Government Regulation Number 10 of 1961 also stated that the Head of Land Registration Office reserves the right to register a transfer of land rights anytime one of the following conditions is not fulfilled:

- The deed referred to in Article 19 is submitted without a certificate or statement as referred to in Article 25 paragraph (1) and other documents.
- Certificates and information letter regarding the condition of land rights are no longer in accordance with the existing lists at the Land Registration Office.
- If the person transferring, granting new rights, mortgaging or assigning the land rights does not have the authority to do so.
- In the selling process, exchanging, granting, granting in a will, giving according to the custom and other acts intended to transfer property rights, shall be permitted by the Minister of Agrarian Affairs or the official appointed by him.

3.3.3 Land Rights Transfer in the New Order Era

After the Independence of Indonesia, lands are generally controlled by the state as stipulated in Article 33 paragraph (3) of the 1945 constitution of the Republic of Indonesia stating that the earth, water, and natural resources contained therein are controlled by the stated and are used for the biggest prosperity of the people. Regarding the rights on land, the BAL is arranged with to provide legal certainty related to land rights held by the people. It has been clearly stipulated in Article 19 paragraph (1) of the BAL stating that: "To ensure the legal certainty by the Government, land registration is held throughout the territory of the Republic of Indonesia based on the provisions regulated by the Government Regulation." Rights on Land is the right to grant an authority to a person who has the right to cultivate or use the land.

After the enactment of the BAL, the transfer of land rights was based on Government Regulation Number 10 of 1961 on Land Registration (known as GR 10/1961) is amended by Government Regulation Number 24 of 1997 on Land Registration (GR 24/1997). In Article 37 paragraph (1) of the Government Regulation no. 24 of 1997 it is stated that, "The transfer of land rights and ownership rights to flat units through buying and selling, exchanging, grants, income in the company and other legal acts of transferring rights, except for the transfer of rights through auction can only be registered if it is proven by a deed made by the authorized Land Deed Official according to the provisions of the applicable laws and regulations. The registration of land rights is according to the provisions of Article 19 paragraph (1) of the BAL is a strong evidence of the abolition of property rights and the legality of the transfer of the land.

On the other hand, the land registration system used in Government Regulation Number 24 of 1997 on Land Registration is a negative setting which contains a positive element because it will produce letters of evidence of rights that serve as a strong evidence as stated in the BAL. The transfer of land rights according to juridical means is made in a written form with a deed drawn up by an authorized official and registered at the Regency/City land office. This step is closely related to the procedure for transferring land rights, because the procedure determines the legality of the transfer of rights. Thus, the legality of the land rights transfer is largely determined by formal and material requirements. The constitution in the formal sense is a real document as a set of legal norms that may be changed only according to special provisions, while the constitution in the material sense is the rules governing the making of general legal norms which can be in the form of a written or unwritten constitution.

3.3.4 Land Rights Transfer in the Reformation Era

The difference lies only in the Reformation Era. The State's Rights to Control lands is carried out the Local Government in Indonesia. It is as a result of the implementation of regional autonomy in the field of governance and finance after the Reformation Era (see Law no. 22 of 1999 replaced by the Act no. 32of 2004 on Regional Government, and Act no. 25 of 1999 replaced by Act no. 33 of 2004 on Fiscal Balance between the Central Government and the Regional Government). To increase the income of regional government, most of regional

government in Indonesia maximized the utilization of land in the area to extract the natural resources such as minerals, mining, and palm oil. In general, the income sourced from the natural resources is used to support the political interest of the current regional government.

On the other hand, based on the State's Rights to Control land, both central and regional government issue permits or concessions for private companies to use the lands ad forests of the state. The Local Government of Indonesia generally issues mineral and coal mining permits, as well as location permits and oil palm plantation business permits to private companies, while the central government issues forest concessions and forest product collection permits.

3.4 The Characteristic of Mineral and Coal Mining

3.4.1 The Nature of Mineral and Coal Mining

Minerals and coal contained in the mining jurisdiction of Indonesia are non-renewable natural resources as a gift from God Almighty which has an important role in fulfilling the lives of many people, therefore their management must be controlled by the State to provide real added value to the national economy as an effort to achieve the prosperity and welfare of the people in a fair way. The legal principle of mining management in Law no. 4 of 2009 concerning mineral and coal mining is based on the principles of expediency, justice and balance; partiality to the interests of the nation; participatory, transparency, and accountability; sustainable and environmentally friendly. The nature of state control over mineral and coal resources in Indonesia is based on the provisions in Article 33 paragraph (3) of the 1945 Constitution, which states "Earth, water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people." Article 33 paragraph (3) becomes the doctrine of state control and at the same time becomes the philosophical and juridical basis for managing natural resources in Indonesia.

3.4.2 Form of Mineral and Coal Mining

The form of mineral and coal mining management is carried out jointly by the government, regional governments and business actors. It is to show that there is no longer a monopoly on mining management by the central government. In addition, business entities and cooperatives, including individuals or local communities are also given the opportunity to conduct mining businesses in accordance with the regulated permits. Although in practice there are often obstacles, such as a long licensing bureaucracy, extortion by unscrupulous to overlapping policies between related sectors. The spirit of regional autonomy is evident in the current mining regulations. According to Article 34 of the Act no. 4 of 2009 on Mineral and Coal Mining, mining businesses is in the form of mineral and coal mining.

The Mineral mining is classified into:

- Radioactive mineral mining;
- Metal mineral mining
- Non-metallic mineral mining; and
- Rock mining.

However, later, there were several changes to Act Number 4 of 2009 on Mineral and Coal Mining. Law Number 3 of 2020 concerning Amendments to Act Number 4 of 2009 concerning Mineral and Coal Mining states that the Central Government in the management of Mineral and Coal Mining has 23 authorities which are the takeover of central authority distributed to the provincial and district/city governments.

Mining business actors shall prioritize contractors and local workers. The ML or SML holders are prohibited from involving their subsidiaries and/or affiliates in the mining services business in the mining business area they operate, except with the permission of the Minister, with the consideration that there are no similar mining service companies in the area; or no mining service company is interested. Mining business activities also cannot be carried out in places that are prohibited from carrying out mining business activities in accordance with the provisions of laws and regulations, unless they have obtained permission from a Government agency.

3.4.3 Functions of Mineral and Coal Mining

Mining management is functioned to dig natural resources wealth to obtain value added for the economy, on the other side the management of mining in which the object is non-renewable can damage the environment which will later destroy the ecosystem. While all creatures, including human, can only survive in an environment with a good and proper ecosystem. Therefore, the mining management planning shall integrates economic, environmental and socio-cultural dimensions, in order to support sustainable national development. The functions of mineral and coal management are:

- to ensure the effectiveness of the implementation and control of mining business activities in an efficient, effective and competitive manner;
- to ensure the benefits of mineral and coal mining in a sustainable and environmentally friendly manner;
- to ensure the availability of minerals and coal as raw materials and/or as a source of energy for domestic

needs;

- to support and develop national capabilities to be able to compete at national, regional and international levels;
- to increase the income of local, regional and state communities, as well as to create job opportunities for the greatest welfare of the people; and
- to guarantee the legal certainty the implementation of mineral and coal mining business activities.

As non-renewable natural resources, mineral and coal are national wealth controlled by the state for the greatest welfare of the people. The control of minerals and coal by the state is carried out by the Government and/or local governments. For the national interest, after consulting with the House of Representatives of the Republic of Indonesia, the Government may establish a policy of prioritizing minerals and/or coal for domestic purposes. The national interest can be carried out by controlling production and exports. In the controlling process, the Government has the authority to determine the amount of production of each commodity per year for each province. The function of the mineral and coal mining law is based on the principles. Mineral and/or coal mining is managed based on the following principles:

- expediency, justice, and balance;
- partiality to the interests of the nation;
- participatory, transparency, and accountability;
- sustainable and environmentally friendly.

In granting mining permits, the government is easier to grant permits to foreign investors on due to the fact that foreign investors are more promising. The principle of accountability means that every mineral and coal mining must be accountable to the people by paying attention to a sense of justice and propriety. This principle is closely related to the rights that will be received by the government, both the central government and local governments that are sourced from mineral and coal mining activities.

3.4.4 Perspective of Certainty in Control of Mineral and Coal Mining

Article 33 of the 1945 Constitution of the Republic of Indonesia as a constitutional basis for natural resources management is translated into various laws and regulations. In this case, the translation of Article 33 of the 1945 Constitution of the Republic of Indonesia into various laws is influenced by various values and interests of the constituents which may conflict with the actual intent of Article 33 of the 1945 Constitution of the Republic of Indonesia itself. Therefore, the constitution needs to be used as a guide in producing various laws in the field of agrarian and natural resource management. Article 33 of the 1945 Constitution of the Republic of Indonesia regulates the Right to Control the State.

In this regard, the most important state control in these production branches is how the form of state control can guarantee the implementation of community welfare. Mining companies are branches of companies controlled by the state. Mineral and coal mining companies that have obtained permits are entitled to manage mineral and coal extractive. Minerals and coal are one of the strategic non-renewable natural resources controlled by the state and are vital commodities that control the livelihood of many people, and have an important role in the national economy. Therefore their management must be able to maximize the prosperity and welfare of the people. Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia confirms that the production branches which are important for the state and which affect the livelihood of the people are controlled by the state. Likewise, the earth, water and natural resources contained therein are controlled by the state and used as much as possible for the prosperity and welfare of the people.

To realize the management and utilization of mineral and coal mining resources for the welfare of the community, the role of the government as a regulator is practically needed in regulating exploitation in the mining sector. The role of the government is very important because the mining sector is a sector that is in demand by foreign investors. Therefore, as a state of law, in Indonesia the law must be able to guarantee legal certainty in all aspects of life, the estuary of which is to realize justice and prosperity for the lives of the Indonesian people. Justice and prosperity must be reflected in all aspects of life, meaning that all people have equal opportunities to improve their standard of living; obtain employment; obtain social services, education and health; Express opinions; exercise political rights; securing and defending the country; and to get protection and equality before the law.

Furthermore, to provide a guarantee of legal certainty, the government as a regulator through the Law on Mineral and Coal provides a legal basis to reform and restructure mining and mineral management and exploitation activities. Especially in the context of facing both national and international strategic environmental challenges and answering a number of problems in the mineral and coal mining sector due to the influence of globalization which encourages democratization, regional autonomy, human rights, the environment, development of technology and information, intellectual property rights and demands in increasing the role of the private sector and society.

In this regard, normatively legal certainty can be realized if regulations are made and promulgated with

certainty because they regulate clearly and logically. It is clear when it does not cause multi-interpretation and logical in being a norm system with other norms so that it does not clash or cause norm conflicts. Norm conflicts arising from uncertainty of rules can be in the form of norm contestation, norm reduction or norm distortion. However, as a manifestation of the guarantee of legal certainty, basically the right to control the state according to the 1945 Constitution of the Republic of Indonesia must be seen in the context of the rights and obligations of the state as the owner of power that carries out the task of creating people's welfare. The position of the state as the governing body, the owner of that power is the embodiment of the understanding of the pattern of relations between individuals and the community in the conception of customary law whose crystallization of values are formulated in the Preamble to the 1945 Constitution of the Republic of Indonesia, so that the right to control the state means the rights and obligations that give birth to power, authority and even coercion. Thus, the definition of the right to control the state is the authority possessed by the state which contains the authority, to regulate, plan, manage and supervise the management, use and utilization of land both in the relationship between individuals, communities and the state with land as well as relationships between individuals, communities and one state and another in relation to the land.

Therefore, the rights of the community in the management of mineral and coal resources have a broad scope, it is not only the right to manage their natural resources, but also the right for the community to obtain legal protection in enjoying these rights so that their life will be guaranteed. By making the issue of community rights in mineral resource management an issue of justice, it can be claimed that the community has the right to manage natural resources or at least obtain benefits that can improve people's living standards and the State is responsible to realize it.

3.4.5 The Perspective of Justice in Mineral and Coal Mining Control

The concept of state control on mineral and coal natural resources in Indonesia is based on the provisions in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, stating that "The earth, water and natural resources contained therein are controlled by the state for the biggest prosperity of the people." Article 33 paragraph (3) becomes the doctrine of state control and the philosophical and juridical basis for the management of natural resources in Indonesia. The state also admit and respect the existence of customary law society over natural resources and their traditional rights. Article 18B paragraph (2) and Article 281paragraph (3) of the 1945 Constitution is the constitutional basis for recognizing and protecting the rights of the indigenous people.

Both articles principally regulate legal relationship between the indigenous people and the state, and become the constitutional basis for the state administrator. Thus, the article is a declaration on:

- The state's constitutional obligation to recognize and respect indigenous peoples, and
- The constitutional rights of indigenous peoples to obtain recognition and respect for their traditional rights.

In this case, the two articles are essentially a reflection of the principle of legal justice *(iustitia legalis)*, as stated by Thomas Aquinas, namely justice based on the law (the object is social order) which is protected by law for the common good *(bonum commune)*. In addition, the two articles are also a reflection of the norms of distributive justice *(iustitia distributive)* as stated by Aristotle.

3.5 Rights of Mining License and Special Mining License Holders According to Article 92 of the Mineral and Coal Mining Law

3.5.1 The Urgency of Coal Mining and Minerals Regulation

The contribution of Mineral and Coal mining for improving people's prosperity related to the purpose of state control over national natural resources derived from the phrase "for the biggest prosperity of people". The prosperity of people from a community is identified by the economic ability in income and necessities of life. Bung Hatta stated that Independence is meaningless when the people are still suffering. The state objective is to protect the entire nation and prosper the people, as mandated in the preamble of the 1945 Constitution of the Republic of Indonesia.

On the one hand, the utilization of minerals and coal is an unavoidable positive step to meet the needs of mineral and coal commodities. This encourages efforts to exploit mineral and coal resources as much as possible. On the other hand, mining activities have an impact on the environment that is directly felt by the community around the mining area.

According to Nyoman Nurjaya, as cited by Mohamad Anis, the policy on the use of mining resources is only directed at increasing state revenues by inviting large investors. The law is centralized and is full of economic orientation. By this centralistic spirit, there is no room for regulation regarding public participation in decision-making and policy-making. The paradigm that must be developed is not only a policy on increasing state revenues, but also securing national energy, and protecting the rights of communities around mining areas. The unwise management of mineral and coal resources will cause many problems in areas that are rich in mineral and coal resources.

The emergence of conflicts between customary law community and mining companies shows that the

positive impacts received by MHA around the mine have not been maximized, for example the blockade of mining areas, environmental problems, land compensation, cultural differences between immigrant communities and customary law communities, and other problems. Generally, the local governments have not implemented a priority scale in implementing several development sectors. Preparation of competent human resources has not been carried out. The unpreparedness of implementing regulations to support the management of mineral and coal resources also tends to be ignored, thus the above problems occur.

The main idea of Article 33 of the 1945 Constitution of the Republic of Indonesia is in line with the concept to prioritize the prosperity of the community not the individuals. It can provide prosperity in accordance with the principle of kinship in the control and or management by the state of important production branches to the state and which affect the livelihood of the people i.e., earth, water and natural resources contained therein, as well as to guarantee the state's ability to protect the public interest and the people's economic interests. With regard to mineral and coal mining, it means that every party who will carry out a mineral and coal mining project in the territory of the customary law community is obliged to provide clear information about all aspects of the mining, including the good and bad impacts on indigenous peoples. The indigenous people have the right to have sufficient time to discuss all such information and to get an understandable advice or assistance from any parties they wish using the language they understand. It is important considering the differences in value systems, ways of thinking and way of life between them and the outsiders.

The Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia are the recognition and protection of natural resources in unity with the customary rights area of a customary law community. It is a consequence of the recognition of customary law as “living law” that has been going on for a long time, and has been continued until now. Therefore, the management of mineral and coal resources without the prior consent of indigenous peoples is a disregard for the rights of customary law community.

3.5.2 Principles and Objectives of Mining and Coal Mineral Regulation

The Article 2 of the Act Number 4 of 2009 on Mineral and Coal Mining has regulated the principles of law on mineral and coal mining. This mining shall be on the basis of:

- Expediency, Justice, and Balance
- partiality to the interests of the nation;
- participatory, transparency, and accountability;
- sustainable and environmentally friendly.

The provisions for production limitation are intended that in producing minerals, the holders of ML, SML and PML shall maintain a balance between the availability of mineral mining materials and market needs, especially the interests of the national economy. In addition, it also considers the rights and interests of future generations, because unlimited mining production means a waste and is a form of deprivation of the rights of the next generation. Such action is a form of violation of the values of justice between generations. Boedi Harsono, quoted by Urip Santoso, stated that the right of control over land contains a series of powers, obligations and/or prohibitions for the holder of the right to do something on the land being entitled. Something that is allowed, obligated and prohibited to be done which is the content of the right of control is the criteria or benchmark for distinguishing between land tenure rights regulated in land law.

3.5.3 Mineral and Coal Mining Management Authority

Based on the Act Number 4 of 2009 this authority includes the authority of central government, provincial government, and local/district government, namely:

- Determination of national policy;
- Arrangement of Legislations;
- Determination of national standard, guidelines, and criteria;
- Establishment of a national mineral and coal mining permit system;
- MA is set after coordinating with the regional government and consulting with the House of Representatives of the Republic of Indonesia;
- Granting of ML, educating, resolving conflicts, and supervising on mining businesses located across provincial areas and/or sea areas more than 12 (twelve) miles from the coastline;
- Granting ML, educating, resolving community conflicts, and supervising mines whose mining locations are in the province and/or sea area more than 12 (twelve) miles from the coastline;
- Granting of ML, educating, resolving conflicts, and supervising on mining businesses which give direct environmental impacts across provinces and/or in a sea area more than 12 (twelve) miles from the coastline;
- Granting of Exploration Mining Business License and Production Operations of Mining Business License;
- Evaluating the Production Operation ML, which is issued by the regional government, which has caused

environmental damage and which does not apply good mining principles;
- Policies settlement on production, marketing, utilization, and conservation;
- To set out cooperation policy, partnership, and community empowerment;
- Formulation and stipulation of non-tax state revenues from mineral and coal mining business outcomes;
- Educating and supervising the management of mineral and coal mining carried out by the regional government;
- Coaching and supervising arrangement of regional regulations in mining sector;
- Investing, investigating, and researching and exploring to obtain data and information on minerals and coal as materials for the preparation of CMA and SRA;
- Management of geological information, information of potential mineral and coal resources, and national mining information;
- Guidance and supervision of post-mining land reclamation;
- Preparation of national level mineral and coal resource balances;
- Development and increase of added value of mining business activities; and
- Increasing the capacity of government officials, provincial governments, and district/city governments in the management of mining businesses.

The provincial government authority in the management of mineral and coal mining, namely:
- Making regional laws and regulations
- Granting ML, educating, resolving community conflicts and supervising mining businesses across regions, districts/cities and or sea areas from four to twelve miles
- Granting ML, fostering, resolving community conflicts and supervising mining business production businesses whose activities are located across regencies/municipalities and or sea areas from four to twelve miles
- Granting ML, fostering, resolving community conflicts and supervising mining businesses that directly impact the environment across districts/cities and or sea areas from four to twelve miles
- Inventory, investigation and research as well as exploration to obtain mineral and coal data and information in accordance with their authority
- Management of geological information, information on potential mineral and coal resources, as well as information on mining in the province/region.
- Preparation of mineral and coal resource balance in the province/region
- Development and increase in added value of mining business activities in the province
- Development and improvement of community participation in mining business with due observance of environmental sustainability;
- Coordination of licensing and supervision of the use of explosives in the mining area in accordance with their authority
- Submission of information on production results, domestic sales, and exploration to the minister and regents/mayors;
- Submission of information on production results, domestic sales, and exports to the minister and regents/mayors
- Guidance and supervision of post-mining land reclamation; and
- Increasing the capacity of provincial government officials and district/city governments in the management of mining businesses.

The authority of the district/city government in the processing of mineral and coal mining, namely:
- Making regional laws and regulations
- Granting ML and PML, educating, resolving community conflicts and supervising mining businesses in the district/city and/sea area up to 4 (four) miles.
- Granting ML and PML, guiding, resolving community conflicts and supervising production operations mining businesses whose activities are located in the district / city and / sea area up to 4 (four) miles.
- Inventory, investigation and research as well as exploration in order to obtain data and information on minerals and coal.
- Processing of geological information, information on mineral and coal potential, as well as mining formations in the district/city area
- Compilation of mineral and coal resource balance in the regency/city area
- Development and empowerment of local communities in mining businesses by taking into account environmental sustainability.
- Optimal development and improvement of added value and benefits of mining business activities
- Submission of information on the results of investment, general investigations and research, as well as

exploration to the ministers and governors
- Submission of information on production results, domestic sales, and exports to the ministers and governors
- Guidance and supervision of post-mining land reclamation; and
- Improving the capacity of district/city government apparatus in organizing mining business processing.

3.5.4 Disharmony of Mining License and Special Mining License Holders' Right Regulations

The Article 34 of Act no. 4 of 2009 stated that mining businesses are classified into mineral mining and coal mining. Mineral mining is classified into radioactive mineral mining, metal mineral mining, non-metal mineral mining; and rock mining. The mining business is carried out in the form of: Mining License (ML), People's Mining License (PML) , and Special Mining License (SML). There found a disharmony in the regulation of the rights of ML and SML holders to Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Before further examination on which parts are synchronized between the legislation, the theoretical basis of this synchronization will be first identified. As stated in the literature review that the 1945 Constitution of the Republic of Indonesia as the legal basis, in the last few years the 1945 Constitution underwent significant changes. It does not only affect the concept and state administration system, but also penetrates into the concept of development and its implementation. Mining Business License referred to in this legal research, are actually only a few of many powers of the state in the implementation of development. The substance of the mining business license contained in Act no. 4 of 2009 concerning Mineral and Coal Mining is the implementation of the formulation of the state control concept contained in Article 33 of the 1945 Constitution of the Republic of Indonesia. As the theories opined by scholars and legal experts include:

- Kranenburg stated that a state is a group of people who establish an organization, namely the state, with the aim of maintaining the interests of the group (Soehino, 1998: 142). Basically, the power of the state is obtained from a human group or nation, the right to control the state means the right of the nation.
- According to Immanuel Kant, the state shall guarantee that every citizen is free in the legal environment. A freedom doesn't mean being able to arbitrarily do as they will. However, all actions must be in accordance with or according to what has been regulated in the law, so they must be according to the will of the people, because the law is the embodiment of the general will (Soehino, 1998: 127). This opinion is almost familiar to Rousseau's opinion that sovereignty is in the hands of the people, which is contained in the general will embodied in state legislation.

These two theory concluded that the state power on natural resources is the right of the people. The state is considered as an organization of power established by the people through community agreement which is granted authority and function to regulate and manage the potential natural resources and to perform based on the general of the people as stipulated in the Legislations. The existence of the 1945 Constitution as the legal basis reaffirms the general will of the Indonesian people in carrying out state administration. The state as the executor of the general wills of the people means that it is also acted as the representative of the people. It is emphasized in Article 1 paragraph (2), namely "Sovereignty is in the hands of the people and implemented according to the Constitution," the sovereignty of the people adopted by the Indonesian nation strengthens the position of the people as holders of the will. However, in a democratic system implies that everything is not directly controlled by the people. Thus it is called the delegation of authority from the people to the state.

4. Conclusion

The essence of 'State control and for the greatest prosperity of people' on mineral and coal mining is based on the principle of mineral and coal mining management, namely the principle of certainty, justice, expediency, fairness, participative, transparency, accountability, sustainability, and environmentally friendly. Besides, it shall also consider the principle of people consent on the basis of information without coercion, and also the principle of mineral and coal resources management for the sake of the people's prosperity. This principle put the people's prosperity as the development subject.

Regulation on Article 92 of Act No. 4 of 2009 on Mineral and Coal Mining which states that ML and SML holders have the right to own minerals, including associated minerals, or coal that has been produced if they have paid exploration or production royalties, except for radioactive associated minerals is contrary to Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia as long as the phrase 'entitled to own' in Article 92 of Act No. 4 of 2009 does not mean a civil subordinating the state.

5. Recommendations

Based on the above conclusions, the following recommendations are presented, namely:

- To clarify the status and meaning of the nature of being controlled by the state and for the greatest prosperity of the people on mineral and coal mining in the explanation section of the Law governing mineral and coal mining.

- The mining regulations, especially in the case of Mining Business license, should be fixed to overcome disharmony (overlapping) among regulations so as to develop investment in the mining sector, and to manage Indonesia's natural resources for the greatest prosperity of the people.
- The rights of ML and SML holders in Article 92 of Act Number 4 of 2009 In the perspective of Article 33 paragraph 3 of the 1945 Constitution of the Republic of Indonesia is based on the interpretation of Article 33 paragraph (2) and (3) the 1945 Constitution into Act no. 4 of 2009 regarding the substance of mining business permits. To optimize the prosperity of the community, the government does not carry out mining management itself because there will be problems on funds and technology, therefore the opportunity is also given to business entities and individuals to participate in the management and exploitation, which is proven in Article 38, Article 67, Article 75 of the Act No. 4 of 2009. However, the position of the government remains as the main actor who applies the law and grants permits unilaterally by continuing to exercise the authority that is regulating *(regelen)*, managing *(besturen),* and supervising *(toezichthouden).*

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Journal of Law, Policy and Globalization www.iiste.org
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

Human Rights and Women's Disproportionate Vulnerability to Climate Change: Insights from Nigeria and Ethiopia

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Abstract
Changes in climate overtime due to natural variability and human activity poses a serious threat to human rights, and indeed to human existence. Climate change has and will continue to contribute to an increase in the frequency and intensity of events which adversely affect the full enjoyment of a broad range of human rights. Women are more likely to experience the adverse effects caused by climate change than men because women constitute most of the world's poor and are often directly dependent on natural resources that are threatened by climate change as their primary source of food and income. In developing nations of Africa, women often face systemic discrimination, cultural stereotypes and social, economic and political barriers that limit their adaptive capacity. Hence, climate change negatively affects women's rights to food and livelihood, water, health, education and participation in environmental decision making. The paper combines theoretical insights with primary data to highlight the peculiar circumstances of women in Africa which increases their vulnerability to the adverse impacts of climate change and the extent of protection under the human rights system. Drawing on women experiences in Nigeria and Ethiopia, it argues for more attention to women's ecological, economic and human rights deficits in a changing climate and the policy implications for future efforts to address the adverse impacts of climate change.
Keywords: Gender, global warming, Africa.
DOI: 10.7176/JLPG/111-03
Publication date: July 31st 2021

1. Introduction

The Intergovernmental Panel on Climate Change defines 'climate change' as a significant and long lasting (a decade or more) changes in the composition of the global atmosphere that, either directly or indirectly, are attributed to human activities.[1] Examples of such changes include global warming, increased global mean temperature; severe heat and drought, extreme rain and wind, and behavioral changes in plants and animals.[2] Rising sea levels pose a significant threat to the approximately 40 percent of the world's population that lives in or near coastal areas.[3] These changes, combined and in isolation, threaten ecosystems, water availability, food security and public health around the world. The effects of these threats range across sustainable development contexts creating risks associated with political unrest or social conflict: as natural resource scarcity increases, feedback fuel famine and relocation of populations.[4] Diverse stakeholders widely support use of both adaptation strategies aimed at helping people cope with climate change shocks, and mitigation strategies aimed at reversing or stopping change through reduction of greenhouse gas emissions.

The importance of climate change in Africa cannot be overemphasized. Studies[5] show that global warming and extreme weather conditions may have calamitous human rights consequences for millions of people.[6] Climate change affects the economic and social rights of countless individuals; this includes their rights and ability to access food, health and shelter.[7] Unsurprisingly, the United Nations emphasizes safeguarding the human rights of people whose lives are most adversely affected by climate change - the vulnerable groups. Vulnerable groups such as the elderly, children, farmers, people living with disability, and women, typically the poorest individuals in the society, disproportionately bear the brunt of climate change risks.[8] This means that the

[1] IPCC, "Climate Change Science - the Status of Climate Change Science Today," *United Nations Framework Convention on Climate Change*, no. February 2011 (2011): 1–7, doi:10.1111/j.1467-9388.1992.tb00046.x.
[2] *Ibid.*
[3] D. R. Bassett, "Climate Change as a Women's Issue" in M. Z. Stange, C. K. Oyster & J. E. Sloan (eds) E*ncyclopedia of Women in Today's World,* (Thousand Oaks, SAGE Publications, Inc.,2011)
[4] *ibid*.
[5] D. Hassan and A. Khan, "Climate-Change-Related Human Rights Violations," *Environmental Policy and Law* 2 (2013): 80–87.; Humphreys, S. (Ed.) 2011. *Human Rights and Climate Change*, (Cambridge: Cambridge University Press); International Council for Human Rights Policy. 2008. *Climate Change and Human Rights: A Rough Guide,* (Vernier: ATAR Roto Press SA), p1;
[6] D. Hassan and A. Khan, *ibid*
[7] S. Humphreys, (Ed.) 2011. *Human Rights and Climate Change*, (Cambridge: Cambridge University Press)
[8] C. J. Onwutuebe, "Patriarchy and Women Vulnerability to Adverse Climate Change in Nigeria," *SAGE Open* 9, no. 1 (2019),

degree to which each of the groups will be impacted by climate change may partly be a function of their status, gender, poverty, age, power and access to and control of resources.[1]

This work focuses on one of these aforementioned vulnerable groups; women. African women, like women in other developing nations, are uniquely vulnerable to climate change.[2] Climate change negatively affects women's rights to health, housing, water and food, among others, due to several factors peculiar to their gender.[3] Women are often excluded from decision-making processes about climate change regulations or policy developments.[4] This state of affairs is problematic because human rights laws mandate that women serve as meaningful participants in development related activities including climate dialogues and actions.

Within Africa, Nigeria and Ethiopia share key similarities in women's vulnerability to climate change and their associated threatened socio-economic and human rights. Both have a very large diversity of ethnic groups and patriarchal system tilted against women which render climate change adaptation burdensome. This paper highlights critically reviews climate change stresses in these countries to illustrate linkages between climate variability, human rights and women rights using experiences in Nigeria and Ethiopia.

2. Linkages between Climate Change and Human Rights

It has long been recognized that a clean, healthy and functional environment is integral to the realization of human rights, such as the rights to life, health, food and an adequate standard of living.[5] This recognition offers one reason that the international community has banded together through multilateral environmental agreements (MEAs) that prohibit illegal trade in wildlife, to preserve biodiversity and marine and terrestrial habitats, reduce transboundary pollution, and prevent other behaviors that harm the planet and its residents.[6] Environmental protection preserves human rights and at the same time, adherence to human rights rules such as those that ensure public access to information and participation in decision-making. Thus, there can be dual contributions to more just decisions about the utilization and protection of environmental resources, and protection against the potential for the abuses under the auspices of environmental action.[7] Domestic environmental laws and MEAs can both be enhanced through the incorporation of additional human rights principles, even as they contribute to the ongoing realization of human rights.[8]

Anthropogenic climate change is the largest, most pervasive threat to the natural environment and human rights in recent times. The IPCC's Fifth Assessment Report (AR5) provides a detailed picture of how the observed and predicted climactic changes will adversely affect millions of people and the ecosystems, natural resources, and physical infrastructure upon which they depend.[9] Both mitigation and adaptation responses to climate change can interfere with human rights, as has been the case for a number of hydroelectric and biofuel projects undertaken, in part, to reduce global greenhouse gas emissions.[10] It is therefore critical that as the world endeavours to address the 'super wicked' problem of climate change it does so with full respect for human rights.[11] International law requires states and other governmental actors to ensure that the actions they undertake to mitigate and adapt to climate change do not violate human rights. [12] This obligation applies to both specific projects and broader policy decisions, and is in line with the objective of the United Nations Framework Convention on Climate Change, Article 2, in that implementing strategies to combat global climate change do not negatively affect the right to adequate food and freedom from hunger, but rather promote sustainable agriculture.[13]

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doi:10.1177/2158244019825914.

[1] *ibid*

[2] Although women in developing nations are most vulnerable to climate change, women in developed nations are also at risk, particularly those in low-income communities. For example, in 2005, Gulf Coast regions of the United States were severely affected by flooding related to Hurricane Katrina. Similar to women in developing countries, the effect of the storm on women in these regions was compounded by their economic status, restricted mobility, and care-giving responsibilities. In addition to the devastation of communities and loss of life caused by the storm, women in affected regions faced post-storm challenges such as lack of affordable and safe housing, which resulted in increased domestic violence and sexual assault. In addition, representation of women in the workforce in these regions decreased with lack of job opportunities, lower wages, and the closure of childcare facilities. See D. R Bassett (n3), p.3.

[3] *ibid.*

[4] D. Hassan and A. Khan, (n5),p.80

[5] United Nations Environment Programme (UNEP), *Climate Change and Human Rights*, UNEP Publication in cooperation with the Sabin Center for Climate Change Law at Columbia University in the City of New York, 2015.

[6] *ibid.*

[7] *ibid.*

[8] *ibid.*

[9] IPCC, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, CONTRIBUTION OF THE WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT (AR5) OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Cambridge University Press 2014).

[10] UNEP, (note 13)p.2

[11] *ibid*

[12] *ibid*

[13] United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 UNTS 107, (entered into force 21 March 1994).

Human rights and climate change are inextricably linked and these inter-linkages are found, especially in those areas in which the worst effects of climate change are likely to be felt by individuals and groups whose rights are not adequately protected.[1] Policy responses to both climate change and human rights are dependent on the international cooperation by States and the multilateral action of the international community.[2] Concerns about climate change and human rights vulnerability arise from common economic roots as protections are inevitably weakest in resource-poor regions. In view of the adverse effects, the United Nations General Assembly (UNGA) has explained climate change with reference to a wide range of human rights implications.[3] The UN Human Rights Council (UNHRC) recognized that climate change 'poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.'[4] It is the tragedy for humankind that although climate change will clearly have direct and indirect human-rights impacts, the focus seems to have been largely on the economic, trade and security impacts of climate change, with little attention to social and human rights issues in policy debate.[5] Climate change and human-rights issues are not only closely connected but also impose legal obligation on States and the international community for the protection of human rights from any kind of violations.

3. Climate change impacts on women's rights

Climate change impacts human dignity, and is, therefore, inseparable from human rights.[6] Mary Robinson rightly argued, 'The human cost of global warming has a name: climate injustice.'[7] As a serious threat to the full enjoyment of human rights, climate change is connected to many of the principles enshrined in the 1948 Universal Declaration of Human Rights (UDHR), although the term 'climate change' was not coined until years later.[8] A human-rights-based approach allows identification of the most pressing needs of individuals in a highly inequitable global society, with greatly differing social, environmental and economic levels of development.[9] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979, provides an insightful framework for linking climate change with the protection of women from harms caused by climate-related vulnerabilities, and the advancement of gender equality, including women's ability to lead alongside men in pursuit of sustainable solutions.[10] This notion aligns closely with the 1995 Beijing Platform for Action, which although does not explicitly mention climate change, but holds relevance to climate change through an emphasis on women's decision-making and protection of the environment.[11] In the Sustainable Development Goals (SDGs),[12] gender is integrated into the goals, and gender equality (Goal 5), serves as a key theme throughout the agenda.[13] Moreover, the relationship between climate change and women's empowerment is reinforced from a security standpoint in the framework for UNSCR 1325.[14] Also the International Bar Association (IBA) noted that gender equity is also an essential element of climate change justice and as climate change accelerates migration and displacement, women in particular are subject to abuse and deprivation.[15]

The specific impacts of climate change on women and their rights can be viewed in relation to the following climate change manifestations:

[1] International Council for Human Rights Policy (2008), (note 5), p.1.
[2] *ibid*
[3] S. McInerney-Lankford, M. Darrow and L. Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions*, (Washington DC, World Bank, 2011), p.11.
[4] *ibid*
[5] D. Hassan and A. Khan, (note 5),p.82
[6] M. Alam , R. Bhatia and B. Mawby, *Women and Climate Change: Impact and Agency in Human Rights, Security, and Economic Development* (Georgetown, Institute for Women, Peace and Security, 2015)
[7] Mary Robinson, UN Special Envoy for Climate Change, speaking as President of The Mary Robinson Foundation "International law is coming up short in its response to climate change," The Guardian, Jan. 9, 2015, cited in M. Alam, *et al., ibid.*
[8] F. Pansieri "Climate change impacts enjoyment of human rights," UNHCR, Feb. 17, 2015, http://www.ohchr.org/EN/NewsEvents/Pages/Climatechangeimpactsenjoyment.aspx#sthash.0Z2DFaPR.dpuf.
[9] M. Alam, *et al*.(note 28)
[10] CEDAW defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Convention on the Elimination of All Forms of Discrimination against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13, http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf. accessed November 29, 2019
[11] The Beijing Platform for Action called for women's participation at all levels of decision-making processes as well as women's representation in various government and ministerial bodies, which would include women's participation in decision-making bodies focused on climate change. See "Platform for Action," UN Fourth World Conference on Women, Beijing, 1995, cited in M. Alam, *et al*.(note 28)
[12] Sustainable Development Goals at https://sustainabledevelopment.un.org accessed 30 November 2019
[13] *ibid*
[14] United Nations Security Council Resolution 1325 (S/RES/1325), on Women, Peace, and Security, was adopted unanimously by the UN Security Council on 31 October 2000 at https://www.unwomen.org/en/digital-library/publications/2006/1 accessed 29 November, 2019
[15] International Bar Association - Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption* (London: International Bar Association, 2014): 47

3.1 Flooding

Flooding and sea level rise destroy crop production and cause salinization problems, which seriously affect women's ability to provide resources for themselves and their families.[1] Sea level rise occurs as a result of the thermal expansion of the ocean, and through the melting of glaciers and ice sheets caused by rising atmospheric temperatures.[2] Sea level rise is common in most coastal cities of West Africa and causes salinity of soil, reduced crop yields, contamination of drinking water and loss of fish habitat resulting in reduced fish production. Flooding is also exacerbated by climate variability due to frequent and heavy rainfall. This causes loss of life, increase in water-borne diseases, loss or destruction of property and agricultural production and even displacement of households in extreme cases. Women are disproportionately affected by these events leading to loss of lives, health complications, loss of livelihood and poor standard of living.[3]

3.2 Deforestation

Deforestation is one of the main human induced contributors to climate change and comes in many forms such as wildfire, agricultural clearcutting, livestock ranching, and logging for timber, among others. Women, like many people in rural communities depend on forests resources, such as for food, firewood, fiber timber, material for crafts, animal fodder, and medicinal herbs, for their livelihood.[4] As a result of deforestation due to climate change, women must work harder to secure resources and feed their families. Deforestation is currently affecting livelihoods across Africa, especially in Tanzania, Sudan, Cameroon, Kenya, and Mali, where women and children collect 60 to 80 percent of all domestic firewood supplies in Africa.[5] As forest resources diminish due to climate variability, it leads to food insecurity and livelihood instability. Women often serve as the managers of household resources, and their burdens are likely to become significantly heavier as they must find new sources of food and resources to support their families.[6]

3.3 Water Scarcity

In relation to water resources, climate changes, evidenced by erratic temperature patterns, rainfall, solar radiation, and winds, negatively impacts water supplies around the world leading to increasing desertification of land. The combination of higher temperatures and lack of water in the soil can decrease crop productivity due to deterioration of soil properties. Prolonged periods without adequate rainfall cause droughts, which then result in a shortage of water. The impacts of desertification and drought can include the loss of livelihoods (pastoral lands, death of livestock) and the displacement of populations from one degraded ecosystem zone to another.[7] Lack of access to clean drinking water also disproportionately impacts women as women bear the primary burden of finding water.[8] What they are able to carry on their heads and shoulders is then rationed carefully for drinking, cooking, cleaning and other basic needs. In sub-Saharan Africa, women and girls collectively spend a total of 40 billion hours per year collecting water for their households.[9] This water scarcity has serious implications for sanitation and health of women and children, increasing the risk of spread of infectious diseases. Search for the water over long distances can also expose women and girls to sexual violence and death especially in conflict prone countries.

3.4 Food Security

Climate change threatens food Security through reduced agricultural production. The effects of climate change (changes in temperature and rainfall precipitation) on crop and food production are already evident in several regions of the world including Africa.[10] There is evidence that extreme weather events (storms and flooding) have impacted food production such as wheat and maize and is also adversely impacting the productivity of fisheries.[11] Women, who comprise the majority of the global agricultural workforce, including between 45 and 80 percent in developing countries, must adapt to increased instances of drought and desertification.[12] In the face of drought and threatened food scarcity, a common strategy adopted by men is leave their rural communities to search for employment outside of cultivating crops leaving women to become sudden heads of households with

[1] *ibid*
[2] "Slow Onset Events: Technical Paper" (United Nations Framework Convention on Climate Change, November 26, 2012): 9, at http://unfccc.int/resource/docs/2012/tp/07.pdf accessed 01 December, 2019.
[3] D. R. Bassett,(note 3), p.36
[4] *ibid*
[5] F. C. Steady (2014) "Women, Climate Change and Liberation in Africa" Race, Gender and Class, Vol. 21(1/2)Pp.312-333 at 324; See also M. Alam, *et al*.(note 28), p.23.
[6] UNEP, (note 13), p.5.
[7] *ibid*
[8] *ibid*
[9] *ibid*
[10] UNEP, *ibid*
[11] *ibid*
[12] M. Alam, *et al*.(note 28), p.27.

assume responsibilities traditionally assigned to men, but often without corresponding authority, decision-making power and access to resources.[1]

3.5 Population displacement

Climate change has the potential to create massive population displacement as well as forced or voluntary migration. Migration is an important form of adaptation which may offer many individuals and families the opportunity to secure better homes, livelihoods, and access to resources but there may be serious risks associated with climate change-induced migration, especially for women. Women and children comprise the overwhelming majority of the world's current displaced population, and although most have been forced to flee due to conflict, the risks they would face due to climate change-induced displacement are comparable.[2] Migration and displacement are often very dangerous for women and girls and may lead to sexual violence, prostitution and even human trafficking. Sometimes, population displacement triggers off conflict between the migrants and the host communities and in all these, it is women and children that are vulnerable to greater risk of harm.

3.6 Mitigation and Adaptation Programmes

Climate change mitigation and adaptation programmes which refers to the manner in which governments and other actors respond to the challenges of climate change can also affect the enjoyment of human rights. This is true for actions undertaken to mitigate the greenhouse gas (GHG) emissions that contribute to climate change, as well as projects undertaken to adapt to the impacts of climate change.[3] Certain kinds of mitigation projects undertaken to reduce or sequester GHG emissions can adversely affect the rights of certain groups. For instance, hydroelectric projects and Biofuels policies and projects often lead to displacement of local people, the destruction of ecosystems upon which they depend, contribute to food shortages, water scarcity and can also harm the health and livelihoods of the people.[4]

4. Legal and Policy Framework on Climate change and Women rights

Gender equality and non-discrimination are two fundamental human rights principles that relate to women. There is a plethora of policy documents and international legal instruments on the subject of climate change impact on human rights especially the rights of vulnerable groups such as women, children, persons living with disabilities and the elderly. These section highlights some of these legal and policy instruments relating to women's right and climate change.

The preamble of the 1948 UDHR begins with its recognition of human rights without any distinction to gender. It is provides that " the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[5] That is, the rights and freedoms enshrined under the declaration can equally be claimed by both men and women. The declaration further provides equality of men and women before the law.[6] The International Covenant on Economic, Social and Cultural Rights (ICESCR)[7] and the International Covenant on Civil and Political Rights (ICCPR)[8], were adopted in 1966 as part of the international Bill of Rights which is applicable by state parties to all without discrimination. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[9] was adopted in 1979 by the UN general assembly as the first universally internationally comprehensive instrument on women's right.[10] The convention primarily addresses the issue of women discrimination in every aspect of life such as on the social, economic, cultural and political spheres.[11] It requires state parties to abolish and modify particularly social and cultural structures that promote stereotypes that have an effect of leading women to acquire an inferior position within the society. In the same vein, the Beijing Declaration and Platform for Action, of September, 1995 were also put in place to achieve equality of men and women and end discrimination against women by

[1] *ibid*
[2] *ibid*, p.31
[3] UNEP, (note 13), p.8.
[4] According to a 2008 Oxfam Report, the "scramble to supply" biofuels like palm oil, which was partly driven by EU biofuel targets, exacerbated the food price crises, brought "30 million people into poverty," and put 60 million indigenous people at risk." See OXFAM, CLIMATE WRONGS AND HUMAN RIGHTS: PUTTING PEOPLE AT THE HEART OF CLIMATE-CHANGE POLICY 15-16 (2008), cited in UNEP, ibid, p.9.
[5] Preamble of Universal Declaration of Human Rights (UDHR), Adopted by the General Assembly of the United Nations, 10 December 1948. Art. 2 of the declaration provides that "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."
[6] *ibid,* art.7
[7] International Covenant on Economic, Social and Cultural Rights, Adopted by the General Assembly of the United Nations on 16 December 1966, article 2.
[8] International Covenant on Civil and Political Rights, Adopted by the General Assembly of the United Nations, 16 December 1966, Art. 2
[9] United Nations Human Rights, Convention on the Elimination of All forms of Discrimination against Women, Office of the High Commissioner, http://www.ohchr.org/Documents/HRBodies/CEDAW/OHCHR_Map_CEDAW.pdf. accessed 2 December 2019.
[10] *ibid,*, art.1
[11] *Ibid.*

elimination of hindrances to achieve gender equality including empowerment of women, elimination of gender based violence, health care for women.[1]

Apart from the international conventions, regional commitments are also made to protect the rights of women. The two major instruments that embodied the rights of women within the African human right system are the African Charter on the Human and Peoples' Right and the Protocol to the African Charter on the Human and Peoples' Right on the Right of Women in Africa.[2] The text of these instruments were based on the international human rights standards of non-discrimination[3] and equality before the law.[4]

The incorporation of international human rights into the domestic laws is vital to the implementation of international instruments within the domestic jurisdiction. The constitution of Nigeria [5] and Ethiopia [6] incorporates these international human rights standards for their application in the respective jurisdictions. The Federal Democratic Republic of Ethiopia (FDRE) Constitution provides that "All international agreements ratified by Ethiopia are an integral part of the law of the land,"[7] and also that "The fundamental rights and freedom specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.[8] In like manner, the Constitution of Nigeria incorporates the text of the international human rights standards in it chapter four as Fundamental Human Rights, applicable to all without discrimination. It further requires that an international legal instrument does not have direct application in the courts except it is domesticated in a national law.[9]

The text and intent of the forgoing and other instruments strongly affirm that Parties and other relevant actors must prioritize gender equality in all their actions and recognize that individuals who are part of certain groups— notably, women, indigenous groups, and children—are entitled to special protections.[10] In relation to climate change, the United Nations Framework Convention on Climate Change (UNFCCC) has also highlighted the obligation of Parties to fulfill the rights of women and promote gender equality.[11] The UNFCCC has emphasized "the need for gender mainstreaming through all relevant targets and goals in activities under the Convention as an important contribution to increase their effectiveness".[12] The 2010 Cancun Agreements include a detailed call for Parties to address the impacts of climate change on people who are vulnerable to climate change as a result of geography, gender, age, indigenous or minority status, and disability.[13] The Cancun Agreements also recognize that gender equality and the effective participation of women are important for effective action on all aspects of climate change.[14] However, they do not outline any specific requirements for countries to ensure that women are adequately involved in the various phases of government decision-making related to climate change mitigation and adaptation, or to address the potentially discriminatory effect of certain actions on women. The Committee on the Elimination of Discrimination Against Women at its 44th session (2009), stated that "All stakeholders should ensure that climate change and disaster risk reduction measures are gender-responsive, sensitive to indigenous knowledge systems, respect human rights…women's right to participate at all levels of decision making must be guaranteed in climate change policies and programmes."[15]

Currently there is a continuing call for cooperation and assistance to address the impacts of climate change, and to support the resilience and adaptive capacities of women and girls as is found in most legal and policy instruments.[16] CEDAW general recommendation No. 37 (2018) on gender-related dimensions of disaster risk

[1] John Wiley& Sons Ltd, 'Introduction: Beijing +20 where now for Gender equality?' Institute of development studies, IDS Bulletin, Volume 46, November 4, July (2015), p.1.
[2] African Charter on Human and Peoples' Rights, Adopted by the Assembly of Heads of states and Government of the Organization of African Unity, at Nairobi on 27 June 1981, art. 2.
[3] *ibid,* art. 2
[4] *ibid,* art.3
[5] Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended in 2011, Cap 4 embodies the Fundamental Human Rights.
[6] Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, 1st year No.1, Addis Ababa, 21st August 1995.
[7] *ibid,* art. 9(4)
[8] *ibid,* art. 13(2)
[9] CFRN 1999, (note 65), s. 12(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
[10] Discussion Paper "The rights of those disproportionately impacted by climate change" (30 September 2016). This paper was drafted by OHCHR in consultation with a core drafting group. It is designed to generate and support discussion at OHCHR's Expert Meeting on Climate Change and Human Rights on 6 – 7 October 2016, at http://www.ohchr.org/discussionpaper/ accessed 5 December, 2019
[11] UNFCCC decisions 36/CP.7, 23/CP.18, and 18/CP.20.
[12] UNFCCC, Report of the Conference of the Parties on its twentieth session, held in Lima from 1 to 14 December 2014. Addendum. Part two: Action taken by the Conference of the Parties at its twentieth session. FCCC/CP/2014/10/Add.3 (2015)
[13] UNFCCC Decision 1/CP.16, The Cancun Agreements, p. 8, UN Doc. FCCC/CP/2010/7/Add.1 (March 15, 2011).
[14] *ibid*
[15] Discrimination against women, available at https://www.hrw.org/sites/.../2015_HRW%20CEDAWpdf accessed 25 May 2019.
[16] Human Rights Council – 41st session - Panel Discussion on Women's Rights and Climate Change: Climate Action, Good Practices and Lessons Learned, *Concept note* (draft as of 21 June 2019) at https://www.ohchr.org › NewsEvents accessed 30 Nov 2019.

reduction in the context of climate change, highlights the importance of gender-responsive climate action and highlights the steps needed to achieve gender equality and promote climate resilience.[1] Also Article 7(5) of the Paris Agreement states that Parties acknowledge the need for gender-responsive climate adaptation and Article 11(2) calls for gender-responsive capacity-building.[2] More than 60 UNFCCC decisions are addressing gender and since 2012, gender and climate change has been a stand-alone agenda item before the Conference of the Parties, and the Subsidiary Body for Implementation.[3] Human rights are at the core of the 2030 Agenda for Sustainable Development and Sustainable Development Goal 13 (climate action) explicitly calls for Member States to "promote mechanisms for raising capacity for effective climate change…including focusing on women".[4] The Human Rights Council in its resolution 38/4 recognizes the need to support the resilience and adaptive capacities of women and girls to respond to climate change and further highlighted the importance of international cooperation and assistance, in particular to better promote women's access to food, water, health care, education, housing, decent work and clean energy.[5]

All these show increasing global legal and policy efforts toward addressing the vulnerability of women to the severe impact of climate change and to protect their human rights. However, it remains a challenge to translate these efforts into practical realities for women in low income communities and developing countries especially African women. Climate change impacts are increasing daily and statistics on casualties of climate-related hazards and natural disasters show that women and girls are among the most impacted.[6]

5. Disproportionate vulnerability of African women to climate Change

Africa is already a continent under pressure from climate stresses and is highly vulnerable to the impacts of climate change.[7] Many areas in Africa are recognized as having climates that are among the most variable in the world on seasonal and decadal time scales. Floods and droughts can occur in the same area within months of each other.[8] Many factors contribute and compound the impacts of current climate variability in Africa and will have negative effects on the continent's ability to cope with climate change.[9] These include poverty, illiteracy and lack of skills, weak institutions, limited infrastructure, lack of technology and information, low levels of primary education and health care, poor access to resources, low management capabilities and armed conflicts.[10] The overexploitation of land resources including forests, increases in population, desertification and land degradation pose additional threats.

There is a wide variation in the capacity of women and men to adequately cope with climate change effects.[11] Women tend to be more vulnerable and face greater challenges than men in adapting to climate change.[12] Vulnerability to environmental hazard (also known as human or social vulnerability) refers to people's exposure to risks, coupled with their capacity to anticipate and respond, whether by adapting to their setting, or by moving to less affected areas.[13] When livelihoods are highly dependent on the environment, vulnerability is potentially higher – and it is evident that poor people are more reliant on the environment for their survival.[14] African women have much to lose, since not only their livelihoods, but also their responsibility for the survival and health of their children, are linked to their natural surroundings. They shoulder an enormous but imprecisely recorded portion of the responsibility for subsistence agriculture, the culling of resources for subsistence and marketing, the provisioning of households in fuel and water, and much of the share of agribusiness and various economic crops.[15] Mary Johnson[16] made the following critical statements borne out of knowledge and experience in climate justice:

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[1] CEDAW/C/GC/37, para 8.
[2] UNFCCC, COP21, Paris Agreement 2015 at https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf accessed 30 November 2019
[3] UNFCCC, "Gender and Climate Change- UNFCCC related activities- 2017" at https://unfccc.int/topics/gender/workstreams/gender-and-climate-change-unfccc-related-activities-2017.
[4] Sustainable Development Goals 13- Climate Action at https://sustainabledevelopment.un.org/sdg13 accessed 30 November 2019
[5] Human Rights Council Resolution 38/4 of 5 July 2018 at https://ap.ohchr.org/documents/ accessed 30 November 2019
[6] UNEP, (note 13), p.5.
[7] UNFCCC, CLIMATE CHANGE: IMPACTS, VULNERABILITIES AND ADAPTATION IN DEVELOPING COUNTRIES at https://unfccc.int/resource/docs/publications/impacts.pdf accessed 5 December, 2019.
[8] *ibid*, p. 18
[9] *Ibid*.
[10] *ibid.*
[11] Global Gender and Climate Alliance, "Gender and Climate Change in Africa FACTS FROM GENDER AND CLIMATE CHANGE : A CLOSER LOOK AT EXISTING EVIDENCE," *Global Gender and Climate Alliance*, no. November (2016), http://gender-climate.org/wp-content/uploads/2014/10/GGCA-RP-Factsheets-FINAL.pdf. accesed 6 December, 2019.
[12] C. J. Onwutebe, (note 8), p.5
[13] M. Madambura and M. Mawere, "Climate Change, Gender and Development in Africa," *African Studies in the Academy: The Cornucopia of Theory, Praxis and Transformation in Africa?* 1, no. 1 (2017): 185–210, doi:10.2307/j.ctvh9vv87.11.
[14] *ibid.*
[15] *ibid*.
[16] Mary Robinson Foundation, "Women's Participation: An Enabler for Climate Justice" (2015) at https://www.mrfcj.org/wp-content/uploads/2015/11/MRFCJ-_Womens-Participation-An-Enabler-of-Climate-Justice_2015.pdf accessed 6 December, 2019.

'*Women constitute 50% of the world's population and the majority of the world's poor';*
'Over 60% of the people living on less than one Us dollar a day in sub-Saharan Africa are women';
'During natural disasters, women and children are 14 times more likely to die than men'[1]

These statements of facts emphasize the disproportionate vulnerability of African women to the adverse impacts of climate change. Poverty increases vulnerabilities to environmental destruction for everyone, especially women.[2] In this paper, vulnerability is viewed in terms of women's capacity to understand, manage, and mitigate and adapt to the many impacts of climate change. Several reasons which account for this differential vulnerability of African women may be categorized into three as follows[3]:

The first one is structural inequality, a poverty factor, which refers to the disparities in economic opportunities and access to productive resources and which render women more vulnerable to climate change.[4] Women are often poorer, receive less education and are not involved in political, community and household decision-making processes that affect their lives.[5] They also tend to possess fewer assets and depend more on natural resources for their livelihoods.

The second reason is the discrimination which hinges on the economic marginalization of women meaning that they have fewer assets and a more inadequate resource base than men to effectively respond to the effects of climate change.[6] African women still face gender-based discrimination on ownership of land and access to natural resources and credit facilities.[7]

The third reason is a sociocultural barrier which refers to gender-differentiated roles and responsibilities of women at the household and community levels which often lead to their increased vulnerability to climate change. [8] These factors have been a recurrent issue in many climate change literature[9] and reports[10] and they represent the major inhibiting factors to the full realization of women rights in developing countries and especially in Africa.

This paper focuses on two unique African countries - Nigeria and Ethiopia - where the adverse impact of climate variability is particularly significant due to both countries' large population, high poverty ratio and much dependence on rain feed agriculture.[11]

In Nigeria, agriculture accounts for about 40 percent of its GDP and employs 70 percent of its people because virtually all agricultural production in Nigeria is rain-fed, and is highly vulnerable to weather swings.[12] Stagnating yields in the presence of a growing population are causing dependency on food imports (particularly rice) to increase. In large parts of the country, especially in the northern states, livelihoods depend on livestock, which accounts for 5 percent of GDP; livestock is already exposed to thermal stress, and to declining pasture productivity due to climate induced drought and desertification.[13] Cervigni *et al* identified four main climate change–related hazards: (a) higher temperatures; (b) change in the amount, intensity, and pattern of rainfall; (c) extreme weather events, including sea surge and drought; and (d) a rise in the sea level.[14] The adverse impacts of climate change are expected to both lead to production losses in agriculture and affect the characteristics of the freshwater resources on which Nigerians depend and the impacts will vary depending on the agro-ecological zone (AEZ), production, and the sociocultural conditions for any given area of Nigeria. On the vulnerability of women in Nigeria to climate change impacts, Onwutuebe noted that to some extent, women in Nigeria are more vulnerable to climate change impacts than men because a large number of them are poor.[15] A large number of women are engaged in the agricultural sector as their main source of livelihood and the sector is highly exposed

[1] *ibid.*
[2] F. C. Steady (note 42), p.324.
[3] Senay Habtezion, *Training Module 1-Overview of Linkages between Gender and Climate Change*, (New York, United Nations Development Programme, 2016),p.18 at https://www.undp.org/gender accessed December 2019
[4] *ibid*
[5] *ibid,* See F. C. Steady (note 42), 325.
[6] *ibid, See* C. J. Onwutuebe, (note 8), p.5
[7] Food and Agriculture Organization, *The State of Food and Agriculture*. (Rome: Italy, FAO, 2011).
[8] *ibid*
[9] Vulnerability to climate change describes the degree of exposure of people, geophysical and socioeconomic systems to adverse climate change as well as the extent to which people can respond to problems associated with climate change. See L. Amusan, O. Abegunde & T. Akinyemi (2017). Climate change, pastoral migration, resource governance and security: The Grazing Bill solution to farmer-herder conflict in Nigeria. *Environmental Economics*, 8, 35-45; I. Madu, (2012) "Spatial Vulnerability of Rural Households to Climate Change in Nigeria: Implications for internal Security" CCAPS Working Paper No.2, The Robert S. Strauss center for international Security and Law, University of Texas, Austin, USA; Hassan and Khan (note 5)p.81. Women vulnerability to climate change has much to do with their level of susceptibility to adverse impacts of climate change with attention is given to their exposure to the risks and human security challenges arising from climate disasters. See C. J. Onwutuebe, (note 8) p.5
[10] See M. Alam et al,(note 28), UNEP, 2015, (note 13), IPCC 2014, (note 17).
[11] UNECA (2011) Climate Science, Information, and Services in Africa: Status, Gaps and Policy Implications. United Nations Economic Commission for Africa, African Climate Policy Centre (ACPC), Working Paper 1.
[12] R. Cervigni, R. Valentini, and M. Santini, *Toward Climate-Resilient Development in Nigeria* (Washington DC, The World Bank, 2013) p.2.
[13] *ibid*
[14] *ibid,* p.16
[15] C. J. Onwutuebe (note 8)

to climate crises[1] and the underlying factor responsible for the disparate effect of climate change on men and women revolves around societal behaviors built around division of roles on the basis of gender.

In Ethiopia, more than 85 % of its population is dependent on rain-fed agriculture[2] and since 1980, Ethiopia experienced at least five major droughts caused as a result of decline in rainfall which in turn led to the death of hundreds of thousands of people, which facilitated the country's dependence on food aid.[3] Over the last 50 years, Ethiopia experienced both warm and cool years, though the warmest days showed an increment in recent years, particularly by 0.37 % in every ten years.[4] In some Ethiopian regions, the increase in temperature along with a decrease in precipitation, is becoming a serious problem that frequently affects the agricultural sector.[5] Crop-pest, livestock epidemic, hailstorm, drought, and floods have become the most dominant and frequently occurring climate related shocks in some of the regions.[6] On women vulnerability to climate change impacts, Atinkut noted that unlike men, women have limited access to information, land and other resources due to socio-cultural barriers and that seasonal migration as an adaptation strategy is less likely for female headed households.[7] This is consistent with the assertion that in response to climate risks, men are more likely to migrate and leave behind their families in search of secondary employment while women are more likely to stay home and face the situation. The peculiar vulnerabilities of women in both countries as well as its impact on their human rights shall be further examined drawing insights from literature and respondent views.

6. Impacts of Climate Change on Women's Rights: Insights from Nigeria and Ethiopia

The qualitative information obtained from key informant interviews largely coincides with the information collected through documentary data. A total of 11 key informants from government agencies such as AU, IGAD, UNDP, EPA as well as some independent environmental experts in Ethiopia, were interviewed to (a) characterize the manifestations of climate change in Ethiopia, (b) identify how and why climate change impacts women more than men and (c) identify the implications of climate change impacts on the rights of women. Information obtained from the key informants on the first two questions was a mere collaboration of documentary sources. The responses on the last interview question are summarized below and corroborated by two case studies from Ethiopia and Nigeria recounting particularly relevant experiences of climate change impact on the rights of women. Most of the respondents had the view that temperatures in the Ethiopia were increasing and the rainfall decreasing at an unusual rate compared to the past 30 years and that climate change impacts affects the full enjoyment of rights of women. They all agreed that climate change impacts affects the full enjoyment of rights of African women especially women in Ethiopia.

With regards to right to life, the right to life is explicitly protected under the ICCPR and treated as a "supreme right, basic to all human beings."[8] It appears in every human rights document and no derogation from it is permitted, even in time of public emergency.[9] The protection of the right to life in the context of climate change is closely related to measures for the fulfilment of other rights, such as those related to food, water, health and housing.[10] Due to climate change people have been suffering from death, disease and injury from heatwaves, floods, storms, fires and droughts,[11] and women and children become casualties more than men. Sometimes women become victims of climate change impacts. Agwu and Okhaime noted that when landslide destroy farmlands at Nanka South East Nigeria, women were forced to migrate to neighboring villages for fetching water, farming or collecting firewood, women were sometimes molested by men who take advantage of the fact that the outsiders will not be able to identify them.[12] All the respondents interviewed asserted that climate change affects the right to life of women in Ethiopia through hunger and malnutrition and other related

[1] *ibid*
[2] World Bank Group (2010). Economics of Adaptation to Climate Change, Ethiopia country study. Washington DC. at http://climatechange.worldbank.org/content/ethiopia economics adaptation climate change study, accessed 6 December, 2019
[3] B. Atinkut and A. Mebrat, "Determinants of farmers choice of adaptation to climate variability in Dera Woreda, South Gondar Zone, Ethiopia" *Environmental Systems Research* (2016) 5:6
[4] B. Marye (2011) "Local people's perception on climate change, its impacts and adaptation measures in Simada woreda, south Gondar," Unpublished M.Sc. Thesis, Addis Ababa University, Addis Ababa, cited in Atinkut and Mebrat, *ibid*,p.2.
[5] *ibid*
[6] T. Misganaw, A. Enyew, T. Temesgen, (2014) Investigating the determinants of adaptation measures to climate change: a case of Batii district, Amhara region, Ethiopia. Int J Agric Res 9(4):169–186
[7] Atinkut and Mebrat, (note110) p.7
[8] ICCPR, (note 57)
[9] Human Rights Committee, General Comments No. 6 (1982) on Article 6 (Right to life), para. 1, and No. 14 (1984) on Article 6 (Right to life), para. 1. See http://www2.ohchr.org/english/bodies/hrc/comments.htm accessed 6 December 2019.
[10] Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General. Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, GA Res. A/HRC/10/61 HRC 10th sess., Agenda item 2 (15 January 2009) [8-15], p.8; cited in Hassan and Khan, (note 5), p.82.
[11] *ibid*
[12] J. Agwu and A.A. Okhimamhe, *Gender and Climate Change in Nigeria: A Study of Four Communities in North-Central and South-Eastern Nigeria*, (Lagos, Heinrich Böll Stiftung (HBS), 2009), p.62

disease conditions due to its impact on food production and water resources. Two case studies from Nigeria and Ethiopia particularly illustrate the extent of threat of climate change impacts on women's right.

Nebechi (aged 28), a mother of three young children aged 3,5 and 7 years, lost her husband, a civil servant in Enugu State, Nigeria, in a road accident in June 4, 2017. As a house wife, she grows vegetables along the Idaw River banks to supplement her husband's meagre income. She grows all year round using water from the river for dry season irrigation, when the sale attract good income. When she became widowed in 2017, she went into full scale commercial vegetable farming. She took a soft loan of 200,000 ($ 600) from Umuchinaemere Community Bank Enugu (at an interest rate of 15% *per anum*), with which she rented more land space, planted various types of vegetables to increase her vegetable farm production and earning to pay her rent, children school fees, feeding and other household needs. In November 9, 2018, there was a downpour of heavy rainfall which was obviously abnormal given the Nigerian rainy season which usually ends in September. The riverbank overflowed and the overbank flooding carried away most farms along the riverbank at Idaw river layout. Nebechi's farm was amongst the several plots that got washed into the river. She ended up without means of supporting her young family, an ailing health (hypertension) and a huge debt of N370,000 (over $1,000). Her efforts to receive assistance from her husband's family proved fruitless as she had rejected the counsel by her brother in-law to return to the village (Mgbowo, Awgu Local government area, Enugu State) to become his third wife. The brother in-law already has eight children many of whom were not in school.
Source: Family Law and Advocacy Center, Enugu, Nigeria.

Lialeese (pseudonym), a 32-year-old Ethiopian woman, was brought in by her relatives to the local private clinic with multiple infected, deep cut wounds on her face. Lialeese's history was taken from the words of her husband. He said that Lialeese was appointed as a paid forest guard by her local council, kebele. She was supplied with a firearm and was requested to control the main road in order to limit the opportunities of unsolicited tree loggers to take the logs to the city, where they could sell them. Her responsibility was that whenever she saw a man carrying a log, she should stop the person, arrest him, and inform the local council. She was also required to go deep into the forest whenever she heard the sound of an axe cutting a tree, and confront that person. One day Lialeese met her distant relative who was cutting a tree and confronted him with the firearm. Her relative started to negotiate with her, promising to pay her some money for allowing him to cut the tree and not reporting his action to the local council. After Lialeese refused, he left the spot, swearing and threatening to kill her. A few days later, he attacked Lialeese in the forest, close to the main road, and cut her face with an axe. No action was taken against the perpetrator by the local council, because Lialeese had no witnesses to support her case. Additionally, no support was provided by the local council to Lialeese.

When Lialeese's scarf was removed to allow for examination, her face was disfigured, swollen, and necrotised. Multiple cuts were clearly visible, including a cut through her left eye. Lialeese was in deep pain, restless, and febrile. The referral to the hospital was immediately written and the severity of the situation explained to her husband. However, Lialeese's husband refused to take her to the hospital because he had no money to pay for the hospital services. He also mentioned that she is not eligible for free treatment because she had recent paid work in the local council. The clinic staff informed Lialeese's husband about the potential consequences, including death that she might face without surgical intervention. He said that he cannot go above God's plans for her, and asked only for pain relief medication for which he was able to pay.

Source: Team and Hassen (2016)[1]

In the two cases narrated here, it is apparent that climate change is grave threat to women's right to life, and livelihood in Africa. Nebechi's case typifies the increasing cases of women becoming heads of households with all the burden of catering for the family falling squarely on their shoulders. Lack of access to and use of land resources as well as access to credit affects women's capacity to cope with the increasing threats of climate change. In the case of Lialeese, without dwelling into the many factors implicated in her case, an important analogy drawn from this scenario is that first, the need for forest guards arose as a result of climate change impacts which has led to increasing deforestation of natural forests in search of living resources. The second issue is why women would opt for this type of job with its attendant hazards not appropriate for her gender and which is contrary to popular socio-cultural gender norms in Ethiopia. Thirdly, lack of government protection for women engaged is not risky job speaks volume for the extent of women rights protection in the face of growing impacts of climate change.

The right to health is addressed in Article 12(1) of the ICESCR. CEDAW, in Article 12(1) expressly states that "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services,.." and also Article 14(2)(b) states "States Parties shall take all appropriate measures ... to have access to adequate health care facilities…" In Nigeria, it has been observed that many ailments were ushered in by climate change and

[1] V. Team and E. Hassen, (2016) "Climate Change and Complexity of Gender Issues in Ethiopia" in P. Godfrey and D. Torres (eds) *Systemic Crises of Global Climate Change: Intersections of Race, Glass and gender,* (Routledge, 2016) Ch.4, pp. 314-326 at https://www.researchgate.net/publication accessed 24 November, 2016.

these include malaria, hypertension, HIV/AIDs, diarrhea, asthma and diabetes, with malaria being the most widespread.[1] In rural Nigerian communities, about thirty years ago, women relied on local herbs for treating illnesses such as chicken pox and yellow fever, but now they resort to the local hospital for treatment, especially because the herbs were no longer available.[2] However, most of the hospitals do not have enough qualified medical personnel or drugs for treatment.

On right to food and livelihood, this is explicitly mentioned under Article 11 of the ICESCR as an obligation on the part of the government to protect the right to food and adequate standard of living for all.[3] Article 14(2)(h) of CEDAW also provides for the right of women to food and adequate standard of living which right is threatened by climate change impacts.[4] It has been estimated that an additional 600 million people will face malnutrition due to climate change with a particularly negative effect on sub-Saharan Africa.[5] Developing countries are particularly vulnerable due to their disproportionate dependency on climate-sensitive resources for their food and livelihoods[6] and extreme climate events are increasingly threatening livelihoods and food security. The impact of climatic change in the form of erosion, landslides and general land degradation has threatened lives and property in most rural communities in Nigeria.[7] This has grossly affected the fertility of farm lands leading to less food production and an increase in the number of women living below the poverty line, with attendant malnutrition.[8] Human activities such as deforestation, the burning of fossil fuel, indiscriminate excavations of soil for foundation filling and sand for brick making and plastering has exacerbated the impact of climate change in South-Eastern Nigeria.[9] A study conducted in south-East Nigeria noted that the destruction of farmlands and crops by landslides and erosion were the impact of climate change and responsible for food insecurity as almost all the women were left without food and loss of income.[10] As a result of insufficient food for their children, women took up menial jobs such as weeding and working at construction sites. This increased their work burden as they had to choose who to feed when the food was insufficient, and most times went hungry and were often ill and malnourished.11

With respect to proprietary rights and access to resources, women in Africa have limited access to land and other resources needed for their sustenance. Customary laws in Nigeria restrict women's proprietary rights12 despite a myriad of decided cases upturning this. The Nigerian Supreme Court has been at the forefront of holding that discriminatory practices and laws against women are illegal and unconstitutional.13 In Onyibor Anekwe & Anor v Maria Nweke14, the issue was a 'purported disinheritance of a widow for not having a male child'. The Supreme Court stated thus: 'The custom of the Awka people of Anambra State pleaded and relied on by the appellant is barbaric and takes the Awka community to the era of cave man. It is repugnant to natural justice, equity and good conscience and ought to be abolished.'15 Similar decision was reached in Lois Chituru Ukeje & Anor v Gladys Ada Ukeje,16 where the Supreme Court relied on the non-discrimination/equality provisions of the constitution to declare the Igbo customary law and practice which deprives children born out of wedlock from sharing the proceeds or benefits of their father's estate as unconstitutional.17 Despite these decisions, it is still a fact that in most rural communities in Nigeria, women do not own land and as a result, they cannot take loans in the event of the erosion of the farmland due to climatic change. Financial institutions in Nigeria would always demand landed properties as securities for loan facility. The only exception are microfinance or community banks which grant small sums of money for small scale farming or trading at cut-throat interest rates. Even in such cases, women are expected to provide their husbands or any male member of their family as sureties. Lack of access to lands and financial resources limits incentives to engage in

[1] J. Agwu and A.A. Okhimamhe, (note 119)
[2] *ibid*
[3] ICESCR, (note 56)
[4] CEDAW, (note 58)
[5] Annual Report of the United Nations High Commissioner for Human Rights (note 106)
[6] Parry, M.L. et al. (Eds) 2007. Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, at 8. Cambridge and New York NY: Cambridge University Press.
[7] J. Agwu and A.A. Okhimamhe, (note 119)
[8] *ibid*
[9] *Ibid,* p.41
[10] *Ibid,* p.56.
[11] *Ibid*.
[12] J. N. Ezeilo, *Gender, Politics and Law* (Lagos: Women Aid Collective, 1999) See for example, Mojekwu v. Iwuchukwu (2004)11 NWLR (Pt 882) 196. In this case, the Supreme Court 'chose to maintain its usual conservative policy in favour of discriminatory customary law rules of inheritance' Osaretin Aigbovo and Anthony Ewere, 'Adjudicating Women's Rights in Nigeria: Has the Tide Finally Turned?' (2015) 5(2) African Journal of Law and Criminology 12, 14.
[13] CFRN 1999, (note 65), s. 21 of the constitution states that the Nigerian state shall protect, preserve and promote Nigerian culture which enhances human dignity.
[14] (2014) All FWLR (Pt 739) 1154
[15] Ibid, per Ngwuta JSC, 1157
[16] (2014) LPELR – 22724 (SC) Electronic Law Reports
[17] *Ibid.*

environmentally sustainable farming practices and make long-term investments in land rehabilitation and soil quality less attractive to women.

In relation to women right to water, Article 14(2)(h) of CEDAW states that "States Parties shall take all appropriate measures…to enjoy adequate living conditions, particularly in relation to … water supply…" Climate change (extreme weather, drought and flooding) will exacerbate existing stresses on water resources, and compound the problem of water supplies and access to safe drinking water.[1] In Nigeria and Ethiopia, it is the primary responsibility of women to provide water for cooking, washing, bathing and drinking.[2] Even in situations when streams have dried up, the water quality in streams has deteriorated, and the streams are not accessible due to landslides, more time and energy is spent in search of water in neighbouring communities.[3] Money intended for food is spent on water, which means that they have to take on an extra job and increase their workload. Poor water quality and water husbandry bring diseases such as typhoid and malaria and then money for food is spent on medication and at the end of the day, these mothers fall into debt.[4]

African women's right to participation in environmental decision making is still very low despite global interests and recommendations for gender mainstreaming in climate change negotiations If given the chance, women can become strategists who can adapt to their environment's challenges and in many instances,[5] women have proven that they are effective in mobilizing their communities to prepare for disasters and respond to its consequences. Adaptive process among these women included animal and crop diversification to suit the prevailing environment, shelter reconstruction, dietary adaptation and anti-erosion ring construction.[6] The mitigation processes included the use of energy-saving technology such as improved cooking stoves and biogas. In Mali and Ghana, women started to cultivate Jatropha curcas in commercial quantities. This fast growing shrub is a source of bio energy for cooking; its seeds are used to make soap and shea butter.[7] Jatropha curcas reduces erosion, increases water retention and nitrifies water sources. In Nigeria, the latex from this plant is also used for dental inflammation treatment and this plant serves as a good example of the ways in which women are using indigenous knowledge to mitigate the effects of climate change and adapt in their communities. This shows that women are important stakeholders whose voice ought to be amplified in climate change decisions.

7. Conclusions and the Way Forward

From the foregoing, it is established that climate change and responses to climate change will have a profound effect on the exercise of human rights for millions and perhaps billions of people across the world.[8] This will occur through both direct impacts on humans and settlements, as well as through the degradation of the ecosystems and environmental resources upon which many lives and livelihoods depend. More so, states have obligations to respect, protect, and fulfill human rights, and this includes obligations to mitigate domestic GHG emissions, protect citizens against the harmful effects of climate change, and ensure that responses to climate change do not result in human rights violations especially to the vulnerable groups. To achieve this a robust legal and policy framework have been put in place at the international, regional and national levels. Several multilateral agreement and international collaborations also have taken place as well as efforts of national governments and private actors. The plight of women and the impact of climate change have been well documented in policy briefs and research reports, yet much still remains to be done to ensure that there is a significant manifest improvement in the protection of human rights of women and the vulnerable members of the society.

The gendered roles of women in most Africa countries is much similar and the paper highlights this drawing from the experiences of women in Nigeria and Ethiopia. These roles which include child bearing, child and husband care, education of the child, cooking food, washing clothes, providing water for the family, and growing food for the family have been severely complicated by climate change impacts in recent years. Thus, climate change impacts have led to food insecurity, shortage of water, shortage of cooking fuel, shortage and loss of shelter, loss of income, increased burden of work and care giving, hunger and malnutrition. These impacts severely limits the full realization and enjoyments of women's right to life and adequate standard of living, right to food and livelihood, right to water, right to health and their proprietary rights and access to resources. Two case studies narrated in this work reveal the limiting factors as well as impacts of climate change

[1] W. V. Reid, et al. 2005. Millennium Ecosystems Assessment 2005, Ecosystems and Human Well-being, Synthesis, at 52. Washington DC: Island Press, cited in Hassa and Khan (note 5), p. 83.
[2] J. Agwu and A.A. Okhimamhe, (note 119); see V. Team and E. Hassen, (note 120); Misganaw et al, (note 113)
[3] J. Agwu and A.A. Okhimamhe, (note 119).
[4] *ibid*
[5] During Hurricane Mitch in Guatemala and Honduras in 1998 (Schrader and Delang 2000), in Ghana, Senegal, Mali and Bangladesh among other places (Dankelman et al. 2008),in J. Agwu and A.A. Okhimamhe, (note 119),p.62; Niger delta women
[6] *ibid*
[7] United Nations Development Programme. Resource Guide on Gender and Climate Change,
2009 cited in J. Agwu and A.A. Okhimamhe, (note 119), p.
[8] UNEP (note 13), p.1.

on women's rights in Nigeria and Ethiopia. As observed from most gender literature and policy briefs, there is need for women right of participation in climate change decisions women being the primary burden bearers of the environmental degradation. Socio-economic status and gendered norms in Africa still severely affect the practical realization of this right in most climate change decisions.

Poverty and sociocultural gender norms limiting access to land and living resources have been identified as the major drivers of women's disproportionate vulnerability to climate change impacts. Women bear the brunt of poverty in Nigeria and Ethiopia because they are the least educated and economically active, the governments should develop more effective strategies to reduce poverty among women. Sustainable Development Goals in Goal 5,(SDGs) mandates all countries to achieve empowerment and gender equality for women and girls, Nigeria and Ethiopia should not be exceptions. Hence more laws should be enacted to promote gender equality in the country and existing laws promoting gender equality and protecting women's rights should be implemented with diligence.

An important note on this paper is that the threat of climate change is real and the impact is not same for all persons, women, especially women in Africa, stand to suffer more. However, the critical role of women in national development especially in driving subsistence agriculture in Africa cannot be ignored. In addition to addressing the poverty vulnerability in women, efforts should be made by national governments in Africa to build their capacity through education, training and access to financial resources. Public awareness is important to change perceptions of women and break the sociocultural barriers attendant to their gender.

Finally in keeping with the mandate of nations in many Multilateral environmental Agreements and the international human rights system, there should be more cooperation and synergy to achieve effective implementation of laws and programmes aimed at protecting women and their rights. It is very crucial to incorporate gender perspectives in climate change programmes because women are critical agents of change with rich experience on the workings of environmental factors. Hence, equitable participation of women in decision making processes at all levels of environmental and climate change governance is key to effective protection of their rights in the face of growing threats of climate change.

Acknowledgements
The author is grateful to Raoul Wallenberg Institute for Human Rights and Humanitarian Law, Lund, Sweden for providing the opportunity and resources for this research; Many thanks to the Director, Staff and graduate students of the Addis Ababa University Center for Human Rights for hosting and making available your Library resources. I value your critics and contributions to this paper. Thanks to Prof Mekete Bekele Tekle, my academic contact peer for his invaluable assistance with materials, access to agencies and critical review of this work.

Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

Inter-Religious Dialog Now and Then in West Java

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Abstract
Religious tolerance is a philosophy that is expected to be manifested in religious life in the Republic of Indonesia which is based on Pancasila. All religions in Indonesia, both those with majority and minority followers, have agreed to uphold the noble values contained in Pancasila. In addition, the government has also provided relatively clear boundaries, there is freedom, but there are still boundaries and must respect each other. Pancasila, the Constitution, UU, PP, Kepres and all regulations that apply in this country, must be upheld by every religious adherent in this country. The government guarantees the freedom to embrace one religion and practice it according to its beliefs. But it seems that in the concept of government, all Indonesian citizens are already religious, because it is based on the first precepts in Pancasila, namely: That the Unitary State of the Republic of Indonesia is based on the One God " This study considers the potential of the first sila of Pancasila as a healthy interculturality by virtue of its open concept of divinity, namely "cultured divinity". The finding is that the first sila of Pancasila can be defined as an open and active intercultural hermeneutics. The fluidic, accommodative, and open nature of the first sila of Pancasila, makin it possible to values contributed from anywhere, is the advantage of Pancasila that makes it acceptable to anyone living in Indonesia
Keywords: Pancasila, inter-Religious, overlapping identity
DOI: 10.7176/JLPG/111-04
Publication date: July 31st 2021

INTRODUCTION

It is not a coincidence that Christians in Indonesia live in the midst of a non-Christian majority spread across various islands and archipelago in the country. From God's side, nothing happens by chance, God has a plan, so that every believer can carry out his duties as a witness, as light or salt, capable of enlightening or salting this nation as God wills. Since 1957, a belief system cannot be categorized as a religion, and at that time people who originally adhered to tribal beliefs or religions were urged to include one of the religions recognized by the state. So thus there was a kind of government intervention to people who had not followed one religion at that time, to immediately choose one religion and include it on their KTPs, so it is not wrong to say that the government has "put religion" on the people. The religion that was listed on their KTP at that time, was not their choice of heart, but it turned out that it was very difficult to change or give up again, when they already had a choice of their own heart. That is why it is only natural that in the future there will be religious syncritism, even today. On their KTPs they state one religion, but in their daily life they still practice other beliefs; this phenomenon by Dr. Baker and by Dr. Harun Hadiwiyono[1] it is called a "fluidic", meaning that beliefs, tribal religions, even like Hinduism and Buddhism, have become "fluidic" in certain religions, especially Islam. Can it be said that they have embraced one religion. If it doesn't mean they should be given the freedom to choose and embrace one religion according to their own conscience, or return to their ancestral beliefs? If that happens, it means that all legal religions in this country have the opportunity to witness or preach to the group.

But the question is how a believer on the one hand can carry out his duties as a believer, but on the other hand he can still coexist with other people in a very heterogeneous society, coupled with the existence of laws, and various government regulations, of The government, fatwas from the regional MUI (Majelis Ulama Indonesia) and regional regulations in each region which greatly limit the movement of believers in carrying out their duties in the Evangelisation. On the one hand it is part of the believers, but on the other hand it is part of this very pluralistic Indonesian society, which has an obligation to maintain order, harmony and stability of the nation, as well as an obligation to respect and respect the adherents of each other. other religions that are legal and protected by the 1945 Constitution.

[1] Hidayat Nurwahid, *Ensiklopedi Islam untuk Pelajar Indonesia*, 2002

The struggle from time to time is how Christians in Indonesia can carry out their duties, without having to clash and violate all existing regulations in this country, and how Christians can co-exist with followers of other religions.

METHOD OF RESEARCH

This study uses qualitative methods with literature review approaches, analysis studies, observations, surveys and interviews.

DISCUSSION AND RESULT

History of the entry of Islam in Indonesia

The Sundanese claim that: "Islam is Sundanese, Sundanese is Islam", "the Sundanese were originally Islam", "Islam is the native religion of the Sundanese people"; It is as if Sundanese people must always be Muslim, because before they were born they were already Muslims.

Islam is actually the same as Christianity, which is a religion that originates from outside, only it may have entered Indonesia relatively earlier than Christianity. Some Islamic figures feel that Islam has entered Indonesia in the seventh century because it is thought that in 674 AD Arab traders had started to settle on the west coast of Sumatra.[1] But the author feels that there is no solid fact that states that they are Muslims. Because around the seventh century Arabia was not completely Islamized by Muhammad and his followers.

The time span of the entry of Islam to Indonesia with the entry of Christianity is not really that much different, because some travelers have found several inscriptions in public cemeteries in Sumatra, and from the inscriptions it is thought that Christianity entered Sumatra before the thirteenth century. Because Islam entered Indonesia around the century eleven (XI). And at the end of the thirteenth century, the Islamic Kingdom was established in the archipelago, the first being the Sultanate of Samudra Pasai in Aceh, which is located in North Aceh, to be precise in Lhokseumawe, namely in 1297. [2] When viewed from the point of view of time, Hinduism and Buddhism actually entered Indonesia much earlier than Islam. The way Islam entered Indonesia has been studied in public schools, starting from Elementary School (SD) to Senior High School (SLTA). Islam entered the archipelago, namely through traders from Arabia (especially Hadramaut), Persia, Gujarat in West India whose main purpose was to come to various islands in the archipelago to trade, namely in the eleventh century (XI). These traders came to various coastal cities of the archipelago, such as Aceh, Demak, Cirebon, Gresik and other coastal cities. But it turns out that in the end when they already have good relations with the rulers or kings of the region, they also begin to carry out religious announcements to these rulers, and history records that not a few of these rulers eventually embraced Islam, and after the kings or the rulers embraced Islam, and then these rulers advised and obliged their people to embrace Islam as well, so then Islamic-based kingdoms were established, especially those in the coastal areas.

Development of Islam in Indonesia

In its development in Indonesia, Islam has at least three phases or stages, namely: the "as a newcomer" phase, the "struggle" phase to gain identity and followers; and third is the "ruler" phase, namely the phase when Islam has become a religion with a large number of followers, so that in many ways "he" seems to be a ruler.

Islam in a Phase As a "Newcomer"

Islam in the phase as a newcomer, in the archipelago at that time did not show much difference from other religions in that phase. In fact, it seems that Islam can adapt more in various aspects, be it social aspects, economic aspects, culture, and even Islam can adapt to religions that came earlier or entered earlier, including Hinduism and Buddhism. As a "newcomer" Islam hardly shows a confrontational attitude, this is very different from Islam when it has become the majority religion.

The soft attitude or compromise of Islam above was one of the factors that caused Islam to be accepted more quickly and easily in various coastal cities at that time. An attitude of compromise with tribal culture and religion, animism and dynamism, coupled with an attitude of compromise with Hinduism and Buddhism, which were the religions of the rulers and many of their followers at that time, has brought

Islam to the form it is today. For example, on the island of Java, especially around Central Java and the Special Region of Yogyakarta, we will find Muslims or adherents of the Islamic religion who are dubbed by the term "Islam Abangan" or "Islam Kejawen". The meaning of the nickname Islam Abangan or Islam Kejawen is inherent in such a way in the daily lives of the average people of Central Java, Yogyakarta Special Region, and even people of East Java. This can be seen in various practices of daily life and also in various rituals, including a Muslim who is devout in practicing his religion, but when he is sick or one of his family members is sick, then he goes to a shaman or “smart person” to ask for medicine or healing from the shaman, then he is given plain

[1]Sukarna, Diktat Sosiologi (Manusia dan Kebudayaan di Indonesia), STT Kadesi.
[2] Iwan Gayo, Buku Pintar, seri Junior, Jakarta : Upaya Warga Negara.. 2003. p.86-87

water or incantations to treat the pain and then he performs various "shari'a" or provisions that have been outlined by the shaman, including providing seven kinds of flowers, frankincense, smooth black chicken, and so on. etc. When paying attention to such matters, it is obvious that apart from the person concerned embracing Islam, in fact the person is also practicing part of the Shari'a of another belief or religion, namely Hinduism. And if then the shaman says that some of the conditions must be brought and placed under a large, very shady banyan tree outside the village near a spring, then it is clear that this person is also practicing the belief in Hinduism, he is also practicing. rituals of Animism and Dynamism. In fact, most Indonesians practice such living practices, regardless of their ethnicity, especially those who still live in villages or regions. In connection with the rituals and practices of life on Dr. Bakker, and also Dr. Harun Hadiwiyono calls him a "stowaway" meaning Hinduism, Buddhism, animism, dynamism, and various faiths in Indonesia are stowaways from certain religions, especially Islam. His dress is Islamic, the identity card (KTP) is written with Islam, but practices from other faiths are still clearly tucked away.[1]

In fact, such practices are evident in the daily lives of the Sundanese people in West Java, as well as in other ethnic groups in Indonesia. The life practice of Muslims is like this because of the initial "mistakes" of the broadcasters, as well as the government or rulers in the past, who had "put on religious clothes" to some Indonesian people.

But in addition to the factors that have been described above, many experts also believe that the practice of going on the pilgrimage is an adoption of Islam to the old religion in the Middle East, namely the religion or belief of the ancient Arabs which they often call the religion of the "era of ignorance. Or the dark ages. But the beliefs or ritual practices they adopted were then given new content and nuances, so that it became like the practice of going on the pilgrimage as it is known to the public today.[2] But apart from the nature of Islam that can compromise other beliefs, the author also sees other factors, including that Islam was once a religion of "newcomers" in the Republic of Indonesia. As a newcomer, he must be able to adapt to existing beliefs or religions in the area so that his existence as a new religion can be accepted easily, so as to win as many followers as possible.

Islam in the "Struggle" Phase

In this phase, namely after Islam passed the phase of being a newcomer to the archipelago, Islam entered the "struggle" phase, namely the phase of struggling to get as many followers as it is today.[3] Islam is a missionary religion, meaning that Islam is a dynamic religion, which continues to move forward to get as many followers as possible in various ways, or in other words Islam is an aggressive religion, in this case it is almost the same as Christianity. Islam has made various efforts, including the first one is: Syiar. Adherents of Islam in new areas, on average, are equipped for this task, apart from being educated in religious matters, so that they have a solid faith in Islam, they are also educated so that they can carry out religious propagation, among others through preaching. A Muslim has an obligation to be able to read the Koran, apart from being able to perform the obligatory prayers for five times, that is why Islamic leaders are very active in advising, encouraging followers to attend recitations, not even a few Islamic scholars who set up study associations. Al-Quran, where one of the materials is reading the Koran and also preaching. People who enter the Islamic religious study association at this time are better known as "pondok" and the people or students are known as "santri", and these students will later depart or return to their respective hometowns. each to carry out religious announcements in their hometown or in a new place.[4]

Second, Islam in Indonesia has also experienced tremendous growth due to the intervention of the rulers at that time. The broadcasters, both local and immigrant, who were mostly wealthy merchants from India and the Middle East, had a very effective focus at that time, namely focusing on the rulers or kings of the region, or officials. important or high officials in a kingdom. History records that many kings or sunan embraced Islam, and later on with the power or authority they had they propagated their new religion. Very solid evidence is that from the nine guardians known as Wali Songo, all of them have the title of sunan, including Sunan Kalijogo, Sunan Ampel, Sunan Bonang, Sunan Kudus, Sunan Gresik, Sunan Giri, Sunan Muria, Sunan Drajat, Sunan Gunung Jati.[5] Some of them were rulers in the kingdom or in their respective areas at that time, scientists or people who were highly knowledgeable and had extraordinary powers, so they became very influential people, they were also great scholars. and they are people who are very active in the spread of Islam, and it can be said that Wali Songo is the main figures who have a very big role in the spread of Islam in this archipelago, especially the island of Java, for example Sunan Gunung Jati, one of the Wali Songo. which was very instrumental in the spread of Islam in West Java, especially Cirebon. He is also the founder of the Banten Sultanate dynasty which

[1]Robert Morey, Islamic Invasion, "Confronting the World's Fastest Growing Religion" Las Vegas: Christian Scholars Press. 1992, p.34
[2] Ibid
[3] Darmaputera, Eka. 1992. *Pancasila, Identitas dan Modernitas: Tinjauan Etis dan Budaya*, Jakarta : BPK Gunung Mulia,p.10
[4] Ibid
[5]De Jong, Kees. 2008. "Keanekaragaman Bentuk Kekristenan Global", *Gema Teologi*, Vol. 32, No. 1, April 2008.

began with his son, Sultan Maulana Hassanudin. On the initiative of Sunan Gunung Jati, an attack on Sunda Kelapa was carried out in 1527, under the leadership of Fatahilah, the warlord of the Demak Sultanate who was also the son-in-law of Sunan Gunung Jati.[1]

Sunan Ampel. Sunan Ampel started his preaching from an Islamic boarding school which was founded in Ampel Denta (near Surabaya). Because of that he is known as the coach of the first Islamic boarding school in East Java. Sunan Giri, Raden Broken, Sunan Bonang and Sunan Drajat were students of Sunan Ampel.[2]

Sunan Gresik. Besides being known as Maulana Malik Ibrahim, Sunan Gresik is also known as Maulana Magribi (Sheikh Magribi) because he is thought to have come from the Magribi region (North Africa). However, until now the history of the place and year of his birth is not known with certainty. He is thought to have been born around the middle of the 14th century. He comes from a devout Muslim family and studied Islam since he was a child, but it is not known who his teacher was, until he later became a scholar.[3]

Sunan Bonang spread Islam by adjusting to the cultural styles of the Javanese people who like wayang and gamelan music. For that he created repertoire that has Islamic values. Each verse of the song is interspersed with two sentences of syahadat (syahadatain)[4] so that the accompanying gamelan music is now known as sekaten. Sunan Giri whose real name is Raden Paku is the son of Maulana Ishak. He was assigned by Sunan Ampel to broadcast Islam in Blambangan. Sunan Giri studied at the Ampel Denta Islamic Boarding School. As an adult, on a pilgrimage trip with Sunan Bonang, he stopped at Pasai to deepen his religious knowledge. Upon his return to Java, Sunan Giri founded a pesantren in the Giri area. He also sent many preachers to Bawean (Madura), even to Lombok, Ternate, and Tidore in Maluku.[5]

Sunan Drajat was known as a saint with a high social spirit. He gave a lot of help to orphans, the poor, the sick and the miserable. His great concern for social problems was very appropriate at that time, because he lived when the Majapahit Empire collapsed (around 1478) and the people experienced an atmosphere of crisis and concern.[6] Sunan Muria was one of the Wali Songo who contributed greatly to the spread of Islam in rural areas. This son of Sunan Kalijaga is known to be alone and lives in the village with ordinary people. In broadcasting Islam, Sunan Muria always made remote villages his operations.[7]

Sunan Kudus or Jafar Sadiq was called wali-al-ilmi (knowledgeable person) by the Wali Songo because he had special expertise in the field of religion. Because of his expertise, he was visited by many knowledge claimants from various regions. He is also trusted to control the government in the Kudus area. Hence, he became the religious leader as well as the government leader in the region[8]

Sunan Kalijaga is also known as a cultural observer and artist (sound art, carving and clothing). He created a variety of wayang stories that breathe Islam. Sunan Kalijaga also introduced a form of wayang made from goat skin (wayang kulit), because at that time the popular wayang was painted on a kind of wide paper (wayang beber). In the art of sound, he is the songwriter of Dandanggula.[9]

Islam in Phase as the Religion of the Majority

The persistence of the guardians or Wali Songo, Islamic scholars, students, and also with the intervention of the rulers who had embraced Islam at that time made Islam in a not too long time, has become a widely recognized religion throughout the city and region. coast, even reaching cities or kingdoms that are far from the coast, even through attacks or wars carried out by kingdoms on the coast that have embraced Islam, has made Islam the religion.

After Islam became big and the majority religion, it was clear that its attitude was different from Islam, when it was still in a position as a minority religion, or a newcomer who still had a small number of followers. After becoming the majority of Islam it became the ruling religion, and even influenced the rulers, government and the running of government, even the Dutch colonialism government for nearly three and a half centuries in this archipelago. The attitude of the Dutch government was very careful, because they did not want to come into contact with Islam, which was already one of the majority religions at that time, because if this contact happened

[1] Iwan,. Buku Pintar seri Junior, p 107.
[2] Ibid
[3] Adeney-Risakotta, Bernard. 1997. "Allah yang Bhineka Tunggal Ika", *Duta Wacana: Majalah Ilmiah Universitas Kristen Duta Wacana*, I/2, Oktober 1997,p.7
[4] Ibid
[5] Adeney-Risakotta, Bernard 2015. "Imajinari Sosial Indonesia dan Barat", dalam Bernard Adeney- Risakotta (ed.), *Mengelola Keragaman di Indonesia: Agama dan Isu-isu Globalisasi, Kekerasan, Gender dan Bencana di Indonesia*, Yogyakarta: ICRS-Yogyakarta dan Mizan,p.8
[6] Ibid
[7] Adian, Donny Gahral. 2017. "Radikalisme dan Pancasila", *Kompas*, 14 Januari 2017.
[8] De Wit, Hans. 2004. "Intercultural Bible Reading and Hermeneutics", dalam Hans de Wit (ed.), *Through the Eyes of Another: Intercultural Reading of the Bible*, Amsterdam: Institute of Mennonite Studies dan Vrije Universiteit,p.45
[9] Dewan Karya Pastoral Keuskupan Agung Semarang. 2016. *Nota Pastoral Arah Dasar KAS 2016- 2020: Membangun Gereja yang Inklusif, Inovatif dan Transformatif demi Terwujudnya Peradaban Kasih di Indonesia*, Semarang: Dewan Karya Pastoral Keuskupan Agung Semarang.

it would clearly be very troublesome for the Dutch government, and it would inevitably lead to a wave of resistance and rebellion. The Dutch government at that time did not expect this to happen, because if the resistance from Muslims or Islamic-based coastal kingdoms would disrupt their "business" in the region. The prudential attitude of the Dutch government has made the Dutch government, especially the Governor-General who is the ruler of the Archipelago or Indonesia today, to appear to have shown his siding with Islam compared to his siding with Christianity which in fact is the religion brought by Dutch zending-zending to ancient time. This was very clearly the case with the churches at that time, namely that it was often difficult to obtain legality or permission from the Dutch East Indies government at that time, even to get permission to preach the gospel in certain areas had to take care of permits to the Queen or King in the Netherlands. . And what happened to Pinkster Beweging, which later became the Pentecostal Movement Church or GGP, through its founder, namely Rev. Dr. John Thissen, at that time to get permission to preach the gospel to a new area, namely from the Priangan area or Bandung, now it extends to the Batavia area, namely Jakarta Now, namely in 1923, he had to take care of permits directly to the Queen, namely Queen Juliana in In the Netherlands, he even had to pay a fine and was imprisoned in a cell for preaching the Gospel outside the regional boundaries set by the Dutch government at that time. [1]

And a radical statement that is quite intriguing that the day of independence on August 17, 1945 is considered as the day of victory of Islam against Christianity. They have turned a blind eye to the history of this nation where young people from various tribes, both Tapanuli, Minahasa, Ambon, Kupang and many other Christian-based regions work together to build strength, fight for the independence of the Republic of Indonesia, and in the Oath Youth in 1928, there were no longer the terms Jong Batak, Jong Jawa, Jong Ambon, Jong Sunda or Jong Minahasa, which existed at that time as stated in the text of the "Youth Pledge", namely: We, the sons and daughters of Indonesia, claim to speak one language. Indonesia,We, the sons and daughters of Indonesia, claim to be one nation, the Indonesian nation,We, the sons and daughters of Indonesia, claim to be spilled one blood, spilled Indonesian blood.[2] The author believes that the achievement of the independence of the Republic of Indonesia on August 17, 1945 was the result of the struggle of the Indonesian youth at that time, and also as a result of the struggle and sacrifice of various parties and all elements of this nation, including Christians, such as National Heroes. Patimura from Ambon, Dr. Sam Ratulangi from Minahasa, Young Marshal Yosafat Sudarso, Adi Sucipto from Java and Dr. TB. Simatupang from Tapanuli, and of course there are many more Christian figures who fought and sacrificed for that independence.[3] On the other hand, this nation must not turn a blind eye to the actions of radical groups that disturb the security and stability of the nation, starting from the DI/ TII movement in 1959, the Tanjung Priuk and Borobudur incidents in 1982, the Surabaya Incident, Situbondo, Tasikmalaya, Rengas Dengklok and other events. other events that took place in 1996-1998. Likewise were the actions of certain sects and mass organizations that often “pestered” the nation.[4]

Stream of Islam in Indonesia

The Number of Muslims in Indonesia is far more than Muslims in other Islamic countries, both in Asia and the Middle East.[5] Of the approximately 270 million population of Indonesia, it is estimated that the number of followers of Islam is up to 200 million. And the Muslim population of this size is divided into many Islamic sects or organizations, ranging from organizations recognized by the government to organizations that are not recognized, including the Ahmadiah Islamic sect whose name was sticking out, because it was considered illegal and heretical by Islamic schools. other, maybe one of the reasons is because they acknowledge another prophet besides Muhammad, namely the one named Gullam Ahmad.[6]

The number of schools of Islam in Indonesia can actually be understood, namely because of the existence of different interpretations or understandings, both about the Koran and other books, and the author feels that it is normal for such a large number of adherents. Because the same thing also happens with Christianity, which in terms of the number of its adherents in Indonesia is still far below Islam, but the number of organizations has reached hundreds of organizations. The flow of Islam in Indonesia can be classified in several ways, for example moderate Islam such as Muhammadiyah and fundamental Islam such as NU. [7]Or based on their origins, namely Shia and Sunni. There are not too many Shias in Indonesia compared to Sunnis, but Islam, whose followers come

[1]Buku 63 Tahun Pinkster Beweging di Indonesia, Jakarta: Majelis Pusat GGP, 1987.
[2] Ghafur, Waryono Abdul. 2015. “Dakwah Islam dan Interaksi Interkultural”, dalam Kees de Jong dan Yusak Tridarmanto (ed.), *Teologi dalam Silang Budaya: Menguak Makna Teologi Interkultural serta Perannya bagi Upaya Berolah Teologi di Tengah-tengah Pluralisme Masyarakat Indonesia*, Yogyakarta: Taman Pustaka
[3] Anis A. Soros, kebenaran Diungkapkan “pandangan Seorang Arab Kristen tentang Islam
[4] Iwan Gayo, Buku Pintar, p. 109-110.
[5] Hermans, Hubert, dan Agnieszka Hermans-Konopka. 2010. *Dialogical Self Theory: Positioning and Counter-Positioning in a Globalizing Society*, Cambridge: Cambridge University Press,p/32
[6]Ibid
[7] Hasan,Noorhaidi.2012.“JalanLainMenujuDemokrasi”,dalamAinurRofiqal-Amin, *Membongkar Proyek Khilafah al Hizbut Tahrir di Indonesia*, Yogyakarta: LkiS,p.23

from the Prophet Muhammad's family, still exists. It is estimated that the number of descendants of the prophet Muhammad who have reached the 43-45 generation worldwide at this time reaches 20,000,000. souls and 2,000,000. souls reside in Indonesia, and they can be recognized easily because they wear the title Habib, especially for their ulama.[1]

Regulations Governing Religion in the Republic of Indonesia

The Indonesian nation and the Unitary State of the Republic of Indonesia are one of the nations or countries in the world that are very vulnerable to division or disintegration, because apart from being composed of many ethnic groups, they are separated by oceans and consisting of many islands, as well as many religions.[2] That is why the Indonesian government has made a regulation regulating religious institutions in Indonesia.

Pancasila

Soekarno and Soeharto fundamentally had different political views, but in terms of Pancasila,they had the same view, this was evident when the second President of the Republic of Indonesia expressed his views and thoughts on Pancasila.[3]

Pancasila, which is formally contained in the 1945 Constitution, is rooted in noble values which for centuries have been part of Indonesian history and culture. In one of his remarks, President Soeharto once said: "We do not have the slightest doubt about the truth of Pancasila for the good, happiness and safety of our nation's life. Pancasila has undergone many tests, even today. It is true that there have been various attempts — some of them even using violence — to uproot Pancasila from the hearts of the Indonesian people, there have been various attempts to replace this country's philosophy with another one. This effort has always been thwarted by the Indonesian people themselves. This shows that Pancasila has truly become part of the life of this nation. Pancasila is the soul of all of us, the soul of all Indonesians.[4] Pancasila has become a matter of life or death for our nation.[5]

Pancasila has also become the basis of this country, which is also the basis of all laws, laws and regulations that exist in this nation. It is well known by all, especially the Indonesian people, that the establishment of the Indonesian nation was based on five principles or five principles, which are called Pancasila (panca = 5 and sila = basic).[6] And in the first Precepts it is very clear that the Indonesian nation and state are based on the one and only Godhead. The author's meaning is that every Indonesian citizen is obliged to be godly, or in other words, every Indonesian citizen is obliged to adhere to one of the religions of a number of religions that have been declared as legal religions in this Republic. So it includes Christianity or Christianity. Thus adhering to Christianity is legal according to Pancasila, because being religious or adhering to one of the officially declared religions is one of the obligations of the entire Indonesian nation.

1945 Constitution

In the 1945 Constitution, namely in Chapter XI Article 29 it is said as Following:

Verse 1. The state is based on the One Godhead.

Verse 2. The state guarantees the freedom of every citizen to embrace his or her own religion and to worship according to that religion and belief

The contents of the 1945 Constitution Chapter XI Article 29 verse 2 above, according to the author's understanding, are, first, every Indonesian citizen is given the freedom to choose one of the official religions, adhere to it and also practice it in accordance with the teachings of his religion.[7]

Second, freedom to worship according to their respective religions and beliefs means that every member of a legitimate religion is given the freedom to practice their religious laws, regardless of their religion, including Christianity. This means that every Indonesian citizen who is a Christian is given the freedom to pray, to worship on Sundays or other days, without fear, even to testify, witnessing his belief in everyone, without coercion or intimidation, because according to Christians witnessing is part of worship. And according to the author, witnessing is legal as long as it does not force people or intimidate people to become Christians, because it is clear that this is guaranteed by the 1945 Constitution which is the highest law in this country, and is the highest legal basis upon which all regulations are based[8] exists and is made in this country.

[1] Laksana, Albertus Bagus. 2014. *Muslim and Catholic Pilgrimage Practices: Explorations Through Java*, Burlington: Ashgate Publishing, Ltd,p.12
[2] Eka Darmaputera, Pancasila Identitas dan Modernitas, Jakarta: BPK Gunung Mulia, 1997, p. 132.
[3] Isma. 2016. "Mengisi Tafsir Pancasila", dalam *Suara Muhammadiyah*, Edisi No. 14, Th. ke-101, 16- 31 Juli 2016.
[4] Ibid
[5] Eka Darmaputera, Pancasila Identitas dan Modernitas, p. 132.
[6] Ibid
[7] H. Kaelan, Pendidikan Kewarganegaraan untuk perguruan Tinggi, Yogyakarta: Penerbit Paradigma, 2002, p. 7.
[8] Krieger, David J. 1991. *The New Universalism: Foundation for a Global Theology*, Meryknoll: Orbis Books,p.45

Ministry decision letter

In connection with religious services and religious statements, the minister of religion and the minister of home affairs, as well as the Attorney General's Office, have regulated a lot about this, one of the decrees of the Minister of Religion and the Minister of Home Affairs, which is stated in the Joint Decree of the Minister of Religion and the Minister of Home Affairs No.01 / BER / MDN-MAG / 1969 Concerning the Implementation of Government Apparatus Duties in Ensuring Order and Smoothness in the Implementation of Development and Religious Worship by Adherents. Article 1. The regional head provides an opportunity for every effort to spread religion and worship by its adherents, as long as these activities do not conflict with the applicable law and do not interfere with security and public order (SKB 2 of the Minister is attached).

Decree of the Minister of Religion of the Republic of Indonesia No.70 of 1978. Concerning Guidelines for Religious Broadcasting. In this decision, the first point stated that: To maintain national stability and for the sake of religious harmony, the development and broadcasting of religion should be carried out in a spirit of harmony, tolerance, teposeliro, mutual respect, respect between religious communities according to the spirit of Pancasila. (The full decree is attached).[1]

Other Decree Letters

RI MPRS Decree No. XX / MPRS / 1966 said that a regulation "must be based and sourced firmly on the prevailing laws and regulations, which are of a higher level." But the authors sometimes see a confusion of regulations in this country, the Indonesian Ulema Council in Cianjur Regency issued a fatwa or a decision prohibiting the rebuilding of a church or church building either in the form of a new denomination, or a new church. which is a development of an existing church in Cianjur Regency, and when this is “violated”, they will not hesitate to dissolve the church or fellowship, even the ongoing services, such as what happened in October to November 2006, there were several churches or posts. PI that must be dissolved and its worship activities stopped, on the grounds that the shop or house used for worship violates the planned use or designation of the building, but when the churches want to arrange a building permit for a church building, that step is suppressed in such a way either through the MUI fatwa or Perda, so it is somewhat impossible to un to be able to build a new church building or build a new church in a broad sense. This also happened with the GKI Hok Imtong church, which was started ten years ago in Cianjur Regency, because they did not have their own church building in early November 2006, or this church was dissolved by the masses.[2]In fact, which regulation is higher in our country, Pancasila and its 1945 Constitution or MUI fatwas as well as local regulations and mass organizations that have sprung up at this time, including the Islamic Defenders Front (FPI), which is often confused by taking over the duties of the police. prosecutors, judicial duties and even local government duties. Because if we return to the MPRS Decree above, it is very clear that every regulation or decision, even law, must strictly refer to a higher provision, and in this country Pancasila and the 1945 Constitution are the highest provisions, meaning that all provisions and regulations must refer to Pancasila and the 1945 Constitution are not the opposite, that is, they are contradictory. Because it is clear that both Pancasila and the UUD'45 firmly guarantee freedom of religion and freedom to carry out religious law, in accordance with the provisions of their respective religions.[3] The Indonesian Church Council (DGI) and the Supreme Council of Indonesian Bishops (MAWI) on January 14, 1979 made comments, because they felt there was a contradiction between the Decree of the Minister of Religion of the Republic of Indonesia No. 70 in 1977 and 1978 with a decree of 2 ministers, namely the Minister of Home Affairs and the Minister of Religion, No.1 of 1979 with dictum 2a Decree of the Minister of Religion No. 70 of 1978. quote SKB 2 of the Minister, article 1 paragraph 2, which reads: "This Joint Decree is not intended to limit efforts at the formation, development and broadcasting of religion in Indonesia" with article 4 which reads: The implementation of religious broadcasting is not allowed to be aimed at people or groups of people who have embraced / adhered to other religions, in a way[4]:

a. Using persuasion with or without using the provision of goods, clothing, food or drink, medication, medicines and any other forms of giving so that people or groups of people who have embraced / adhered to another religion change and embrace / adhere to the religion it broadcasts.
b. b. Distributing pamphlets, magazines, bulletin, books, and other forms of printing goods to people or groups of people who have embraced / adhered to other religions.
c. Make door-to-door visits to people who have embraced other religions.[5]

Apart from DGI and MAWI, of course, we will all be able to see that there is a difference or contradiction

[1] Amandemen I, II, III, IV UUD 45 (Jakarta: Pustaka Agung Harapan, n.d.). p. 24.
[2] Ibid
[3] Muslimin. 2017. “Paskah 2017, KAJ Usung Tema ‘Amalkan Pancasila: Makin Adil, Makin Beradab’”, http://news.akurat.co/id-28701-read-paskah-2017-kaj-usung-tema- (diakses 17.05.2017, pukul 23.28 WIB).
[4] Hendardi. 2017. “Setara Institute Beberkan Fakta Baru Aksi Penolakan Gereja Santa Clara”, http://rmol.co/dpr/read/2017/03/27/285419/Setara-Institute-Beberkan-Fakta-Baru-Aksi- Penolakan- Gereja-Santa-Clara (diakses 02.04.2017, pukul 11.40 WIB).
[5] Weinata, Sairin, *Himpunan Peraturan Di Bidang Keagamaan*, Jakarta: BPK Gunung Mulia, 1996, p. 490-491

between the decision of the Minister of Religion of the Republic of Indonesia above, which is a bit contradicting the SKB between the Minister of Religion and the Minister of Home Affairs, as quoted above.

Religion, A Psychological-Historical Study

Religious tolerance is a philosophy that regulates the relationship between one religion and another so that it remains harmonious and there is no disintegration. All religions in Indonesia, both “majority” and “minority” have agreed to uphold the noble values contained in Pancasila. In addition, the government has also provided relatively clear boundaries, there is freedom, but there are still boundaries and must respect each other. Above have described various regulations that should apply in this country, and are upheld by every religious adherent, regardless of majority or minority perspective; but for minorities they often feel that there are such constraints in exercising religious freedom, what is even more sad is the prohibition to testify to unbelievers, even though Pancasila and the 1945 Constitution give them freedom. Witnessing or witnessing is different from Christianization or Islamization or Hindunization.[1] Testimony is a neutral term, but then it seems to have generalized or expanded its meaning, so that it is often seen as Christianization or Islamization. Testimony is an attitude, explanation, expression from someone who understands something, sees something, feels something, and he feels the need to tell it to others, not to influence or force others to follow that person's religion or belief.

In the concept of government, all Indonesian citizens have a religion, because it is based on the first precepts in Pancasila, namely: That the Unitary State of the Republic of Indonesia is based on the One Godhead ”. Because one of the foundations of this country is almighty divinity, every Indonesian citizen must have a religion, which is why the author observes that the government often, whether consciously or not, has used religion to its citizens, so that in making a National Identity Card (KTP), it always includes the religion held by the KTP holder. The government redefined religion in 1957 along with the establishment of the Indonesian Ministry of Religion. The redefinition of “Religion” has disadvantaged the adherents of a large number of faiths in Indonesia21 because they are no longer allowed to include their belief in their National Identity Card, and instead “government” or officials write one religion on the KTP; Until now, in several places the term "beating flat" sometimes occurs, especially when filling in the religion column, without paying attention to the KTP form. The events and conditions that afflict some people like this can be interpreted that they are the same as people who are not yet religious, they have just arrived at the stage, are "made religious", or they are "subjected to religion" or "dressed in religion", and this is not the same with religion. That is why in Indonesia the term “abangan” Islam is known, namely those whose KTP is Islam, but in their daily life practice they still practice other beliefs, and this phenomenon by Dr. Baker and by Dr. Harun Hadiwiyono is referred to as a "stowaway", meaning that local beliefs or religions have become "stowaways" in official religions such as Islam and Christianity. Kaharingan, the regional religion of the Dayak people in Central Kalimantan, may be called the “official passengers” of Hinduism, as there seems to be an attempt by the “government” to incorporate the kaharingan into the Hindu religion. This is almost the same as the Confucian religion before it was recognized as an independent official religion. During the era of the Indonesian President Abdurrahman Wahid, Confucianism was used as a passenger in Buddhism and Hinduism.

The existence of the terms "fluidic" and "overlapping identity" above, has opened a very wide way for religious syncritism, so it is natural that even though their ID cards are Muslim or Christian, even Hindu, they still practice Animism, dynamism, regional religions, ethnic religions. and other beliefs.

This religious syncretism occurs not only among Sundanese or Javanese tribes, but this phenomenon occurs in almost every ethnic group in Indonesia. In this connection Islam and Christianity have been harmed, not benefited, but could it be because of the "generosity" of the Islamic and Christian scholars that they have allowed this incident to continue, without any real action to overcome it. In this regard, the government must immediately redefine the meaning of religion and belief to God Almighty, after that a pure return to Pancasila, in connection with freedom or freedom in the Almighty God, and if this happens, it means that the government will recognize the regional religion / tribal religion and beliefs that have long been "fixed. eskan ”and have been a stowaway or official passenger on a religion that is considered legal or official.

Responding to mistakes, especially past mistakes, there must be a redefinition or redefinition of the terms "religion" and "being religious" so as not to harm certain groups. Apart from that, the current government must apologize to the people, on behalf of the past governments that have robbed them of their rights, especially the right to adhere to a belief or religion according to their own conscience; because many people have been deprived of their rights to adhere to one belief, a regional religion, and one of the official religions according to their own choice of heart, as stated in the 1945 Constitution Chapter XI Article 29 paragraph 2.

If the above happens, then to religious figures or ulama, do not be reluctant to give freedom to their respective people to make their choices, because the mandate of the 1945 Constitution teaches that there is no

[1] Weinata Sairin, Himpunan Peraturan di Bidang Keagamaan, 561-571

coercion and deception in disseminating the teachings of their respective religions respectively.[1]

INTERCULTURALITY OF INDONESIA RELIGION IN WEST JAVA CONTEXT

Unity in Diversity, diverse but one existence. This National Motto accurately describes the deepest realities of Indonesia. It reflects such a determination to knit unity and togetherness of Indonesian society, which is perhaps the most heterogeneous society in the world. And the determination to unite reflects the existence of the same culture, behind a very striking plurality. At first glance the diversity and diversity of Indonesia is far more prominent than its unity, therefore the danger of disintegration is always a threat, both real and potential.[2]

Indonesia, is not only rich in culture, ethnicity and language, but Indonesia is also rich in religions, meaning that in Indonesia there are a number of religions and beliefs that are recognized and have legal positions according to the law in this country. Government steps some time ago, especially during the reign of President Soeharto, or during the New Order era, namely to make Pancasila as the only principle in society, nation and state. It is the right effort, although at first this effort had raised pros and cons among the community, and it is considered that there is a tendency towards intervention by the government against various social organizations (Ormas) [3] and religious (religious) organizations in Indonesia, but actually through this effort, the government aims to build national unity and unity. That is why in every movement and effort every mass organization or religious institution must maintain and establish the unity and unity of the Indonesian nation, so that it does not collide with Pancasila, the 1945 Constitution, laws and other regulations, and also so that there is no disintegration of the Republic of Indonesia.

Method of "*Caina Herang Laukna Beunang*"

"*Caina herang laukna benang*"— the fish can but the water is clear. Is an expression which is the philosophy of the Sundanese ancestors in doing or doing something; the goal is achieved, the fish can - "laukna yarn" but the water is still clear - "caina herang" the water does not become cloudy, does not cause chaos or noise.

Within the Unitary State of the Republic of Indonesia there is an order that regulates the life of the nation, state and religion, so that the existing freedom is not misused, so that it can cause disharmony in relations with one another, including the relationship between religious communities, because all citizens of Indonesia are aware of the existence of "diversity. "Which is so heterogeneous.

In preaching and preaching the Gospel every cleric or religious figure or anyone may preach, explain, write down the strength or strength of their respective religion but without vilifying, scolding, comparing, then vilifying the teachings of other religions, and may not offend or hurt the hearts of religious people. other.[4] So it is the responsibility of the ulama and religious leaders to explain clearly according to their respective abilities and expertise, while the people are given the freedom to make their choice, but there should not be intimidation or coercion, or "the lure of something". And then the religious leaders must with a big heart accept any reality, including if there are people who turn to other religions, on the basis of their own will.

The author feels sure that there is still a good, accurate, relevant way not to violate the existing order, namely in the context of witnessing in the Indonesian and Pancasila context. The author remembers very well what the Rev. Dr. Chris Marantika, D.D. That evangelism is an art.[5] So high artistic ability is needed so that the goal is achieved or the laukna of the thread, but the water is still clear.

Avoid Debate

There needs to be a redefinition of the terms debate with dialogue, because these two terms are not the same. According to the author of the debate is a dialogue for each showing superiority, superiority, and intelligence or strength of each, that is why demonizing and attacking each other is common, such as the debate between Ahmed Deedat and Anis Shorros which was held in a conference hall in England , and watched or witnessed by both groups of devotees, and it often happened that both groups of both the audience and the arguing person became hot-hearted, their faces and ears turned red and went home in anger. And it is clear that for Indonesia's climate, which is very fragile, this should not be done. And in terms of results, for example the opponent in the debate turns to follow his religion or belief, very rarely, and what often is the opposite, namely hostility, and this is the author's experience, for example in 1983 in Padalarang Bandung, on the sidewalk by the side of the road, the author argued with someone. Haji, who works as a seller of books for Muslim reading, at that time the author

[1] Nadlir, Moh. 2017. "Percepat Pembubaran HTI, Pemerintah Pikirkan Opsi Terbitkan Perppu", http://nasional.kompas.com/read/2017/05/16/21192561/percepat.pembubaran.hti. pemerintah.pikirkan.opsi.terbitkan.perppu (diakses 20.05.2017, pukul 11.30 WIB).

[2] [40] Eka Darmaputera,Pancasila Identitas dan Modernitas, p.22

[3] Wijsen, Frans 2015. *Christianity and Other Cultures: Introduction to Mission Studies*, Lit Verlag. Wirutomo, Paulus, dkk. 2012. *Sistem Sosial Indonesia*, Jakarta: Universitas Indonesia Press.

[4] Van den End, Sejarah Peerjumpaan Gereja dan Islam, Jakarta: BPK Gunung Mulia, 1990, p. 67-68

[5] Tanja, Victor I. 1998. *Pluralisme Agama dan Problem Sosial: Diskursus Teologi tentang Isu-isu Kontemporer*, Jakarta: Pustaka Cidesindo,P.5

was briefly insulted by the Haji. And when we trace the history of Christian- Islamic encounters, with various debates, starting from Patriarch Timotius I a Catholic living (circa 728-823) with Caliph Al-Mahdi and sultan Harun Al- Rashid (during his reign around 775-809 AD). Antara Jahannes Damascenus (665- 750), a figure of the Eastern Orthodox church. This was done by Basillius I and Niketas of Bynzantium (867-1056), as well as Bartholomew of Edessa (1100), Niketas Akominatos, an archbishop of the former emperor (- 1225), and also Johannes Kantakuzenos (1360). There are many other figures who are very concerned about focusing their services on the Islamic world, but the author reads that the results are not as expected, even though they may not be without results.

Dialogue, in simple terms can be interpreted as an effort made by two different groups of people or two people of different religions, then they each agree to exchange ideas, with the aim of each wanting to know the sincere beliefs of their friends, with questions - a genuine question, and not to discredit or offend. In fact, according to the authors, this kind of dialogue is still quite relevant in a country based on Pancasila, as long as each sincerely agrees to respect each other.

Avoid arrogance

The arrogance that is meant here is, an act of violence, intimidation, coercion, provoking the masses for various negative things, assault, namely in the sense of attacking the beliefs of others, vilifying and scoffing at the beliefs of others in public, and through the mass media, as well as various other acts of violence that can harm other parties.

Religious arrogance is an attitude that arises due to several factors, for example feeling as the majority, feeling as having power, feeling as self-righteous, because of jealousy and hatred and wanting to be in power and to become rulers as well as several other factors,

All religious people in Indonesia should not commit this bad act against followers of other religions, even though they may be in majority areas.In Christianity, Christ Jesus has provided a perfect example when He lived in His incarnation in this world, as well as his teachings, namely that we love each other, including loving those who do not have the same religion or belief.

In a country based on Pancasila and the 1945 Constitution, arrogance is not appropriate, but must be eliminated completely, because it is clear that it violates Human Rights, and is contrary to the culture inherited from the nation's ancestors, namely polite, friendly, ethical character, compassion, tepo seliro. And this is also contrary to the culture of the Indonesian people who are accustomed to living in diversity and diversity.

Avoid Overlapping Methods

Psychologically, basically humans are creatures who like to imitate, especially for something good and profitable. On the other hand, humans do not like to be imitated, especially with regard to things that are quite essential, for example the recipe for food / cooking of a restaurant, a method that is quite accurate and proven to be successful in doing business, a product of a company, which is why we know the term patent, which is legality. which states the ownership or rights of a person or a company, and if it turns out that at any time it is found that the patent rights were copied by the company or someone, he will immediately report the matter to the authorities, and the imitator can be sued.

Muslims do not like it when people of other religions imitate them, especially imitate their way of worship, their way of dressing, their way of preaching, and also other ways. The author remembers that in the late eighties to the nineties, when a Christian institution published the Gospel of Luke with a cover or title similar to Arabic calligraphy, many Muslims were offended, even some of their mass media said that Indonesian Christians were manipulating. , and various other comments that are not pleasant to hear or read. Dr. John Culver, in the Muslim-Christian Encounter class[1], once told that a Christian institution published the Book of Proverbs, with the name "Wisdom of the Prophet Sulayman" which was criticized by Muslims, they urged the institution to immediately withdraw all books that have been circulating, especially those that are still in existence. in bookstores. And in terms of clothing or clothing, Muslims are also not happy when people of other religions imitate their dress, because for Muslims that is their identity. For Christians they do not have any characteristic clothing, except for a certain sect, but they do not represent Christians in general. But if there is something that is characteristic of a religion, and then followers of other religions imitate it, especially in relation to preaching and preaching the Gospel, that should also be unethical. So don't use the "imitate/overlapping" method.

Making Sincere Friendships

In many minority countries who live under the pressure of the majority, live in fear and bitterness, but they can do nothing because they are afraid, and are helpless especially in relation to religion and worship; On the other hand, the majority live in arrogance, and they suppress the weak, so that their relationship can be likened to a fire

[1] Van Bruinessen, Martin (ed.). 2014. *Conservative Turn: Islam Indonesia dalam Ancaman Fundamentalisme*, Bandung: Mizan,p.23

in the husks, outwardly invisible, but inside there is a fiery red fire. If this situation is left without resolution and the government's efforts should one day disrupt and threaten national stability.

This situation is not expected by the government, which is why many efforts have been made by the government to create harmony between religious communities.

"Forge genuine friendships with them." And this attitude is a reflection of the teaching of the Lord Jesus: Sincere like a dove and clever like a snake (Matt. 10:16).

If there has been a refusal in service so far some people say that it is because 60% is the factor of the person concerned, and not the factor of society who refuses. So if 60% is the factor of servants of God or Christians themselves, then it means that the rejection or acceptance of someone's service is largely dependent on the Christian or the servant of God concerned.

CONCLUSIONS AND CONTRIBUTION

There are many roads leading to Rome, this is an expression that the author feels, but actually not only the author, but surely there are still many other believers who have this kind of belief, in connection with da'wah and PI in this country. At first glance, it seems that every gap for da'wah and PI in this country has been closed tightly, so that it seems as if there is no way or opportunity to carry out the Great Commission. But the author believes that His power is still valid, the promise of His participation is still valid, His miracles are stil, so therefore his orders with respect to the Great Commission are still valid.

Believers in Indonesia can still implement PI in this country, without fear of violating existing government provisions, and without fear of being called less Pancasila or not having religious tolerance, or other terms similar to that, because the author believes that with an attitude of tolerance , or mutual respect among adherents of different religions, and also in a country based on Pancasila, we can still implement PI as discussed in the section above.

In addition to some of the methods above that are often forgotten by believers and evangelists, in this section the author also wants to give some suggestions, first: Implementing PI in Indonesia must not be radical or frontal nor can it be a kind of revolutionary movement, both in terms of ways. nor in expecting results. Second, enter through subtle, but sincere, slow but constant means, until you get recognition naturally from the surrounding community, that in the area there are believers or a group of believers, whose existence is clear and transparent, so as not to raise suspicions either. from the local community as well as from the government. Third, adapt as best as possible in the community and also in any existing community activities, especially if the PI is held in rural areas. Fourth. Be a good role model for society in all aspects of life, both in terms of morals, kindness, family, economic conditions, as well as in relation to society, adherents of other religions, and government, for example in relations with taxpayers, in mutual cooperation and so on. , so that there is no gap for those who do not believe to accuse us, but instead they see a very different quality of life, very high quality. It is our duty, the believers in this country, to do what is our duty and responsibility, our part. While God's responsibility, let us return it to Him. Our obligation is to do what we can do. And for the end result we leave it to God who has the work, because in fact we are only His partners exspecially in West Java.

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Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

The Regulations of Corporate Action in Capital Market in Indonesia

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Abstract
Disclosure principles is the main principle in capital market which must be obeyed by issuers since the general offering until the company became public company, should do corporate action. The regulation of corporate action procedure in capital market is fundamentally an effort of law protection for the minority shareholders and independent shareholders. There is a collision between the regulation of company act and capital market act in the practice. This condition, by law, can be called as conflict of norm, as there is conflict between the statute. In facing the problem, principle of justice can be applied to legitimize and have normative influence. Principle of justice that underlies the application of preference to the two laws and regulations is lex specialis derogat legi generali principle. This principle is a method of resolving conflict of norm between specific norm and general norm. It means that the application of the preference principle is done by putting a side the norms or provisions, in this case is the company act by norms or specific provisions, which is the capital market act.
Keywords: Corporate Action, Capital Market, Conflict of Norm, Preference.
DOI: 10.7176/JLPG/111-05
Publication date: July 31st 2021

1. Introduction

The implementation of disclosure principles by issuers in capital market is not conducted only at the general offering but also must be obeyed after the company became public company. Disclosure principle is obliged when public companies do corporate action. Fundamentally, company activity that impacted to the alteration of capital structure and financial position can be categorized as corporate action. Beside that, in every corporate action will influence the cost and the published amount. This view is told by Francis Groven who stated that corporate action occurs when changes are made to the capital structure or financial position of an issuer of a security that affect any of the securities it has issued.[1]

As seen in the purpose of corporate action, it can be divided into some types:

1. Corporate action to distribute opulence, as in the distribution of dividend and bonus stock;
2. Corporate action to get new capital, as in the first stock offering, right issue and bond publishing;
3. Corporate action to reconstruct finance, as in capital alleviation and stock split;
4. Corporate action to reconstruct company, as in takeover, merger and consolidation.[2]

The emerging problem is the regulation in capital market act associated to the corporate action has special characteristic if it juxtaposed to the regulation in Law Number 40 of 2007 regarding Limited Liablity Company ("Company Act"). This case is seen after a company carries out initial public offering. Besides the status that will change into public company, as the consequency, the issuers are not only submissive to Company Act, but in some specific matters, they also obey the provisions in Law Number 8 of 1995 regarding Capital Market ("Capital Market Act"). Likewise, in associated to corporate action carries out by public company, other than complying with the provisions stipulated in the Company Act, they are also required to follow special requirements stipulated in Capital Market Act.

2. Discussion

2.1. Regulations of Corporate Action in the Capital Market

The procedural regulations concerned to *corporate action* in the capital market are basically to implement the principle of transparency and as an effort to provide legal protection for minority shareholders and independent shareholders. There are several provisions for corporate action, including the takeover of public company, mergers and consolidation of business.

2.1.1 The Takeover of Public Company

The terminology of the takeover of the company is regulated in Article 1 number 11 Company Act which determines "… A takeover is a legal act carries out by legal entity or individual to take over the shares of the company that cause the transfer of control on the company." The point in the provision of this article is that a

[1] Francis Groves, *Corporate Actions-a Concise Guide: An Introduction to Securities Events*, Harriman House Ltd, Great Britian, 2008, p.4.
[2]Michael Simmons and Elaine Dalgleish, *Corporate Actions: A Guide to Securities Event Management,* Hoboken: Jhon Wiley & Son, 2006, p.3, quoted from Mutiara Rengganis and Richele S. Suwita, *The Regulation of Corporate Action in Capital Market by Financial Service Security*, Law & Capital Market Journal, Capital Market Law Consultant Association, Vol.VIII.ED.13/2017, p.49.

legal action is done either by a legal entity or individual who takes over the shares of a company which resulted in the transfer of control over the company. The terminology of company takeover or acquisition in some literatures known as acquisition or take over is one company taking over controling interest in another company[1] which implies the takeover for the importance of company controlling by another company.

The regulation of takeover is stipulated in Article 125 (1) of Company Act which determines: "A takeover is done by taking over shares that have been issued and/or will be issued by a company through the company's board of directors or directly from the shareholders." Furthermore, in the Article 125 (3) it is emphasized that: "The takeover as stated in paragraph (1) is the takeover of shares which causes the transfer of control of the company."

Basically, to protect the interests of public shareholders and as an effort to improve the quality of information disclosure of every transaction on the shares of a public company that has the potency to change the controlling shareholders in the public company, it must be done through tender offer. The regulation of tender offer is stipulated in Article 83 of Capital Market Act that stated: "Every party that makes a tender offer to purchase the issuers' Securities or public company obligated to follow the provisions of transparency, fairness and reporting that is stipulated by Capital Market Supervisory Agency." In the explanation of Article 83 of the Capital Market Act, it is explained: "What is meant by 'tender offer' in this article is the offer through mass media to obtain equity Securities by purchasing or exchanging with other Securities. What is meant by 'equity Securities' in the explanation of this article is the shares or securities that can be exchanged with other shares or securities containing the right to acquire shares."

The procedure of public company takeover regulated in the Regulation of Financial Servises Authority Number 9 /POJK.04/2018 on Public Company Takeover. The regulation background on tender offer is related to a transaction that has the potency to change the controlling shareholders in a public company. This case reminds that tender offer is an offer to purchase Security from public shareholders that resulted to the decreasing number of shareholders significantly and there is a possibility that related company is no longer qualifying as Public Company. For this reason, protection to public shareholders is needed. The effort to protect public shareholders is carried out to make sure that tender offer transaction is fair. The fairness, particularly in acquiring information about the proposed tender offers program, including cost pricing, Securities selling method, as well as specific requirements that can cancel the tender offer. The regulation about tender offer is the corporate action in the form of public company takeover that is used to protect the interests of public shareholders on the takeover by the new controller in a public company.

In taking over company in the capital market, the regulation is oriented on the process and method of the company takeover especially public company takeover. Both in taking over public company directly and inderctly that cause the change of controller in that public company. Public company controllers, are the direct and indirect parties:

a. Own more than 50 % (fifty percent) of Public Company Shares from the whole shares with voting right that is fully paid-in; and/or
b. Have the ability to define, direct and indirect, with all methods of management and/or public company policies.

The takeover of public company that causes the cange of controlling in a company must do tender offer, that is an offer to purchase outstanding stock for new controllers. And every party that does tender offer to purchase Issuers' Securities or public company should follow the provision of transparency, fairness and reporting that is set by Financial Services Authority.

2.1.2. Business Consolidation and Merger

The understanding of business consolidation according to provision regulated in Article 1 (9) of Company Act is a legal act done by one corporation or more to merge with other corporation and caused the assets and liabilities of the merged corporation to devolve upon the corporation legally and the legal status of the merged corporation is ended by law. *Bryan A Garner* limited merger as follows:

"*Merger is an amalgamation of two corporation pursuant to statutory provising in which one of the corporation survives and the other disappear. The absorption of one company by another, the former losing its legal identity and latter retaining its own name and identitu and acquiring assets, liabilities, franchise, and powers of former, and absorbed company ceasing exist as separate business entity*".[2]

It is almost similar to takeover company, in business consolidation or merger is known some forms:

a. Merger Horisontal, when two companies with the same business line are merged or when the companies that compete in the same industry are merged;
b. Merger Vertical, inculpating different operational production stage that correlated one to another, from head to toes.

[1] Jack P., Friedman, *Dictionary of Business Terms,* New York, USA Barron's Educational Series Inc., 1987., p.10.
[2] Bryan A Garner, *Op.Cit*, Garner, Bryan A.. *Black's Law Dictionary*, Eleventh Edition, Thomson Reuters, St. Paul, Minn., 2019, p. 1184.

c. Merger Conglomerate, when 2 (two) companies with different business lines are merged. In another word, merger conglomerate happens between companies that do not compete against each other and do not have seller – buyer relation.[1]

It is different from business consolidation, according to Article 1 (10) of Company Act, merger in literature mostly called as consolidation or in Dutch literature it is called "*fusie*",[2] a legal act carries out by two or more corporations to merge by establishing one new corporation that legally obtains assets and liabilities of the merged corporations and the legal status has ended. An almost similar opinion stated that *fusie* or absorption happens through the consolidation of 2 (two) or more companies, where 1 (one) of them, the smaller company will lose its identity and merge or become the part of the other existing (surviving) company that keeps its name and identity.[3]

The regulation about consolidation and merger in capital market is regulated in Article 84 of Capital Market Act that stated "… Issuers or public company that carry out merger, consolidation or takeover another company should follow the provisions of transparency, fairness and reporting as stipulated by Capital Market Supervisory Agency and other applicable laws and regulations."

The explanation of Article 84 of Capital Market Act is more emphasized than the purpose of combination and merger which is more oriented on the protection of investors' interests and to comply with the principle of disclosure in capital market as explained below:

> The provision referred to in this Article is intended to protect the interest of investors from harmful practices in merger, consolidation or takeover transactions, including participation involving Issuers or public companies, by requiring the issuers or public companies to comply with Principles of disclosure and reporting stipulated by Capital Market Supervisory Agency. The implication of this provision is carried out without diminishing the provisions of the Company Act.

Regulation relating to business mergers and consolidation procedures are regulated in Financial Services Authority Regulation Number 74/POJK.04/2016 concerning Business Mergers and Consolidation ("POJK 74/POJK.04/2016"). One of the main objectives of the regulation of POJK 74/POJK.04/2016, is to protect investors especially public shareholders, to maintain an orderly, fair, transparent and accountable capital market operation. In addition, the aim is also to provide convenience for public companies that will do business merger and consolidation with certain conditions and requirements as well as to improve the quality of information transparency in the business mergers and consolidation plan.

There is provision that requires public company before doing business mergers and consolidation, every board of directors is required to prepare a business mergers and consolidation plan as regulated in Article 3 of POJK 74/POJK.04/2016 as follows :

(1) The Board of Directors of each company that will carry out a business mergers or business consolidation mutually should prepare a plan for business mergers or ubsiness consolidation.
(2) Business mergers and consolidation plan as referred to in paragraph (1) must be approved by each company's board of commissioners.

The information that must be included in business mergers and consolidation plan, regulated in Article 4 Paragraph (1), POJK 74/POJK.04/2016, which stipulates as follows:

(1) Business mergers and consolidation plan as stated in Article 3 at least contains information:
   a. Name, domicile, business activity, capital structure and shareholders, and management and supervision of each company that will do business mergers and consolidation;
   b. Name and domicile of the company resulting from business mergers and consolidation;
   c. The structure of the members of board of directors and members of board of commissioners of the company resulting from business mergers and consolidation;
   d. Business mergers and consolidation schedule;
   e. The reasons and explanations for conducting business mergers and consolidation from each company that will do business mergers and consolidation;
   f. The procedure for stocks convertion of each company that will do business mergers and consolidation to the stocks of the company resulting from it;
   g. The draft amendment to statutes of the company resulting from business mergers and consolidation (if any) or the draft of article incorporation of the new company resulting from business consolidation;
   h. The recapitulation of important financial data sourced from financial report that has been audited by public accountant from each company that will do business mergers and consolidation, with the following conditions:
      1. The companies that will do business mergers and consolidation are public company, for the last 2

[1] Andi Fahmi Lubis, Anna Maria Tri Anggraini, Kurnia Toha, Budi Kagramanto,et al, *Business Competition Law, between Text and Context,* Deutsche Gesellschaft fur Tehnische Zusammenarbeit, Indonesia, 2009, p.191
[2] Rudhi Prasetya*, Limited Company, Theory and Practice*, Sinar Grafika, Jakarta, 2011, p. 92-93.
[3] Andi Fahmi Lubis, Anna Maria Tri Anggraini, Kurnia Toha, Budi Kargramanto, et al., *Ibid*.

(two) years; or
2. Companies that will do business mergers and consolidation are not public company, for the last 3 (three) years.

i. There is interim period financial data, presenting a comparison of the same interim period from the previous year (it doesn't need to be audited), except for the report of financial position;
j. Proforma financial information of the company resulting from business mergers and consolidation that has been audited by public accountant;
k. The summary of the appraiser's report regarding the stocks assessment of each company that will do business mergers and consolidation covering at least:
   1. Party's identity;
   2. Assessment object;
   3. Assessment Purpose;
   4. Assumptions and divider conditions;
   5. Assessment approach and method; and
   6. Assessment result;
l. The summary of Appraiser's report regarding the fairness opinion on the business mergers and consolidation;
m. The result of the expert's assessment regarding certain aspect from business mergers and consolidation (if necessary);
n. The opinion of the legal consultant regarding legal aspects of business mergers and consolidation;
o. The settlement method of employees' status of the company that will do business mergers and consolidation;
p. The settlement method of the rights and obligations of the company that will do business mergers and consolidation to the third party;
q. The settlement method of the rights of the shareholders who oppose the Business business mergers and consolidation; and
r. The explanation of the benefits, risks that may rise because of business mergers and consolidation, and future business plan.

The information that should be written in business mergers or consolidation plan as stipulated in Article 4, POJK 74/POJK.04/2016 is more comprehensive compared to the formulated program as regulated in Article 123 of Company Act. This case is possible because in paragraph (5) Article 123 of Company Act provides flexibility in the Capital Market Act and the regulation implementer to determine and/or regulate other as formulated "… The provisions regarding merger and consolidation plan are also applied to public company as long as it is not regulated in law and regulation in capital market sector."

In the provision POJK 74/POJK.04/2016, shows special attention that may rise because of business mergers and consolidation on public company. This case does not provide protection to the investor or the minority shareholders. In the provision in POJK 74/POJK.04/2016, requires the statements in business takeover and merger plan regarding the candidate of public company controller as stipulated in Article 7 as follows:

In the case of business mergers and consolidation will result to a new controller in the public company, business mergers or consolidation plan is also obligated to contain:

a. Explanation regarding the controller candidates of a public company, at least covering:
   1. The candidates of public company controller are individual, the information of name, address and the affiliated relation with the public company (if available); or
   2. The candidates of public company controller are other parties besides individual, the information that must be reavealed are:
      a). Name;
      b). Domicile or the address of the headquarter;
      c). Business sector;
      d). Legal status;
      e). Management and suprvisor structure;
      f). Capital structure or equivalent information;
      g). Financial data recapitulation;
      h). Beneficiary of the controlling candidate; and
      i). Characteristic of affiliated relation to the public company.

3.1. Capital Market Act Preference

According to the explanation on the previous chapter, shows that corporate action in capital market is a common thing either in developing company or in the restructuring organization framework. The provisions related to corporate action that applied in capital market, despite oriented to business development, the implementation

procedures compulsory watch the interest of investors, minority shareholders and independent shareholders. It describes the problem where there is collision between the regulations in Company Act and Capital Market Act. This condition in legal practice is called conflict of norm, a condition where there is conflict between the content of one statute to another statute. In this condition, the function of legal principles can legitimize and have normative influence and bind the parties.[1]

In the legal order which consists of principles, norms and regulations of law arranges the life of legal subject in the society, and the whole organisations and processes needed to create law in real life. Legal order elements are organized hierarchically in a legal law system due to the work of legal principles.

These legal principles that express logical function of humans' common sense, actually the inherent in law and in the understanding and in the existence of legal order itself that is brought by the reality and legal purpose are stability, predictability in order to create assurance and justice.[2]

Basically, *asas'* is also called principles, so the understanding of *asas hukum* is similar to the legal principles.[3] Legal principles is a thing than can be the focus of thinking and opinion. *Asas* originated from Arabic which means the outset of building, the base or foundation.[4] While the principle means taking or putting something as the first thing, the beginning, the base, basis or foundation.[5] *Black Law Dictionary* defines it as "*a basic rule, law, or doctrine*.[6]

Paul Scholten defines legal principles as "basis thought, which is found inside and behind every legal system that has been formulated in laws and regulations and adjudication, that relates to the provisions and individual decisions can be seen as the explanation".[7] Based on this definition, it is clear that the role of legal principles is as metanorm relating to legal norm in the form of behavioral norm. In other words, legal principles is metanorm or the values that base the legal norm.

The same view is stated by Ron Jue who explains legal principles as follows: "The values that base the meaning of legal norms is called legal principles. The principles define and legitimize legal norms. In consequence, legal norms that can be viewed as operationalization or processing furtherly from legal principles."[8]

Legal principles (*rechsbeginselen*) is the base to form positive law. Djuhaendah Hasan describes the function of legal principles is to guide legislators in the process of law making.[9] Legal principles is also functioned to give direction and guidance for the application of the rule into an apropriate form and composition for users of the right forming methods and to follow specified process and procedure as well as to be used to test (*toetsen*) whether the legal norms in law and regulations is correspond to the principles that have been used as the base of formation.[10]

Based on some definitions related to basis and principles, Budiono appraised that there are two concepts to be combined which are the truth in thinking and acting. The link is in the concept of "basis," that is every thinking or acting activity must be based on the truth. Truth is not the only basis or principle. To make the truth becomes basis or principle, it must be used as the base of thinking and other deeds.[11]

The principle that underlies the application of priority to the two laws and regulations is the principle of *lex specialis derogat legi generali*. This principle is one of the principle of preference known as legal principle that can be used in statutory approach. Basically, the use of *lex specialis derogat legi generali* principle refers to the two laws and regulations which hierarchically have the same position, but the scope of the material content among the two laws and regulations is more specific than the others.[12]

The principle of preference can be applied if one of them referred to the two laws and regulations of the same order and concerned for the same matter but one of them is more specific and another is general, Papinianus stated *lex specialis derogat legi generali* adage.[13] This principle means that in an lawsuit or legal case

[1] Zainal Asikin, *The Study of Law*, Raja Grafindo, Jakarta, 2015, pg.100-112.
[2] Bernard Arief Sidharta, *The Discovery of Law in the Study of Law Philosophy*, in Law Antinomy Pendulum, Anthology of 70 Years Valerine J. L. Kriekhoff, Print out 1, Genta Publishing, Yogyakarta, 2014, pg.24.
[3] Peter Mahmud Marzuki, *Law Theory*, Kencana, Jakarta, 2020, pg. 18.
[4] Lalu Wira, Pria S, *Legal Principles of General Mining*, Dissertation, Postgraduate Program Airlangga University, 2008, pg. 8.
[5] Laica M Marzuki, Siri': *A Part of Law Society Awareness Bugis-Makasar (A Law Philosophy Research*) Hasanuddin University Press, Ujung Pandang, 1995, pg. 144.
[6] Bryan A Garner, *Op.Cit*, pg. 1444
[7] JJ.H. Bruggink, *Reflection of Law, Basic Understanding of Law Theory*. Translated, B. Arief Sidharta, Citra Aditya Bakti, print out IV, 2015, pg.119-120.
[8] R.J. Jue, Grondbeginselen van het Recht, 1990:63, quoted from Bruggink, Ibid, pg. 212.
[9] Djuhaendah Hasan, *Legal System, Legal Principles and Legal Norms in Constructing National Law, in the reflection of Legal Dynamic, A Chain of Thought in the Last Decade,* Public Company Printing of Republic Indonesia, 2008, pg.80.
[10] Hamid. S.A. Attamimi, *The Role of Indonesia Presidential Decree in the Implementation of State Government Administration*, Dissertation, Indonesia University, Jakarta, 1990, p.313.
[11] Rachman, A. Budiono, *Legal Protection for Child Labor*, Disertation, Airlangga University, Surabaya, 2007, p.36.
[12] Peter Mahmud Marzuki, *Introduction of Law Study*, Revised Edition, Print out 4th, Kencana Prenada Media Group, Jakarta, 2008, p.139.
[13] P. van Dijk, et al, *Van Apeldoorn's inleading tot de Studie va het Nederlandse Recht*, W.E.J. Tjeenk-Willijnk, 1985. Quoted from Peter Mahmud Marzuki, *Introduction of Law Study*, Revised Edition, Print out 4th, Kencana Prenada Media Group, Jakarta, 2008, p. 260.

there are two statutes that can be applied, so the statute that should be applied is the statute that specifically regulates the case.[1]

The principle of *lex specialis derogat legi generali*, is a settlement method of conflict of norms between specific norm and general norm. The use of this preference is carried out by setting aside (not to defeat) the general norm. However, the use of this principle is not to eliminate the specific norm, but only to prioritize it.[2]

This matter is getting clearer because it is explicitly written in Article 154 Paragraph (1) of Company Act which says: "As for Public Company, the provisions of this law shall apply if it is not regulated otherwise in the laws and regulations of Capital Market sector." However, not all laws and regulations stated their positions as in the provision of Article 154 paragraph (1) of Company Act as *lex generalis*. By observing the scope of material content of the two laws and regulations which hierarcichally similar, the *lex specialis derogat legi generali* prionciple can be used to support an argument for the preference of a particular laws and regulations. Moreover, in the explanation, Article 154 (1) of Company Act expounds that basically for corporation that carries out an activity in capital market sector, for example a public company or stock exchange applies in the provisions in the Company Act. However, considering the company's activity which has certain characteristic differs from the common corporation, it is necessary to open the possibility of specific regulations to the corporation.

4. Conclusions

Regulations in the Capital Market Act have different characteristics when compare to the regulations in Company Act. It corresponds to the characteristics of activity in capital market which oriented in providing legal protection for investors, minority shareholders and independent shareholders. The different characteristics are clearly seen in the provisions in associated to the corporate action in capital market differ from the same regulations in Company Act.

This condition in legal practice can be called as conflict of norm, where there is a conflict between the content of one statute and another statute. In facing this kind of matter, the function of basis or legal principles can be use to legalize and have normative influence. Legal principle that underlies the implication of preference for two laws and regulations is the principle of *lex specialis derogat legi generali*. The principle is a settlement method of conflict of norm between specific norm and general norm. It will not eliminate the general norm, but only to prioritize the specific norm. It means, if conflict of norm found in the practise, the provisions in capital market which are specific norms can set aside the provisions written in Company Act.

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[1] Peter Mahmud Marzuki, *Ibid*.

[2] Yovita Arie Mangesti, Slamet Suhartono, *the Study of Law Contemporer, Breaking Through the Rigidity Limit of Normative Law*, Setara Press, Malang, 2020, P.78.

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Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

Developing Human Right Norms for Investor-State Arbitration: The Needed Panacea for Environmental Injustice?

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Abstract
The dissatisfaction of States and some non-State actors with investor-State arbitration has deepened over the years. This has resulted in agitations for the reform of investor-State dispute settlement. Part of the reform agenda is the need for international investment tribunals to be required to consider human right norms, in appropriate cases, in the determination of arbitration matters before them. This is because, as good as the idea of protecting foreign investments is, if it is not put in its right perspective, it may lead to good government policies and the human rights of indigenes of host communities being sacrificed on the 'altar' of investment protection. Thus, this work aims at contributing to the ongoing debate on the need for international investment tribunals to always take public interest into account when deciding disputes before them. In that regard, this work examines the connection between human rights and investor-State arbitration, with particular focus on how these evolving human right norms would produce the needed panacea for environmental injustice. Although the ongoing agitations for reform transcend investor-State arbitration, this work in limited to discussing the specific issue of the need for investor-State arbitration tribunals to be required to give adequate consideration to human right norms in the determination of the matters that come before them. In this work, we used qualitative methodology based on doctrinal approach. The research design used is content analysis, which helps in describing the connection between human rights and investor-State arbitration as well as the concept of developing human right norms in investor-State arbitration.
Keywords: Environmental injustice, Human right norms, Investment, Investor-State arbitration, Public interest
DOI: 10.7176/JLPG/111-06
Publication date: July 31st 2021

1. Introduction

A major concern today among scholars and arbitration institutions is the fragmentation of investor-State dispute settlement (ISDS) system.[1] This fragmentation is principally due to most States' present dissatisfaction with investor-State arbitration (ISA)[2] and the perception of some scholars that ISA is skewed towards investors in a way that makes States virtually helpless.[3] The perception seems strengthened by the fact that investors usually resort to ISA in order to contest host States' measures that they perceive as a threat to their anticipated profits.[4] The flip side is that, sometimes, in an attempt to protect foreign investments, municipal government policies[5] and citizens' human rights are thereby sacrificed.[6] This state of affairs has prompted States and other stakeholders to engage in concerted efforts at looking for alternatives to ISA in all directions – including the use of local remedies only[7] and diplomatic protection,[8] which both have severe pitfalls.[9] Diplomatic protection, as innocent as it sounds, did result to war in extreme cases, making it most undesirable.[10] And, to insist on local remedy only

[1] See Report of the United Nations Commission on International Trade Law (Fiftieth session, 3-21 July 2017) paras 243-250
[2] ISA is also known as international investment arbitration (IIA) and, in some context, used interchangeably with ISDS. It is important to note, however, that ISDS is wider in scope than ISA and that ISA is actually subset under ISDS.
[3] Karen L. Remmer, 'Investment Treaty Arbitration in Latin America' (2019) 54(4) Latin American Research Rev 795, 796; see also Anna Joubin-Bret, 'UNCITRAL ISDS Reform: Mandate, Process and Reform Solutions' (27 April 2021) <https://afaa.ngo/page-18097/10368672> accessed 6 June 2021
[4] Remmer (n 3) 796 citing Todd Weiler, 'Philip Morrison vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law' (2010)
[5] Joubin-Bret (n 3)
[6] See 'Mandates of the Working Group on the Issue of Human rights and Transnational Corporations and other Businesses' (7 March 2019) 4
[7] See, for example, the South African Protection of Investment Act 2015, s 13
[8] See Luke Nottage, 'Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia' (2013) 37(2) Asian Studies Rev 253, 264; see also Sanjeet Malik, 'BIT of Legal Bother' (*Business Today*, May 2012) <www.businesstoday.in/magazine/columns/india-planning-to-exclude-arbitration-clauses-from-bits/story/24684.html> accessed 17 March 2020
[9] Leon E. Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46(1) J of World Trade 83, 91
[10] John Dugard, 'Articles on Diplomatic Protection, 2006: Introductory Note' (Audiovisual Library of international Law) <https://legal.un.org/avl/ha/adp/adp.html> accessed 20 July 2021

will hamper foreign direct investment (FDI) inflows required for economic development.[1]

Although some approaches by States in pursuing the ISDS reform agenda (use of local remedy only and diplomatic protection) are unsuitable for international investment disputes as mentioned above, the agitation for reform has scored a high point in awakening the need to take public interest into account in ISA proceedings, which has already resulted so far[2] in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014 (Rules on Transparency) and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 2014 (the 'Mauritius Convention on Transparency').[3] Similarly, there is a developing jurisprudence premised on the argument that ISA arbitral tribunals should act as agents not only for the parties that appointed them but also for the global community at large.[4]

In pursuing the argument that ISA tribunals should also act as agents for the larger community, human right norms have steadily been creeping into ISA.[5] The main objective of this work, therefore, is to examine the connection between human rights and ISA,[6] especially those that are treaty-based, with particular focus on how these evolving human right norms in ISA would produce the needed panacea for environmental injustice.

2. The Demand for ISDS Reform Touching on Human Rights

As noted above, there are on-going agitations for and actions towards reforming ISDS, principally because of the shortcomings of ISA as it is presently practised. ISDS reform agenda as it stands today seeks to address, inter alia: (a) the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISA tribunals;[7] (b) concerns pertaining to arbitrators and decision makers;[8] (c) the need for human right norms to be given adequate consideration in ISDS[9] and d) the perceived need to establish a Multilateral Investment Court (MIC).[10] In this work, our concern is limited to item (c) as it relates to ISA.

The need for human right norms to be given adequate consideration in ISA addresses, inter alia: the issue of human rights breaches by transnational corporations and other business enterprises; the issue of the right to development of host communities; the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the issue of the rights of indigenous peoples; and the issue of human rights to safe drinking water and sanitation.[11] These concerns arose because of the perception of scholars that the inherently imbalanced nature of the ISA system and lack of investors' human rights obligations, among other factors, have led to undue restrictions of States' fiscal capability and undermined their capacity to regulate economic activities and to realise the economic, social, cultural and environmental rights of their citizens.[12]

The developing jurisprudence, therefore, is that international arbitral tribunals should be bound to consider third-party claims for human rights violations when deciding investment disputes.[13] The corollary of this is that, though the investment agreement may be between two States[14] or a State and a foreign investor,[15] as the case may be, the arbitral tribunal, as agent of the larger community, must seriously consider the issue of human rights violations affecting members of the public even though they are not, strictly speaking, party to the investment agreement.

Investment treaty arbitration arises from either a bilateral investment treaty or multilateral investment treaty. This means that, though the agreement is for the protection of their citizens' investments in the other contracting State(s), only States are parties to the agreement. Usually, by the nature of these investment agreements, their aim of promoting foreign investment in host States is not emphasised but contingent on the fact that protecting foreign investment would attract investors to the investment-seeking country. This template, therefore, does not

[1] See World Economic Forum, 'Global Investment Policy and Practice' <https://www.weforum.org/projects/investment> accessed 20 July 2020, where the author argues that FDI inflows depend on creating the right business environment and investment climate, underpinned by international agreements, national policies, domestic regulations and specific measures
[2] The ISDS reform discussion is ongoing.
[3] Joubin-Bret (n 3)
[4] Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2020) Law and Ethics of Human Rights, para 1
[5] See Fola Adeleke, 'Human Rights and International Investment Arbitration' (2016) 32(1) South Africa J on Human Rights 48-70, where the author discusses, among other things, how recent investment arbitration disputes have raised several human rights related issues.
[6] See T. Weiler 'International Investment Law and International Human Rights Law: Reuniting Two Long Lost Siblings' (Speaking Notes, 15 March 2018)
[7] Doug Jones, 'Investor-State Arbitration in Times of Crisis' (2013) 25 Nat'l L Sch Indian Rev 27, 57-58; See IIED, CCSI and IISD, 'Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Issues' (15 July 2019) para 1
[8] See IIED, CCSI and IISD (n 15)
[9] 'Mandates of the Working Group' (n 6) 4
[10] See Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (European Yearbook of International Economic Law, Springer Open, Berlin 2020) 117
[11] 'Mandates of the Working Group (n 6)
[12] IIED, CCSI and IISD (n 15)
[13] Sweet (n 12) 14
[14] In the case of treaty-based arbitration.
[15] In the case of international investment arbitration based on a specific contract between a State and a foreign investor.

directly include obligations on foreign investors to protect the human rights of indigenes of host communities in the course of their investment activities.[1] And, these rights become easily violated, especially in third-world countries with weak accountability mechanisms.[2] We submit that because of this gap, it behoves an international arbitral tribunal to diligently consider human right issues brought to its attention in the course of determining the dispute before it, based on internationally recognised human rights.

3. Striking a Balance between Investors' BIT Rights and their Human Rights Obligations

Historically, ISA was essentially a mechanism for achieving the twin aims of protecting the investments of foreigners, on the one hand, and enhancing the inflow of foreign direct investments (FDIs) into developing countries, on the other. In the 1960's, many third-world countries, including the newly independent African nations, were amongst the foremost nations that canvassed for an arbitration regime for international investment disputes, beginning with their contribution to the negotiation of the Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) in 1964,[3] which crystalised with the eventual enactment of municipal laws devoted to promoting and protecting foreign investments.[4]

In recent times, however, scholars and international organisations have drawn attention to the activities of some foreign investors in the oil and mining sector that are inimical to the environment and to the impunity with which these activities are carried out in developing and third-world countries.[5] These environmentally harmful activities are exemplified by some arbitration matters, such as, *Chevron v Ecuador*,[6] and *The Renco Group Inc. v The Republic of Peru*[7] *(Renco v Peru)*.

Chevron v Ecuador arbitration touches directly on ISA vis-à-vis environmental injustice. In this arbitration, the activities of Chevron, and its predecessor Texaco Petroleum Company, had led to severe pollution and complete degradation of the Ecuadoran Amazon. Since Ecuador, because of some legal constraints, could not sue Chevron for the damage done, the inhabitants of the Amazon decided to bring a group action against Chevron in the *Largo Agrio* claim and got a municipal court judgment for US$9.5 billion.[8] Despite the palpable damages caused by Chevron, it responded by suing Ecuador on the basis of the US-Ecuador BIT[9] and prayed the arbitral tribunal to override the Ecuadorian Constitution and Ecuador's obligations under human rights treaties in favour of the BIT, which the tribunal regrettably did.[10] And, though the judgment of the court of first instance has been upheld by Ecuador's Supreme Court, Chevron has refused to pay the judgment sum.[11]

Similarly, *Renco v Peru* provides another important instance where ISA has been used to perpetuate environmental injustice in underdeveloped countries. In 2006 and 2007, La Oroya, the centre of Peruvian mining activities where in 1997 the US Company Doe Run Peru bought a metallurgical complex, was reported to be one of the ten most polluted areas of the world, with 70% of the children in the area having great health challenges as a result of the pollution.[12] Environmental cleanup was part of the contract between Doe Run Peru (a subsidiary of the Renco Group Inc.) and the government of Peru but the company failed woefully to implement any of the environmental specifications in the contract, leading to the revocation of its operating licence by the Peruvian government.[13] As a result, Renco Group Inc. instituted a PCA investment arbitration against Peru for US$800million in damages, which it lost; but rather than accept the PCA's verdict, it instituted another arbitration on the same facts,[14] namely, *The Renco Group Inc. v The Republic of Peru II* (*Renco v Peru II*)[1] based

[1] See Nsongurua Udombana, 'Shifting Institutional Paradigms to Advance Socio-Economic Rights in Africa' (2007) <DO - 10.13140/RG.2.2.12829.15846> 242
[2] 'Investor-State Dispute Settlement' <https://www.elstel.org/ISDS.html.en> accessed 28 May 2021
[3] See Paul-Jean Le Cannu, 'Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System' (2018) 33(2) ICSID Rev 456
[4] See, for example, the Nigerian Investment Promotion Commission Act, CAP N 117, LFN 2004, which was originally promulgated as Nigerian Investment Promotion Commission Decree in 1993.
[5] See Global Justice Now, 'Investigating the Impact of Corporate Courts on the Ground – The Truth is out there' <https://waronwant.org/sites/default/files/ISDSFiles_Chevron_April2019.pdf> accessed 28 May 2021; see also Information Centre on Business and Human Rights, 'Prominent Organizations Publicly Condemn Chevron's Actions in Ecuador's Case' <business-humanrights.org/es/ultimas-noticias/prominent-organizations-publicly-condemn-chevrons-actions-in-ecuador-case/> accessed on 29 May 2021
[6] PCA Case No. 2007-02/AA277
[7] ICSID Case No. UNCT/13/1
[8] Global Justice Now (n 30)
[9] US-Ecuador BIT signed in 1997
[10] 'Investor-State Dispute Settlement' (n 25); see generally Fola Adeleke, 'Human Rights and International Investment Arbitration' (2016) 32(1) South Africa J on Human Rights 48-70
[11] Information Centre on Business and Human Rights (n 28)
[12] 'Investor-State Dispute Settlement' (n 25)
[13] ibid
[14] Business & Human Rights Resource Centre, 'Peru: Govt. Wins Arbitration Brought by Renco over Doe Run Smelter-Company Claimed Govt. Cleanup Order to Protect Town's Health Was Excessive' (Bloomberg, 18 July 2016) <https://www.business-humanrights.org/en/latest-news/peru-govt-wins-arbitration-brought-by-renco-over-doe-run-smelter-company-claimed-govt-cleanup-order-to-protect-towns-health-was-excessive/> accessed 4 June 2021

on the Peru-United States Trade Promotion Agreement (PTPA).[2]

As protective as the PTPA is in respect of American investors in Peru, its aim is to ensure that all forms of investment by US citizens in Peru are protected and that 'U.S. investors will enjoy in almost all circumstances the right to establish, acquire and operate investments in Peru on an equal footing with local investors',[3] not on a better footing as most foreign investors attempt to use investment treaty arbitration to achieve.

The *Renco* arbitrations and *Chevron v Ecuador* award give credence to the argument that BITs enable investors commit corporate misdeeds in host States that they do not commit in their own countries, and that they do so without any repercussions;[4] but, rather sometimes, they are rewarded with high damages against their host States when these States decide to regulate their actions.[5] As stated earlier, this state of affairs is the reason some scholars believe that ISA is skewed towards investors,[6] citing violations of indigenous peoples' human rights in host communities where oil exploitation and other mining activities take place, without regard for how these activities affect their economic, social, cultural and environmental rights.[7] It is against this backdrop that the United Nations Human Rights Council (UNHRC), by Resolution 26/9,[8] established a new intergovernmental Working Group (IGWG) to develop an international legally binding instrument to regulate transnational corporations (TNCs) and other businesses with respect to human rights.[9]

While there appears to be unanimity on the necessity to protect the environment, there remains a big gap between theory and practice and a similar big gap between what happens in developed countries and third-world countries. In order to drive the point home, we will undertake a comparative study between what is obtainable in the United States and Nigeria in terms of responses to the issue of environmental damage and personal injuries occasioned by oil spillages resulting from the activities of transnational companies.

Grigsby laments the glaring difference between the attitude of British Petroleum (BP) in settling the claims resulting from the U.S. Gulf Coast oil spill and oil conglomerates' attitude in similar or even worse circumstances in Ogoni, Nigeria.[10] He reports the incident of April 20, 2010, when BP's Deepwater Horizon oil rig in the Gulf of Mexico burst into flames resulting in eleven deaths and environmental pollution and degradation. Medical claims by affected individuals settled by BP, together with cleanup efforts, amounted to US$7.8 billion; and another US$5 billion was paid by the company to 62,000 businesses and individuals. In addition, the company agreed to pay US$18.7 billion to the states of Louisiana, Mississippi, Texas, and Florida over an 18-year period.[11]

In contrast to the above scenario, the plight of the Ogoni people, who are also victims of alleged careless practices by transnational companies, including Shell-BP, has not received similar treatment in spite of the Ogoni people's protestation that the exploitation of oil and gas on their land has resulted in the destruction of crops, fish and community land.[12] Interestingly, even though Nigerian law criminalises pollution of the environment,[13] the degradation of the environment where oil is exploited has gone on for over six decades without any meaningful remediation, amelioration of the plight of the residents or meaningful development of the affected communities.[14]

To terminate, or at least, minimise the above dichotomy, there is the urgent need for concerted international effort to arrest the situation due largely to the prevalent corruption and poverty in third-world countries.[15] To this end, the United Nations needs to accelerate the process of adopting the proposed international legally binding

[1] PCA Case No. 2019-46
[2] The PTPA entered into force on 1 February 2009.
[3] Office of the United States Trade Representative, 'Peru Trade Promotion Agreement' <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> accessed 6 June 2021
[4] See Udombana (n 24) 245
[5] See Leer Mas, 'Prominent Organizations Publicly Condemn Chevron's Actions in Ecuador Case' (Amazon Watch, 18 December 2013) <www.business-humanrights.org/ultimas-noticias/prominent-organizations-publicly-condemn-chevron-actions-in-ecuador-case/> accessed 2 June 2021
[6] Karen L. Remmer, 'Investment Treaty Arbitration in Latin America' (2019) 54(4) Latin American Research Rev 795, 796
[7] See, for example, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (African Commission Communication 156/96, pp 9-10)
[8] A/HRC/RES/26/9
[9] Friends of the Earth International, 'The UN Treaty on Transnational Corporations and Human Rights' (2019) <https://www.foei.org/un-treaty-tncs-human-rights> accessed on 20 January 2020.
[10] Scheagbe Mayumi Grigsby, 'Enforcing Economic, Social and Cultural Rights: A Stark Dichotomy', *NE. U. L. R. EXTRA LEGAL* (3 May 2017) 2-3.
[11] Jessica Hagen-Zanker and Heidi Tawakoli, 'An Analysis of Fiscal Space for Social Protection in Nigeria' (2012) <www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7580.pdf.> cited in Scheagbe Mayumi Grigsby, 'Enforcing Economic, Social and Cultural Rights: A Stark Dichotomy', *NE. U. L. R. EXTRA LEGAL* (3 May 2017).
[12] Grigsby, (n 46) 3-4.
[13] Minerals and Mining Act, s 115.
[14] Udombana (n 24) 247-248
[15] See Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21st Century*, Gordon Brown (ed.) (Open Book Publishers, 2016) 68-69.

instrument to regulate the activities of transnational corporations (TNCs) and other companies [1] touching on human rights,[2] in order to safeguard the environment globally.[3] The proposed UN Treaty on Transnational Corporations and Human Rights (UN Treaty) would offer a major legal regime to address environmental injustice, especially if it is based on the principle of the already existing equality of all peoples irrespective of their backgrounds or national legal systems[4] and social equity that seeks to eliminate obvious inequities.[5]

Thus, if properly developed, the proposed UN Treaty would help to ensure that environmental pollutions resulting in similar circumstances receive the same treatment, irrespective of whether they occur in a first or third-world country.[6] The proposed UN Treaty defines 'human rights abuse' to mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognised human rights and fundamental freedoms, including environmental rights.[7] Similarly, the proposed Treaty defines 'business activities' to mean any for-profit economic or other activity undertaken by a natural or legal person, including State-owned enterprises, transnational corporations, other business enterprises, and joint ventures, undertaken by a natural or legal person, including activities undertaken by electronic means.[8] However, the proposed Treaty is to apply only to businesses, including but not limited to transnational corporations and other business enterprises, that undertake business activities of a transnational character.[9] Of utmost importance is the provision that victims of human rights abuses in the context of business activities shall enjoy all internationally recognised human rights and fundamental freedoms.[10]

In concluding this section, it is important to note that the aim of developing human right norms is to balance foreign investor's right to the protection of their investment against their obligation to respect the recognised human rights of all those that may be affected by their business activities. Thus, under the proposed UN Treaty, the UN reaffirms the fundamental human rights and the dignity and worth of the human person, the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations.[11] In a nutshell, just like the Founding Fathers of the United States perceived it, human rights must come first, and legal regimes second.[12]

4. State Parties' Role under the Evolving Dispensation

One of the fallouts of corruption in third-world countries is that government and government officials usually fail to monitor the operations of and require standard safety measures by transnational companies and other businesses in the oil and mining sector. For instance, in *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*[13] (*SERAC* case), the Applicant alleged that Nigeria failed to monitor the operations of and require standard safety measures by its company, Nigerian National Petroleum Company (NNPC) and a joint venture, Shell Development Petroleum Company, in which it has majority shareholding. The complaint further alleged that the involvement of government and the oil companies' operations led to the violation of the Ogoni people's economic, social and cultural (ESC) rights under the African Charter of Human and Peoples' Rights (African Charter).

The African Commission found that Nigeria was in breach of several ESC rights, including the rights to health, property, and protection of family.[14] The Commission also found that Nigeria failed in its responsibility under the African Charter to take the needed steps for the 'improvement of all aspects of environmental and industrial hygiene.'[15]

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[1] See the proposed UN Treaty on Transnational Corporations and Human Rights (2020 Second Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises).
[2] Friends of the Earth International (n 45).
[3] The UNHRC adopted Resolution 26/7 which established a new Intergovernmental Working Group (IGWG) to develop a legally binding instrument to regulate transnational corporations.
[4] Lawrence Cronin, 'The Ninth Amendment and Conceived Children: Legal Theory and Civil Action' (2021) 31 <https://app.scholasticahq.com/supporting_files/3957471/attachment_versions/3970589> accessed 15 June 2021
[5] See Tia Gaynor, 'Decisionmaking, Social Equity and Choice Points' [10 January 2017] PA Times <https://patimes.org/decision-making-social-equity-choice-points/> accessed 16 June 2017
[6] See Hilary Charlesworth, 'A Regulatory Perspective on the International Human Rights System' in Peter Drahos (ed), *Regulatory Theory* (ANU Press, 2017) 357.
[7] 2020 Second Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, art 1.2
[8] ibid, art 1.3
[9] ibid, art 3
[10] ibid, art 4
[11] 2020 Second Revised Draft (n 58), Preamble
[12] Cronin (n 55) 16-17
[13] Communication 155/96 (2001)
[14] ibid 10.
[15] ibid 9.

One great feature of the proposed UN Treaty is its obligation on States to ensure the protection of their citizens against human rights violations resulting from transnational-like business activities.[1] This is important for two reasons. First, it adequately addresses the lack of or inadequate enforcement mechanism in previous human rights instruments,[2] which often resulted in a wide gap between promise and performance.[3] Secondly, as the *SERAC* case above reveals and as contemplated by article 1.3 of the proposed UN Treaty, the contravening business entity may be wholly or partly owned by the State, which may decide to turn a blind eye to the violation of the human rights of those it is supposed to protect.[4]

From the analysis above, the proposed UN Treaty is a welcome development but it is not foolproof as some States have not always kept faith with their human rights obligations.[5] In the new dispensation, affected communities should have legal standing to institute group action in international investment arbitration or join arbitral proceedings as third parties.[6] This can be facilitated in two ways. First, the proposed UN Treaty should specifically provide for third-party rights to participate in ISA proceedings where a person or a group of persons can show that their human rights have been violated by the activities of an investor.

The second way to fortify persons or communities with *locus standi* to protect their human rights against violation before ISA tribunals is for States to enact third-party rights legislations as some countries, such as, Australia, United Kingdom and United States, have already done. For instance, under the English Contracts (Rights of Third Parties) Act 1999, a person who is not a party to a contract may nevertheless enforce a term of that contract if the contract expressly provides that he may do so or if it purports to confer a benefit on him.[7] Also, where the contract in question contains an arbitration agreement whose scope is wide enough to cover the dispute in question, a third party who applies to be joined to the arbitral proceedings is treated as being a party to the arbitration agreement as regards the enforcement of his right pursuant to the contract,[8] such that he is not just entitled but can be required to arbitrate any dispute.[9]

It is submitted that third-party rights should be advanced beyond the 1999 English Act to allow any person or group of persons who can show that their interest is likely to be affected by the outcome of the arbitration proceedings to join in the proceedings for the purpose of protecting their interest. On that score, it is pertinent to note the momentous and revolutionary decision of the Nigerian Court of Appeal in *Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Services & Anor*,[10] where the Court held that a third party non-signatory to an arbitration agreement has the right to intervene in an on-going arbitration with the aim of stopping the continuation of the process where the third party can show that his interest is likely to be affected by the outcome of the arbitration proceedings. Although the *Statoil* decision has been criticised as having no basis under Nigerian law,[11] it remains a bold judicial pronouncement begging for legislative support to provide a legal framework for the entrenchment of third-party rights in Nigeria and other countries which are yet to enact third-party rights legislations.

5. Conclusion

The rationale for the position taken in this paper is that rights vested in a person must attract obligations and that where there is a proved wrong there has to be a remedy.[12] Where, for example, a foreign company derives rights from an investment instrument, it cannot avoid its liability to the community where it carries out operations if such operations result in the violation of the rights of those who live in the community. The opposite approach ultimately resulted in several human rights violations in Nigeria by government and transnational companies for

[1] 2020 Second Revised Draft (n 58), art 5
[2] Hilary Charlesworth, 'A Regulatory Perspective on the International Human Rights System' in Peter Drahos (ed), *Regulatory Theory* (ANU Press, 2017) 357, 359; see also David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' [October 2015] (109)(4) *The American Journal of International Law*, 713, 748.
[3] See Nsongurua Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' (2004) 40 Stan J Intl L 105, 138; See also Inter-Parliamentary Union and OHCHR, *Human Rights Handbook for Parliamentarians* (No. 26, 2016) 100
[4] See Udombana (n 24) 247-249
[5] *SERAC* case (n 58); see the *Convention on the Rights of the Child 1989*, which has similar obligations on States as the proposed UN Treaty and which has been ratified by all the nations of the world except the US but has received only lip-service from most third-world countries as evidenced by the deplorable conditions under which many children live in these countries; see generally Violet Benneker, Klarita Gërxhani and Stephanie Steinmetz, 'Enforcing Your Own Human Rights? The Role of Social Norms in Compliance with Human Rights Treaties' (2020) 8(1) Social Inclusion 184-193
[6] See *Chevron v Ecuador* (n 28) where one of the arguments of the Claimant was that the indigenes of the devastated Ecuadorian Amazon lacked the locus to bring a group action against it.
[7] English Contracts (Rights of Third Parties) Act 1999, s 1
[8] ibid, s 8(1)
[9] David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet & Maxwell, London 2007) 96
[10] (2014) LPELR-231444 (CA)
[11] Jeremy Wilson, 'Nigerian Court of Appeal Allows Third Party to Challenge Arbitration Award' (12 February 2915) < https://www.covafrica.com/2015/02/nigerian-court-of-appeal-allows-third-party-to-challenge-arbitration-award/> accessed 8 February 2021
[12] See the decision in *Statoil (Nigeria) Limited & Anor v Federal Inland Revenue Services & Anor* (n 76).

over half a century, and still counting.[1] These violations are as a result of pollution and degradation of the environment from oil and gas exploitation, with no regard to the indigenes of the affected communities.[2] This has led to agitations, insurgencies and deaths.[3] It is against this background that in 2014, a people's victory was celebrated when the UNHRC adopted Resolution 26/9,[4] which established a new intergovernmental Working Group (IGWG) to develop an international legally binding instrument to regulate transnational corporations (TNCs) and other businesses with respect to human rights.[5]

It is recommended that all individual countries should build on the effort of UNHRC by enacting municipal laws to protect the environment as Chile has done recently.[6] And countries, like Nigeria, which already have laws that criminalise environmental pollution[7] should begin to give teeth to these laws. On its part, the UN should consider incorporating effective accountability measures in the proposed Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.

[1] See generally K. G Kingston, C. Wigwe, S. Dike, Z. Adango and O. V. C Okene 'Current Issues in Environmental Justice in the Nigerian Society' (Published Conference Paper of the National Association of Law Teachers, April 2019) <https://www.researchgate.net/publication/332379885_CURRENT_ISSUES_IN_ENVIRONMENTAL_JUSTICE_IN_THE_NIGERIAN_SOCIETY> accessed 8 June 2021

[2] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (African Commission Communication 156/96) 9-10

[3] See Crisis Group, 'The Swarms of Insurgency: Nigeria's Delta Unrest' (20 August 2006) <https://www.crisisgroup.org/africa/west-africa/nigeria/swamps-insurgency-nigerias-delta-unrest> accessed 12 June 2021; see also Udombana (n 24) 247

[4] A/HRC/RES/26/9

[5] Friends of the Earth International (n 45)

[6] Information Center on Business and human Rights, 'Chile: By Majority Vote, the Legislature approves a Law that Defines the Crime of "Water Theft" to Control and Sanction Agribusiness, Mining and Forestry Companies' (4 June 2021) <https://www.business-humanrights.org/es/%C3%BAltimas-noticias/chile-por-mayor%C3%ADa-de-votos-legislativo-aprueba-ley-que-tipifica-el-delito-de-robo-de-agua-para-fiscalizar-y-sancionar-a-empresas-de-agronegocio-miner%C3%ADa-y-forestales/> accessed 12 June 2021

[7] Minerals and Mining Act, s 115.

Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

Influence of Negotiation Dispute Resolution Mechanism on Sustainable Conflict Resolution in Bungoma County, Kenya

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Abstract
As noted by empirical evidence, negotiation is a key approach to the peaceful resolution of dispute and conflicts that may arise between the parties. It is also within the reach and control of parties like communication and collaboration because there are no third parties involved. Thus, negotiation is a direct process of dialogue and discussion taking place between at least two parties who are faced with a conflict situation or dispute. Both parties come to the realization that they have a problem, and both are aware that by talking to each other, they can find a solution to the problem. The purpose of this study was to assess the influence of utilization of alternative dispute resolution mechanisms by leaders on sustainable conflict resolution in Bungoma County, Kenya. The study focused on identifying the various types of conflicts in Lwandanyi, Webuye and Cheptais Sub-Counties and the factors influencing the adoption of Alternative Dispute Resolution Mechanisms with specific focus on negotiation . The specific objective of the study was to examine the influence of negotiation dispute resolution mechanism on sustainable conflict resolution in Bungoma County, Kenya. The sample size was comprised of grass root leaders. Simple random sampling and stratified random sampling methods were used to pick the required sample size for the study from the targeted population. The required data was collected using questionaire and interview schedules. The study found that leaders in Bungoma County appreciate and make use of ADR mechanisms in conflict resolution. Mediation mechanism was commonly cited as being used by leaders in addressing various forms of conflict. The study also found that land disputes are the commonest of all conflicts. This was attributed to historical land injustices especially in Mt. Elgon region where politicization of land allocations in the former white settler farms has led to long standing conflict between the Bukusu and the Sabaot communities. The study also revealed that most land disputes were arising due to lack of land ownership documents and rampant corruption at the lands' ministry was blamed for this state of affairs. Based on the study findings, it was recommended that the National and County governments take decisive action to address the land grievances of the Sabaot community to stop the inter clan fighting and leaders be trained and equipped with skills and competencies necessary for conflict resolution.
Keywords: Negotiation, Dispute Resolution Mechanism, Sustainable Conflict Resolution
DOI: 10.7176/JLPG/111-07
Publication date: July 31st 2021

1.1 Background of the Study

According to conflict theorists (Fisher, 2000) there are several sources of disputes including economic, value and power. Economic dispute involves competing motives to attain scarce resources. Each party wants to get the most that it can to maximize net gains. Value disputes involve incompatibility in ways of life, ideologies the preferences, principles and practices that people believe in. Power dispute occurs when each party wishes to maintain or maximize the amount of influence that it exerts in the relationship and the social setting. Power conflict occurs between individuals, groups or nations.

Over the last decade courts have developed rules that require parties to try Alternative Dispute Resolution mechanisms, usually mediation, before trial. Mandatory Alternative Dispute Resolution has become popular because it helps unclog the court system and because most cases can settle once the parties have undertaken discovery and understand what evidence exists. Uwazie (2011) however observed that despite numerous attempts at modernization, many African countries are still struggling to establish functional, timely, and trusted judicial systems. Most courts in Africa are fraught with systemic problems, such as antiquated structures. Countless judges still take notes by hand, as there are no stenographers. Re-cords are archived manually and a reliable computer in an African court is rare, especially at the magistrate courts that handle most cases. Many African citizens have lost faith in the ability of their nations' courts to provide timely or just closure to their grievances (Liebmann, 2000).

1.1.1 Alternative Dispute Resolution

Dependent on the intensity of the disagreement the dispute may gradually become a confrontation and finally a conflict. Dispute resolution can occur through three ways; negotiated outcome, where the parties concerned sort out things themselves: mediated outcome, where the parties use the services of an independent mediator to help them arrive at their own agreement and an arbitrated or adjudicated outcome, where an independent arbitrator or

court determines how the dispute is to be resolved and makes a binding decision or order to this effect (Algert & Watson, 2002).

Alternative Dispute Resolution (ADR) is the general name given to a variety of procedures available to parties in civil cases to resolve their disputes before a formal trial (Lambert and Myers, 1999). Alternative Dispute Resolution refers to processes for resolving disputes other than litigation. Alternative dispute resolution (ADR) mechanisms have existed for thousands of years. Alternative dispute resolution (ADR) refers to any process or collection of processes established to resolve disputes without trial or violence. The term ADR is often used to refer to a broad category of ADR processes such as negotiation, conciliation, mediation, settlement conferences, arbitration, consensus building, and community conferencing.

The primary motivations for ADR are to save money and control risk. Preparing for trial is extremely expensive, and parties can save money if they can resolve the case without having to incur the expense of trial preparation (Barrett & Barrett, 2004). Also, when parties settle cases, they have some control over the outcome of the case in that they can negotiate for terms of the settlement. If a lawsuit goes to trial, the outcome of the case is left entirely in the hands of the judge or jury. Parties cannot control the risk of losing at trial. ADR gives parties a chance to control that risk. In some cases, privacy or confidentiality may be a factor. Most litigants think of ADR as private, and thus, if they seek secrecy, they may be motivated to try ADR.

Deferent types of Alternative Dispute Resolution include arbitration, negotiation, mediation, adjudication, family group conferences, expert determination and case evaluation. In mediation, a neutral third party helps the parties come to an agreement about how to resolve the case (Barrett, & Barrett, 2004). The mediator has no authority to impose a solution on the parties. Instead, he goes back and forth between sides to help them come to an understanding about how the case could be resolved to their mutual satisfaction. A mediator can be helpful in helping parties evaluate their case realistically, as the mediator can point out which facts or arguments he believes or rejects (Barrett, & Barrett, 2004). When courts order parties to try ADR, they most often order mediation. Non-mediated settlement is the process where the parties negotiate with each other without the help of a third party to come to a mutually satisfactory resolution of the case. This process is not ordered or overseen by a court and, therefore, is a private, rather than public, process.

The idea of Alternative Dispute Resolution (ADR) is about the search for and application of "nonconventional" peaceful means of settling disputes and resolving conflict situations using the least expensive methods, and in ways that satisfy the parties, as well as ways that preserve relationship diplomatically after a settlement might have been reached by the two parties (Hornby, 2006). ADR is specially meant to serve as an alternative to the official or conventional means of settling disputes, mainly through litigation and the courts, but with a preference for non-violence.

1.1.2 Bungoma County

Over the years Bungoma County has witnessed numerous conflicts ranging from land clashes in the Mt Elgon region, political violence linked to electoral processes, domestic violence, conflicts related to business transactions as well as labor unrest just to mention but a few. Investigation of the influence of the utility component of Alternative Dispute Resolution strategies will help inform sustainability of conflict resolution efforts (Chesi, 2012). Also, land conflicts has affected Mt. Elgon District in Bungoma county of Kenya. These land conflicts have had far reaching negative effects on the certainty of land markets, tenure and food security, economic production and reduction of poverty. Often, the land conflicts lead to; civil strife, loss of lives, population displacement, destruction of property and international humanitarian crisis (Chesi, 2012).

1.2 Statement of the problem

Without timely, accessible, affordable, and trusted mechanisms to resolve differences, localized disagreements or crimes can degenerate into broader conflict (Algert, 1996). This contributes to cultures of violence and vigilante justice. There are recurrent conflicts despite efforts being put in place to address such conflict. The court systems are overwhelmed by a backlog of cases and have systemic challenges being brought about by corruption, poor infrastructure and inaccessibility that work to kill their efficiency. The choice of a good alternative dispute resolution strategy is a difficult task, because a lot of physical and mental energy is required (David, 2006).

It is apparent that the success of a functional alternative dispute resolution strategy depends on good application using appropriate method which can subsequently motivate parties in dispute in their various communities. Lack of good alternative dispute resolution strategy by a trained individual in our community and institution can lead to inappropriate behavior and frustration. In making choice of alternative dispute resolution strategies communities are faced with the challenges of selecting the method suitable for achieving non (David, 2006).

Sustainable conflict resolution still remains a major challenge in Kenya and beyond. As noted by Murungi (1995), numerous conflict resolutions have been attempted, but none of them seems sustainable in creating an atmosphere for peace, security and inter-ethnic. Disputes keep recurring sometimes with greater intensity leading

to widespread loss of life and destruction of property. This is despite the litigation processes in court systems and other alternative efforts being expended in addressing conflict. There is a disconnect between sustainable conflict resolution and the numerous efforts being put to use. No study had been done on the influence of negotiation dispute resolution mechanism on sustainable conflict resolution in Kenya hence a research gap. This study therefore sought to investigate the influence of negotiation dispute resolution mechanism on sustainable conflict resolution in Bungoma County, Kenya.

1.3 Purpose of the Study

The purpose of the study was to assess the influence of utilization of alternative dispute resolution mechanisms by leaders on sustainable conflict resolution in Bungoma county, Kenya.

1.4 Objective of the study

The specific objective of the study was;

To assess the influence of negotiation dispute resolution mechanism on sustainable conflict resolution in Bungoma County, Kenya

1.5 Research Question

The study sought to answer the following question;

What is the effect of negotiation dispute resolution mechanism on sustainable conflict resolution in Bungoma County Kenya?

1.6 Significance of the Study

This research is vital to the conflict resolution teams in Bungoma County because it provides an insight on the utilization of alternative dispute resolution mechanisms by leaders on sustainable conflict resolution. The teams will be able acquire knowledge on the best approach to conflict resolution.

The results of this research are important to the Government of Kenya in the development of rules and procedures of solving conflicts arising within the country. Through the findings of this study, the policy makers can learn various ways in which they may need to handle conflict resolution and hence come up with policies that lead to sustainable conflict management and resolution.

The results of this study will greatly benefit the victims of conflicts in Bungoma County. It will increase awareness on the benefits of embracing Alternative Dispute Resolution Mechanisms and contribute to quick, timely and affordable administration of justice.

Future researchers will also be able to use the research findings as a benchmark to their research on conflict resolution. In addition, the findings of this study will serve as a source of reference in future research. The study has also suggested other areas where future researchers can further their knowledge.

1.7 Literature Review

This section discusses past studies on utilization of negotiation dispute resolution mechanisms by leaders and how it influences sustainable conflict resolution.

1.7.1 Empirical Review

According to Uwazie (2011) the notion of ADR fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation. Pioneering ADR projects in Ghana, Ethiopia and Nigeria have generated positive results and illustrate the suitability of ADR in African contexts. Under these arrangements, ADR was used as the default resolution method. Formal court litigation, or instances where the judge actually judges, are reserved for cases of constitutional or legal interpretation, where there is a need to set precedence, in cases with major public policy implications, or as a last resort after ADR has been tried.

1.7.1.1 Negotiation Dispute Resolution Mechanism

Negotiation is a process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict (Fisher, Ury and Patton 1991). Negotiation is any form of communication between two or more people for the purpose of arriving at a mutually agreeable solution. According to Fisher and Ury, (2011) prostrates that negotiation is a basic means of getting what you want from others. It is a back and forth communication designed to reach an agreement. In Negotiation, representatives of disputing parties often called negotiators meet to work with or against each other for their own position or pre-determined, desired outcome. Often formal negotiation proceedings take place between groups of people rather than individuals, and the list of tactics that negotiators may use is long and varied.

As noted by Umunadi (2011), negotiation is a key approach to the peaceful resolution of dispute and conflicts that may arise between the parties. It is also within the reach and control of parties like communication and collaboration because there are no third parties involved. Thus, negotiation is a direct process of dialogue

and discussion taking place between at least two parties who are faced with a conflict situation or dispute. Both parties come to the realization that they have a problem, and both are aware that by talking to each other, they can find a solution to the problem. The benefits of compromised solution, it is believed to outweigh the losses arising from refusal to negotiate (Umunadi, 2011). In negotiation, there must be communication between two or more people intended to gain understanding, to produce agreement, to bargain between individual involved in a conflict or dispute.

Negotiation typically takes place during the early stages of conflict when communication between parties is cordial and good or at the de-escalation point when communication has been restored (Chikwe, 2011). There are two types of negotiation. We have the positional negotiation and the collaborative negotiation. The first type of negotiation is based on the aggressive pursuit of interest by parties, and is typically adversarial and competitive. Parties make demands that are inconsiderate of the interest and needs of others, and this makes it difficult for this interest to be met. Parties may also perceive themselves to be in competition. The desire will be to win, instead of working towards a mutually beneficial outcome. Thus, the demands of one party can be met only to the detriment of the other. Parties tend to stubbornly adhere to their positions and one side seems to dominate the negotiation. It can break down easily (Chikwe, 2011).

Fisher and Ury (2011) identify negotiation as the most used form of dispute resolution because of its vast applicability within the home and community. In a negotiation the disputants may represent themselves or they may be represented by agents and whatever the case, whether they are represented or not represented, they have control over the negotiation process. Even though negotiations can be time consuming and mentally taxing, they are usually most fruitful in the end, for there is the likelihood of a win- win situation, where both parties leave the table with something better than what they came with (Mnookin et al, 2000).

1.7.2 Theoretical framework

Various theorists have come up with theories on dispute resolution. The theories adopted by this study include theory of process pluralism, theory of conflict and General Theory on Conflicts and Disputes. Theory of process pluralism points out that different kinds of matters may require different kinds of procedures or ways of dealing with the underlying conflict (Ralf, 1958) theory of conflict attempts to understand the different sources of conflict, the dynamics of how conflict develops, escalates or declines, and how conflict can be managed, reduced or resolved. Conflict theory tries to explain the types of conflicts that exist and whether they are productive or destructive and then goes on to attempt to explain the ways in which conflict proceeds or is structured and how it can be managed or resolved. The General Theory on Conflicts and Disputes assigns disputes to transitional and mature democracies and conflicts to authoritarian regimes (Otomar and Wehr, 2001). The First Premise of the General Theory is that there are no conflicts in democratic society, only disputes. The Second Premise is that in authoritarian regimes there are only conflicts and politicized systems of settlement, not disputes. The Third Premise is that in international relations, national states can transform conflicts into disputes. Conflicts are those issues that lack a legitimate, reliable, transparent, non-arbitrary forum for the peaceful settlement of differences (Otomar and Wehr, 2001). Disputes, conversely, are pre described as having recognized forums for their expression and resolution that meet the above criteria. In short, conflicts lack a viable containe" for the routine management of differences. A mature theory of dispute-resolution must encompass all institutions and processes - whether legal or non-legal, formal or informal, contemporary or customary - to further the end of settling disputes by smoothing away discords.

1.8 Research Methodology

This study adopted a descriptive research design. As noted by Cooper and Schindler (2000) descriptive research design are concerned with addressing the particular characteristics of a specific population of subjects, either at a fixed point in time or at varying times for comparative purposes. As noted by Gill and Johnson (2002), descriptive research design describes characteristics associated with the subject population. By using descriptive research design, the study was able to establish the how of the phenomenon under investigation. The target population of this study comprised of the dispute resolution leaders in Bungoma county. These are Members of County Assembly (MCA), religious leaders, County Commissioners, local chiefs and their assistants, village and clan elders, representatives of aid agencies, representatives of civil society groups, women leaders and leaders of the youth. These leaders were selected because of the role they play in dispute resolution.

The study selected a representative sample of 90 from the target population. Use of a sample enables the study to save cost and time. According to Pamela L.A & Robert B.S (1995) experienced researchers regard a sample of 100 respondents as the minimum sample size and 1000 as the maximum sample size for large populations. They note that it is seldom necessary to sample more than 10 percent of the population to obtain adequate confidence.

The study used purposive sampling and simple random sampling to select a sample from the target population. Purposive sampling is a method in which elements are chosen based on purpose of the study. In this study purposive sampling was used to pick three Sub-Counties namely; Webuye, Cheptais and Lwandanyi

because they are conflict flash points. Simple random was used to randomly sample the leaders in each of the selected Divisions. According to Mugenda and Mugenda (2003), simple random sampling is a sampling technique designed to ensure that every unit of a population has equal chances of being selected in the population. By use of simple random sampling in this study, a representative sample was obtained.

The data collection instruments that were used in this study are questionnaires and checklist of specific questions that were posed to key informants. As noted by Mugenda and Mugenda(1999), questionaires are appropriate for use when the target population is educated and knowledgeble. The questionaires were chosen for data collection in this study since the population of the study is well educated and also the questionaires save on cost and time. The questionnaire designed in this study comprises of two sections. The first part includes the demographic characteristics questions designed to determine the profile of the respondents while part two deals with the identified factors. The questionnaire has both open and close ended questions. The closed ended questions make use of a five point Likert scale where respondents were required to fill according to their level of agreement with the statements. The unstructured questions were used to encourage the respondents to give an in-depth response where close ended questions are limiting.

A pilot study was conducted to test for clarity and understanding of questions and also to find out whether the questions yield the answers expected. The researcher selected a pilot group of 5 individuals from the target population.

The study used both face and content validity to ascertain the validity of the questionnaires. Content validity was employed by this study as a measure of the degree to which data collected using a particular instrument represents a specific domain or content of a particular concept.

Reliability was assessed using the split half reliability method. Reliability is said to be stable if it gives consistent results with repeated measurements of the same object with the same instrument. The degree of stability is determined by comparing the results of repeated measurements. The split half method involves scoring two-halves of a test separately for each person and then calculating a correlation coefficient for the two sets of scores. The researcher split the instrument into two halves. The researcher got a coefficient of 0.70 which implies that there is a high degree of data reliability.

Kothari (2004) views data analysis as the whole process, which starts immediately after data collection and ends at the point of interpretation and processing of results. The quantitative data collected using questionnaires and interview schedules will be inspected for completeness, and analysed using Statistical Package for Social Sciences (SPSS v. 21.0). The results were presented in form of tables and graphs.

1.9 Findings

Research findings are presented in this section.

1.9.1 Questionnaire return rate

Out of 90 questionaires administered to 90 leaders in three sub counties of the larger Bungoma County,85 were returned making questionaire return rate to be 94%.

1.9.2 Demographic information of the respondents

This study sought information from male and female leaders of diverse age groups. This was aimed at ensuring that all leaders regardless of the age participated in the study.

Table 1: Age of the respondents

	Frequency	Percent
25-35	6	6.7
35-45	26	28.9
45-55	36	40.0
55-65	21	23.3
65 and older	1	1.1
Total	**90**	**100.0**

The Table shows that 40% of the respondents were aged between 46-55 years and that those aged between 36-45 years accounted for 28.9% of those interviewed. Those aged between 26-35 years accounted for 6.7% while those between 56-65 years stood at 23.3% The leaders who indicated that they were 65 years and above stood at 1.1% of the entire sample.

In terms of gender,86.7% of the interviewed were men while 13.3% were women. In Luhya ,Teso and Saboat cultures women have not been readily accepted as capable leaders and have therefore been largely excluded from grass root leadership. Most village and clan elders are men hence the small number of women

respondents. It is vital to note that the 2010 constitution gives both men and women equal opportunity in all spheres of social,political and economic being of our country. Therefore nobody should be discriminated or denied leadership opportunities on account of their gender. Women must rise to challenge these dicriminatory tendencies and play an active role in the leadership of their communities.

Table 2: Gender of the respondents

		Frequency	Percent
Valid	Male	78	86.7
	Female	12	13.3
	Total	**90**	**100.0**

The respondents were asked to indicate their marital status, this was aimed at establishing whether marital status has a bearing on whether an individual is given leadership roles or not including conflict resolution.

Table 3: Marital status of the respondents

		Frequency	Percent
Valid	Married	86	95.6
	Single	4	4.4
	Total	**90**	**100.0**

This study indicates that 95.6% the respondents are married while a mere 4.4% are single an indication that the local communities place value on family life and thus require their leaders to be marry before taking on leadership roles. This however, needs to change so that leadership is not pegged on marital status. It is discriminatory and unconstitutional

The respondents were asked to indicate their level of education, this was aimed at establishing whether education is a factor that hinders people from executing their leadership responsibilities including conflict resolution.

Table 4: Education of the respondents

		Frequency	Percent
Valid	.00	1	1.1
	Primary	3	3.3
	Secondary	43	47.8
	Tertiary	33	36.7
	University	10	11.1
	Total	**90**	**100.0**

This study indicates that literacy levels among leaders in Bungoma County is high with 47.8% of the sampled leaders having attained secondary education,36.7% had gone through tertiary institutions while holders of university degrees stood at 11.1%. This therefore shows that the leaders have the requisite education and capacity to execute their functions including conflict resolution.

The question on whether the leaders were born and raised in their area of jurisdiction or they immigrated in to the area was also posed to the respondents. This was aimed at ensuring that the respondents understand the area they work in and the conflict issues at hand. 77.8% of the respondents said they were born and raised in their areas of jurisdiction. 15.6% of the respondents migrated into their current areas of residence while 2.2% of the sampled respondents were born in their areas of residence but were raised elsewhere. This is a clear indication that most of the sampled leaders know their areas well and have a grasp of the issues that cause conflict.

From the study it was also established that 80% of the respondents have lived in their areas of jurisdiction all their lives while 11.1% indicated that they had lived in their areas of residence for Ten years or more. Only 7.8% of the responding leaders said they had lived in their areas for more less than five years. The length time lived in area has a bearing on a person's understanding of not just the area and its people but also the issues affecting them.

This question was posed to respondents with a view to establish whether or not they had worked in the public sector as government employees. Experience in the public sector especially in volatile areas gives an officer opportunity to handle and manage conflict. It affords such officers an opportunity to understand conflict resolution including alternative dispute resolution mechanisms. This experience works to equip the officers with knowledge and skills in the execution of their responsibilities to the public.

As shown in Table 5, 50% of the respondents reported that they have never worked in the public sector as government employees while 44.4% reported to have worked in the public sector. The 50% however explained that they are village and clan elders who work alongside public servants especially chiefs and County Commissioners. Five respondents did not answer this question.

Table 5: Whether or not leader had worked in public service

		Frequency	Percent
Valid	.00	3	3.3
	Yes	40	44.4
	No	45	50.0
	7.00	2	2.2
	Total	**90**	**100.0**

The dominant tribes in Bungoma Countyy are the Bukusu and the Sabaot accounting for 70% and 24% of the County population respectively.The Kikuyu,Teso,Tachoni and other tribes account for only 6% of the County population.This percentages explain the antagonism between the Bukusu and Saboat over land ,distribution of jobs and development resources.

In Lwandanyi and Cheptais Sub-Counties,this conflict is pronounced because of these two dominant tribes.The Saboats mainly inhabit the Cheptais area and the greater Mt. Elgon .The Saboat accuse the Bukusu of dominating them by taking most of the political and state leadership positions because of their superior population numbers. This fights led to the creation of Mt. Elgon constituency so that the Sabaots can have their own member of parliament to champion their grievances.

The Bukusu on the other hand accuse the Sabaot of alleniating themselves and identifying with the Kalenjin in the Rift Valley a fact that was always visible during elections where the Saboat voted to support the presidential candidate fronted by the Kalenjin community.

Table 6: Intermarriage among communities

		Frequency	Percent
Valid	.00	2	2.2
	Yes	85	94.4
	No	3	3.3
	Total	**90**	**100.0**

Communities in Bungoma County intermarry freely. 94.4% of the sampled respondents indicated that there's free intermarriage among tribes residing in their Sub-Counties. A negligible 3.3% responded to the contrary. However, this has done little to prevent conflict over land resource allocation in the County an indication that there is significant political undertones in the conflicts.

1.9.3 Frequency of conflict

Table 7: Frequency of Conflict

		Frequency	Percent
Valid	.00	3	3.3
	Fairly frequent	14	15.6
	Not frequent	30	33.3
	Very Frequent	2	2.2
	After every electoral cycle	41	45.6
Total		**90**	**100.0**

The study also sought to establish the frequency of conflicts and as shown in Table 4.4.6, 45.6% of the respondents reported that conflicts arise after every electoral cycle. 33.3% of the respondents said the conflicts though present, are not frequent while 15.6% of the sampled leaders said the conflicts are fairly frequent. In Kenya, elections are always associated with violence and it is not surprising that 45.6% of the sampled leaders in Bungoma County said the conflicts arise during and after elections. Politicians use violence to influence the outcome of elections.

The frequency of conflict especially around election time is an indication that politics is a major factor in the triggering of conflict in the County. Politicians take advantage of community grievances concerning land and distribution of development resources to whip up emotions and even sponsor violence for personal gain. In my discussion with leaders in the sampled sub- Counties it emerged that prior to elections the Sabaot leaders in mt Elgon cause tension to trigger mass exodus of the Bukusu so that they do not vote and tilt scales in favour of particular candidates.

1.9.4 Adoption of negotiation in conflict resolution

Negotiation has been overwhelmingly adopted as an alternative dispute resolution mechanism in Bungoma County. This is evidenced 93% confirmation by the sampled respondents. This question was aimed at establishing whether or not the leaders had adopted this mechanism in their day to day conflict resolution duties.

Table 8: Negotiation as used by leaders in dispute resolution

		Frequency	Percent
Valid	00	1	1.1
	any form of communication	22	24.4
	back and forth communication	15	16.7
	negotiators meet to work with or against each other	4	4.4
	negotiation proceedings take place between groups of people	2	2.2
	parties come to realization of the problem, ensure communication between conflicting parties	21	23.3
	12.00	8	8.9
	15.00	6	6.7
	45.00	1	1.1
	56.00	1	1.1
	135.00	5	5.6
	145.00	1	1.1
	156.00	1	1.1
	1234.00	1	1.1
	Total	**90**	**100.0**

The purpose of negotiation is to engage the parties in dispute in direct communication that will result in a mutually agreed settlement of the dispute. The communication is usually back and forth and is designed to ensure the conflicting parties reach an agreement. This was pointed out by 17% of the sampled respondents. Mostly, negotiators meet to work with or against each other for their own position or pre-determined, desired outcomes. The aim is to extract as much as they can from the other party in the dispute.

Negotiation proceedings may take place between groups of people rather than individuals, and the list of tactics that negotiators may use is long and varied. Through negotiation both parties come to the realization that they have a problem, and both are aware that by talking to each other, they can find a solution to the problem. This was pointed out by 23% of the respondents.

Those leading the negotiations must ensure that there's communication between the conflicting parties intended to gain understanding, to produce agreement, to bargain between individual involved in a conflict or dispute.

In this study 24% of the sampled respondents indicated that the negotiation process they have adopted ensures that there's communication between the conflicting parties is intended to gain understanding and to produce a mutually agreeable settlement.2% indicated that negotiations that take place are between groups of people rather than individuals. 4% of the respondents said negotiators meet to work with or against each other for their own position or pre-determined, desired outcome. They do this with the realization that they have a problem, and both are aware that by talking to each other, they can find a solution to the problem. It is clear from this study that the leaders pay a lot of attention to communication between the conflicting parties since this leads to understanding of each others' arguments and ultimately to a negotiated settlement.

1.9.5 Negotiation is based on the aggressive pursuit of interest by parties, is adversarial and competitive where parties make demands that are inconsiderate of the interest and needs of others

This study showed that a sizeable 47% of the respondents strongly agree that negotiation is based on the aggressive pursuit of interest by parties, and is typically adversarial and competitive where parties make demands that are inconsiderate of the interest and needs of others. The leaders pointed out that most times opposing sides in a dispute want to achieve their own interest and have little or no regard for their counterparts at the negotiating table. They mostly have the winner takes all mentality that mostly derails negotiations. It thus takes sober facilitation by neutral third parties to steer the negotiations through emphasis of give and take where parties are encouraged to strongly consider letting go off some demands to enable consensus building. 38% slightly agree with the above statement but were quick to point out that most disputants are not necessarily interested in seeing their counterparts lose in the negotiations but strongly work to avoid loss of what rightfully belongs to them. 13% of the sampled leaders strongly disagreed saying negotiations do not have to be adversarial and inconsistent with the needs of others. In land disputes for example they argued that historical boundaries are crucial in determining ownership and leaders call upon elders from time to time to unravel boundary disputes. What clear from the above graph is that negotiation is based on the aggressive pursuit of interest by parties, and is typically adversarial and competitive where parties make demands that are inconsiderate of the interest and needs of others.

1.9.6 The view that demands of one party can be met only to the detriment of the other where parties tend to stubbornly adhere to their positions and one side seems to dominate the negotiation.

In this study, 37% of the sampled respondents strongly agreed with the view that demands of one party can be met only to the detriment of the other where parties tend to stubbornly adhere to their positions and one side seems to dominate the negotiation.39% of the leaders slightly agreed with this view while 22% of the respondents strongly disagreed with it.

This question was posed to the respondents to assess their understanding of negotiation and get a view of the kind of negotiation processes undertaken by these leaders in the course of their dispute resolution duties. Those who strongly agreed with the above statement were mostly from Lwandanyi and Cheptais Sub-Counties where land disputes abound. They mentioned that Sabaot and Bukusu were always motivated by ethnic rivalries and historical differences such that they had little regard for each other.

Table 9: Opinion on negotiation processes

		Frequency	Percent
Valid	Strongly agree	44	48.9
	Slightly agree	31	34.4
	Strongly disagree	15	16.7
	Total	**90**	**100.0**

In this study, 49% of the sampled respondents strongly agree with the view that in negotiation processes, the disputants may represent themselves or they may be represented by agents and whatever the case, they have control over the negotiation process.34% of the respondents slightly agreed with this statement but did not give reasons why. 17% of the respondents strongly disagreed. Those who strongly agreed with this statement said land disputes attracted lawyers or advisor hired by disputants. This however was done by families that are endowed with resources. Those who come from poor backgrounds represented themselves but had control of the process.

1.9.7 Level of acceptability of negotiation by the parties in resolving conflict

In this study 77% of the sampled respondents said negotiation was highly acceptable among disputants in their areas of jurisdiction while 22% said they rarely used it. Negotiation is highly acceptable because it is cheap and is done in familiar surroundings. The leaders said Community elders know each other well and are able to access each other on short notice. The leaders i interviewed gave the example of 1992 land clashes between the Bukusu and the Sabaot in Cheptais Sub County where Community elders on both sides had to intervene to stop the killings after the failure of politicians to stop the fighting. The fighting was stopped through negotiations.

In Webuye Sub County a conflict was brewing between the Bukusu and the Tachoni following a proposal to review constituency boundaries. The Bukusu leaders were said to be opposed to the creation of a constituency for the Tachoni sub tribe but negotiations were held and the Tachoni got a constituency (Webuye North) for the first time since independence.

Table 10: Frequency of Recurrence of disputes addressed through Negotiation.

		Frequency	Percent
Valid	.00	1	1.1
	rarely recur	73	81.1
	recurs every five Years especially after election	16	17.8
	Total	**90**	**100.0**

With regard to recurrence of disputes addressed through negotiation,81% of the sampled leaders said that such disputes rarely recur while 18% said such disputes recur every five years especially during elections. Those who said the disputes rarely occur were however clear that such disputes are those land disputes between individuals and are far in between. Those who said the disputes recur every five years especially during elections made reference to community land disputes. These they said are common place between the Bukusu and the Sabaots in Cheptais and Lwandanyi Sub-Counties and are mostly fueled by politicians.

1.9.8 Disputes resolved through negotiation

According to the leaders sampled in this study, land disputes form the bulk of the disputes solved through mediation by leaders in the County accounting for 60% of the cases. Disputes over sharing of political leadership positions account for 9% of the cases while disputes arising out of unequal distribution of development resources only account for 10% of the cases.

A further probe into why the land disputes featured prominently in cases handled by leaders through negotiation revealed that the County had huge chunks of land that had not been registered and lacked ownership title deeds. This the leaders said was the reason for the high number of land disputes. They blamed the lands ministry for this failure.

When asked why negotiation had taken center stage in land issues the leaders said residents were frustrated by court processes because they are slow but and costly. Disputes arising out of unequal distribution of development resources and sharing of state jobs were said to be handled by members of parliament and leaders in senior positions in government and only featured at the grassroots when members of parliament complain publicly at official functions to galvanize support and secure development support for the County.

1.10 Conclusions

Alternative dispute resolution mechanisms are an important component in the justice system of a country. They provide opportunity and space for parties in conflict to resolve the issues in contention amicably while avoiding the costs and delays associated with normal court processes.

This study established that though ADR mechanisms are in use at the community level, County governments have not put in place mechanisms to institutionalize ADR. There are glaring capacity gaps that continue to impact on the adoption and use of ADR mechanisms. This must be addressed.

1.11 Recommendations.

1. In order to address land disputes emanating from lack of clear ownership, the lands ministry needs to improve the quality-of-service delivery to the citizens of Bungoma County. Rampant corruption perpetuated by officers at the lands' office was cited as am major stumbling block in acquisition of land title deeds and must be stopped.
2. Land allocations in the former white settler areas of mt. Elgon have been infiltrated by political interests and this is the root cause of unrest in Mt. Elgon Sub-County. The national and County government must take decisive action to address the land grievances of the Sabaot community to stop the inter clan fighting that has led to loss of many lives and massive destruction of property.
3. For the leaders to be more effective in conflict resolution they must be trained and equipped with skills and competencies necessary for this responsibility. There's need to address the quality of the trainings being provided because they are poor.
4. The County government must invest in the establishment of arbitration structures at County level so that citizens can find assistance. This can be done through employment and training of arbitration personnel for the County.

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Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

The Presumption of Legitimacy Under Section 165 of the Evidence Act and Its Inadequacies in the Determination of Legitimacy Status/Paternity of a Child: A Call for the Adoption of Genetic Testing (DNA Test) as a Preferable and Conclusive Proof of Paternity

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Abstract
The Nigerian Courts in plethora of cases have placed heavy reliance on the presumption provided for under Section 165 of the Evidence Act in the determination of the paternity/legitimacy status of a child. This rebuttable presumption clothes the court with the power to make certain inferences as to the paternity of a child once it is established that such a child was given birth to during the subsistence of a valid marriage. The Court can also in situations where the marriage has been dissolved also make the same inferences, if the child was given birth to within the permitted gestation period. This rebuttable presumption provided for under Section 165 of the Evidence Act also presupposes that where a married woman in the course of an extramarital affair gets pregnant and such pregnancy is accepted by the husband, if any claim by a third party is made in respect of such child, the Court is clothed with the power under the Act to presume that the product of such extramarital affair is a legitimate child of the subsisting valid marriage. This paper, in the face of technological advancements in genetic testing which involves DNA Profiling, contends and argues that the presumption provided for under Section 165 of the Evidence Act is grossly inadequate in the determination of paternity of a child most especially where the paternity of such child is in dispute.
Keywords: Paternity, Marriage, Legitimacy, Presumption, Gestation Period, DNA, Genetic.
DOI: 10.7176/JLPG/111-08
Publication date: July 31st 2021

1.0 Introduction

Considering the patrilineal nature of the Nigerian milieu and the stigma associated with the illegitimacy status of a person, it is imperative that a more precise mode of ascertaining paternity should be adopted. While so many persons have been disentitled from their inheritance on basis of failure to prove that they were born during the subsistence of a valid marriage, so many marriages have either broken down or have experienced turbulence and chaos due to paternity fraud. So many husbands have laboured and toiled in raising children of another under the misconceived presumption that any child born during the subsistence of a valid marriage is deemed a child of the man. Under the Evidence Act,[1] once a child is born during the subsistence of a valid marriage, there is a presumption that the child belongs to the husband of the woman and thus a legitimate child. This presumption of law is a strong legal presumption on the ground that public policy favours legitimacy to preserve stable family groupings. This presumption of law as contained in Section 165 of the Evidence Act reads thus:

> Without prejudice to Section 84 of the Matrimonial Cause Act,[2] where a person was born during the continuance of a valid marriage between his mother and any man or within 280 days after dissolution of the marriage, the mother remaining unmarried, the Court shall presume that the person in question is the legitimate child of that man.

This presumption is however rebuttable if there is evidence suggesting that at the time conception ought to

[1] 2011, Section 165.
[2] Cap. M7 LFN 2004, the said Section 84 provides that notwithstanding any rule of law in proceeding under this Act either party to a marriage may give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time, but shall not be compellable to give such evidence if it would show or tend to show that a child born to the wife during this marriage was illegitimate.

have taken place, the man did not have sexual intercourse with the woman or that the man was away from his matrimonial home. Thus, a child born to a married couple is presumed to be their legitimate offspring in the absence of a clear demonstration that the husband could not possibly be the father. For instance, a man who slipped into coma for a period of over 490 days,[1] cannot be said to be the father of a child born 4 or 5 days after he regained consciousness. Relatedly, a soldier who was on official duty for a continuous period of two years in a distant country could not have had access to his wife to have sexual intercourse hence any child born within ten days upon his arrival cannot be said to be the child of the man. Although this presumption is rebuttable, the line of reasoning adopted by the courts has shown that the evidence for the purpose of repelling the presumption must be strong, distinct, satisfactory and conclusive.[2] Reiterating the foregoing principle, the Supreme Court in *Elumeze v. Elumeze*,[3] opined that anyone born by the wife of a valid marriage is presumed legitimate, unless it can be proved that the husband and wife had no access to each other or that sexual intercourse could not have taken place.

2.0 Presumption of Legitimacy under the Evidence Act and its limitations

As earlier stated, a child is legitimate if born during the pendency of a valid marriage. The marriage referred to as being valid, includes both marriage under the Act, Customary marriage and Islamic marriage. The only thing expected from the party who is relying on the existence of a valid marriage to prove his paternity is to show that he was born during the subsistence of the valid marriage. In a situation where the valid marriage was dissolved before the delivery of the child, what is expected to prove is that the child was born within the permitted period of gestation. The burden of proof lies on the party relying on the fact that the child was born during the subsistence of a valid marriage or within the permitted gestation period. However, where the husband/father of the child is the party denying paternity, the onus lies on him to prove that at the time conception was assumed to have taken place he was away from his wife or that it was practically impossible that he could have had sexual intercourse with his wife. In the absence of such cogent and credible evidence, it is presumed in law that the child is legitimate and belongs to the man.[4] According to *Aguda*,[5] even where the wife commits adultery, Customary Courts nevertheless invariably rules in favour of the legitimacy of the child especially where the lawful husband of the woman subsequently acknowledges the child as his. In *Idahosa v. Idahosa & Ors.*,[6] upon the death of their father (Pa Idahosa) and mother (Madam Onaiwu) of the Appellant & 1st Respondent (who are brothers), the 1st Respondent reported an alleged dying confession of their mother; that the Appellant was not sired by their father rather by one Pa Osayande. Thus, the Appellant was illegitimate and consequently could not inherit the *Igiogbe*.[7] The trial Court found for the Respondent but on appeal the decision was set aside. This strong presumption of legitimacy was demonstrated by the Court of Appeal in this case when it rejected the evidence given by DW2 (Pa Osayande) that he knew the mother of the Appellant and 1st Respondent and that in course of his relationship with the mother (Madam Onaiwu) of the Appellant & 1st Respondent, the Appellant and his older sister were born. The Court held that there is no doubt that the Appellant and his older sister were born during the continuance and subsistence of some form of a lawful and valid marital union recognized by law between Late Madam Onaiwu and Late Pa Idahosa. In the absence of any evidence that during their life time, Pa Idahosa had any doubts about the paternity of the Appellant and his older sister, the paternity of the Appellant and his older sister is a matter within their exclusive knowledge. The Court rejected the evidence of Pa Osayande (DW2) as fanciful or deluded ideas and thoughts of a senile blind man who was at the sunset of life.[8] The said decision on appeal was also affirmed by the Supreme Court.[9] Also in *Anozie v. Uwakwe*,[10] the Appellant's claim for ownership of the foetus in the womb of the Respondent; a married woman on ground that he had sexual intercourse with the woman was out rightly rejected by the Court of Appeal as a wishful fantasy and wild speculation. The Court stated that in absence of a state of marriage between the Appellant and the woman, he cannot lay such claim to the foetus; more so when the married woman has denied his paternity to the foetus.

While the decision reached in the *Idahosa* case was partly influenced by the fact that there was no evidence to show that the husband of the marriage (Pa Idahosa) ever doubted the paternity of the Appellant and 1st Respondent, the Court of Appeal's decision in *Anozie*'s case was also influenced by the denial raised by the

[1] The average length of human gestation is 280 days or 40 weeks from the first day of the woman's menstrual period.
[2] See C.C Ani, *Understanding Legal Concepts in Nigeria*, Volume II (Enugu: CIDJAP,2020) P.81.
See also *Piers v. Piers* (1894) 9 ER 1132.
[3] (1969) LPELR-25522 (SC); (1969) 1 ANLR 301.
[4] L., Atsegbua, *Law of Evidence* (Benin-City: Justice Jeco Printing & Publishing Global, 2012) p. 248.
[5] A., Aguda, *The Law of Evidence* Reprint (Ibadan: Spectrum Books Ltd,2007) p.253.
[6] (2010) LPELR-9072 (CA).
[7] Under the Benin native custom, the eldest surviving male child of a man is entitled under the custom to inherit the house the man lived and died commonly called the Igiogbe.
[8] See *Idahosa v. Idahosa & Ors. Supra* (n.8) at p. 42, paras. E, *Per Gumel, JCA*. There was no evidence that DW2 (Pa Osayande) ever confronted Madam Onaiwu with any evidence he ever had if any at all, of his paternity of two of her children.
[9] See *Idahosa v. Idahosa* (2020) 6 NWLR (Pt.1720) 254 SC.
[10] (2016) LPELR-4055 (CA).

married woman. The foregoing judicial decisions is a pointer that the onus to rebut this presumption of legitimacy by evidence most times lies with either the father or mother of the child whose status is in contention and there is no compulsion to give such evidence if it will show that the child born during the marriage is illegitimate.[1] Thus an impotent husband upon an agreement with his wife may lure an unsuspecting male to impregnate his wife and then find succor and protection under section 165 of the Evidence Act. It can therefore be said that the unsuspecting male will definitely face an ordeal of proving that the child belongs to him if a strict reliance is made on the legal presumption in the determination of the paternity of the child, most especially where the couple are at accord to conceal certain facts surrounding the conception of the child which was as a result of the extramarital affair.

Furthermore, this presumption of law, if relied on strictly, may create a difficult state for a wife of an impotent husband to discharge the evidential burden imposed on her in proving that the children of the marriage belongs to someone else and not the impotent husband. In *Oduche v. Oduche*,[2] the contention of a woman (Appellant) that her husband (Respondent) was not the father of the children of the marriage on grounds of impotency of her husband was rejected by the Court in view of the fact that it was common ground that during the subsistence of the marriage, both parties had sexual intercourse. Dismissing the appeal, the Court of Appeal penned thus:

> There is no burden on the Respondent to call a witness to establish the fact that he is capable of impregnating his wife. The law presumes the fact. Indeed, when a child is born in a valid marriage. The law presumes that the married couple had sexual intercourse between themselves. I am satisfied that the trial judge was right in his findings that the three children are indeed the children of the Respondent. The Appellant being unable to rebut the presumption in S 48 of the Evidence Act.[3]

The husband of a valid marriage is also not left out from the hardship caused by a strict application of this legal presumption in the resolution of paternity when in dispute. For instance, a suspicious husband who is in doubt of the paternity of the products of the marriage may find it quite impossible to prove the paternity of the products of the marriage most especially where the couple was sexually active during the supposed time of conception. The snag that might be faced by such husband comes into play where the Court in the resolution of the paternity in dispute, decides to jettison genetic testing (DNA test) and instead relies on the legal presumption that any child of a valid marriage is deemed a legitimate child of the marriage.

In *Ibeabuchi v. Ibeabuchi*,[4] the denial by the Appellant (husband) of the paternity of a child (Anointed Ibeabuchi) born by the Respondent (wife) during the subsistence of their marriage was rejected by the Court of Appeal. According to the Appellant, the Respondent claimed to be pregnant in May, 2005 and gave birth on 15th December, 2005 hence it was impossible for Anointed Ibeabuchi to have been conceived and born within a period of 6-7 months. The Court applied the presumption of legitimacy provided for by S 165 of the Evidence Act and held thus:

> On the totality of evidence adduced by the Appellant and the balance of probability. The learned trial judge of the Lower Court was right when he held in page 359 of the record that Master Annointed Ibeabuchi was born during the subsistence of the valid marriage between the Appellant and the Respondent.[5]

Also in the Islamic case of *Rabiu v. Amadu*,[6] the principal issue involved in the case was hinged on the conviction that the child delivered by the Respondent was given birth to within a period below the minimum permissible gestation period allowed under Islamic Law. The facts of the case are that the Appellant married the Respondent on 29/12/1990. They stayed together from 03/01/1991 when the Respondent moved in until 15/02/1991 when the Appellant brought her back to her parents over the dispute arising from her pregnancy. The pregnancy was found out within the 42 days they cohabitated which is 03/01/1991 to 15/09/1991, thus, the pregnancy of the Respondent was discovered during or within the period when the Respondent was lawfully and validly married to the Appellant. Dismissing the appeal of the Appellant denying the pregnancy of the Respondent, the Court held that under Sharia, a child conceived in lawful and valid wedlock is a legitimate child of a man so lawfully and validly married to its mother. This is because under Sharia, the legitimacy of a child is proved by the proof of the existence of a lawful and valid marriage between the parents at the time of the child's conception. In the same case, the Court laid down situations under Islamic Law, where paternity is presumed as the following:

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[1] S 84, Matrimonial Causes Act, Cap. M7, Laws of Federation of Nigeria, 2004.
[2] (2005) LPELR-5976 (CA); (2006) 2 FWLR (Pt. 310) 2255; (2006) 5 NWLR (Pt. 972) 102.
[3] See *Oduche v Oduche Supra*. (n.14) at p. 10-11, paras. F-C, Per *Rhodes-Vivour, JCA* (as he then was). S 148 of the Evidence Act being referred to is the extant S 165 of Evidence Act, 2011.
[4] (2016) LPELR-41268 (CA).
[5] *Ibid.* at p. 16, paras. E-G, *Per Bdliya, JCA*.
[6] (2002) LPELR-9161 (CA); (2003) 5 NWLR (Pt. 813) 343.

(i) Where marriage contract exists between the spouses either de jure or de facto.
(ii) Where there is actual consummation or possibility of consummation between the Spouse without hindrance.
(iii) Where the child is born within the minimum or maximum period of gestation.[1]
(iv) Where there is no legal denial (LIAN: Mutual Imprecation) by the spouses.[2]

There may also be situations where a child or children have hinged their right to succession on the basis that they are products of a valid marriage so as to enable them partake in the partitioning of the estate of their late father. Such children are expected to show by cogent evidence that at the time of conception and birth, their mother was validly married to their father and in a situation where they fail to adduce any cogent evidence, they may be excluded in the partitioning of the estate. This paper contends that in the absence of any cogent evidence that the children were products of a valid marriage or that they were acknowledged during the lifetime of their father, it may cause untold hardship to these children if a more accurate mode of ascertaining paternity like DNA testing is rejected by both the trial and appellate Courts. In *Okolonwamu v. Okolonwamu*,[3] the Appellants were faced with an arduous task of proving that the testator validly married their mother under Asaba Native Law and failing to do so their claim on paternity based on existing marriage failed on the ground that marriage of the said parents must first be proved before paternity can be presumed. In *Jatau v. Mailafiya*,[4] which was decided based on Islamic Law, the Supreme Court endorsing the legal presumption opined thus :

> A child's paternity or affinity is not considered through physical resemblance but by consideration of the period which the child is born after consummation of the marriage of his parents. The consensus of opinion in the Maliki School is that if a child is born within 6 months of consummation of the marriage the child is affiliated to the husband.[5]

3.0 Other Judicially Noted Modes of Proving Paternity

In light of the limitations associated with the legal presumption as discussed above, there are other methods for proving the paternity of a child. The Court of Appeal in *Okolonwamu & Anor. v. Okolonwanu & Ors.*,[6] laid down ways by which paternity can be proved in the following words:

> 1.Paternity by existing marriage: A child born during the pendency of a valid marriage between a couples is automatically presumed to be legitimate. 2. Paternity by subsequent marriage to the mother: This occurs when a child is born at a time when the mother was not married to the father and after whose birth the mother and father entered into a valid marriage. 3.Paternity by acknowledgement by the father accepting paternity of the child: This incudes paying for the hospital bills and upkeep of the child, introducing the child to his family as his child etc.[7]

3.1 Proof by Subsequent Marriage

S 3(1) of the legitimacy Act of 1929[8] is instructive on this. The said legislation provides thus:

> Where the parents of an illegitimate person marry one another whether before or after the commencement of this Act, the marriage shall if the father of the illegitimate person was or is at the date of the marriage domiciled in Nigeria render that person if living legitimate from the commencement of this Act, or from the date of the marriage whichever happens.

This is also a form of legitimation. Legitimation can be defined as a process whereby an illegitimate child is made legitimate. Legitimation presumes that the child is legitimate. Some of the salient conditions to be fulfilled under the foregoing S 3(1) of the Legitimacy Act are:

(i) It is in respect of marriage celebrated under the Act.[9]
(ii) The father of the illegitimate person must be domiciled in a State in Nigeria at the time of the marriage.
(iii) The parents of the illegitimate person must have subsequently married each other validly under the Marriage Act.

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[1] Under the Evidence Act, the permitted period of gestation for the presumption of paternity is 280 days while under Islamic Law, the minimum period is six months while maximum is five years. See also *Tanimu v. Kura* (2017) LPELR-43097 (CA).
[2] See *Abdusalami Ustaz v. Jamila Abdullahi* (2015) LPELR-40740 (CA).
[3] (2014) LPELR-22631 (CA). See also *Masama v. Magama* (2018) LPELR-46486 (CA) where the Court of Appeal held that in the absence of proof of a valid marriage, the lower trial Court was wrong to have attributed paternity to the Appellant on the basis of presumption of law.
[4] (1998) LPELR-1598 (SC).
[5] See *Jatau v. Mailafiya Supra*. (n.22). at p. 10 – 11, paras. F-A, *Per Mohammed, JSC.*
[6] *Supra*. (n.21).
[7] *Ibid* at p. 43-44, para. C, *Per Ogunwimuju JCA*.
[8] Ordinance No 27 of 1929.
[9] M.O, Izzi, C.D, Longjohn, 'An Analysis of Concepts of Legitimacy and Legitimation Under Nigerian Family law', *Journal of Property Law and Contemporary Issues*, 2017 5 (1), p. 187.

(iv) The illegitimate person to be legitimated must be living at the time of the marriage.

It is pertinent to note that nothing precludes an illegitimate person from being legitimated under Customary Law by subsequent marriage of both parents, provided that none of the parents at the time of such subsequent marriage is legally married to another person by virtue of a marriage celebrated under the Act. This prohibition is in respect of statutory marriages only because many if not all Customary Law permits polygamy. However, this prohibition can also come into play under Customary Law where the mother of the child at the time of the subsequent marriage is validly married to another under Customary Law. It then follows that for the fact that the putative father was legally married to a person under Customary Law at the time of the subsequent marriage will not affect the process of legitimation by subsequent marriage based on the fact that most Customary Law permits polygamy. The consequence of legitimation by subsequent marriage under the Legitimacy Act is that such a person has the same rights and is under the same obligation in respect of maintenance and support for himself or any other person as if he had been born legitimate.[1] Such a person, his wife and children are also enabled by such legitimation to take as from the date of legitimation, interest in property or intestacy or disposition occurring after the date of the legitimation as if he had been born legitimate.[2] In the determination of seniority in respect to distribution of property, the legitimated person ranks as if he had been born on the date when he became legitimated. If however, there are more persons who were legitimated at the same time, they will rank *inter se* in their natural order of seniority.[3]

3.2 Proof by Acknowledgement

Acknowledgement occurs where the putative father of a person recognizes and accepts (expressly or by conduct) paternity of such person. Acknowledgment can also occur in absence of any valid marriage between the putative father with his paramour.[4] Acknowledgement is one of the accepted ways of legitimizing an illegitimate child and at the same time a mode of proving paternity of an illegitimate child. Prior to the coming into force of S 39(2) of the 1979 Constitution,[5] there have been divergent and conflicting views on decency and propriety of acknowledging children born outside wedlock so as to give them the same footing in sharing and distribution of the Estate of the deceased. Some judgment as we shall see expressed the view that acknowledgement of the paternity of children born outside wedlock is against public policy as it emboldens promiscuity. The other and better view which tilts towards the provision of S 42(2) of the 1999 Constitution suggest that an innocent child should not be denied rights that ordinarily would have accrued to him if not for the actions of the parents.[6] *Chianu* aligning with this better view had this to say:

> In time Judges realized that there is no legal or moral justification to visit the sins of parents on innocent children. The ethical consideration of not punishing the innocent weighs against the objection based on presumed societal drive to ensure that sexual immorality is stemmed.[7]

In *Cole v. Akinyele*,[8] the husband during the existence of a statutory marriage entered into an irregular relationship with the mother of the two Appellants. One of the Appellant was born during the existence of the statutory marriage between the husband and his wife, while the other was born a month and two weeks after the demise of the wife. The Court per *Brett FJ* held that it would be against public policy for a husband to father a child outside his marriage and consequently the first child cannot be legitimized even if the husband had publicly acknowledged his paternity under Customary Law before his demise.

Expressing his view on the decision of the Court to deny the 1st Appellant the status of Legitimacy on ground of public policy *Nwogugu* opined that public policy will not be more outraged if the child born during the subsistence of the statutory marriage is legitimated by acknowledgement or the subsequent marriage of the parents under Customary Law.[9] In *Re Sarah Adadevoh*,[10] the deceased married his wife who predeceased him under the Marriage Ordinance with no issue. Upon his death, children from different women laid claims to the estate of the deceased. The trial Court held that since the children were illegitimate in accordance with English Law, they could not inherit. This decision was reversed by the West African Court of Appeal where it was held

[1] See S 8 Legitimacy Act, 1929. See also P.O, Itua, 'Legitimacy, Legitimation and Succession in Nigeria: Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the Rights of Inheritance', *Journal of Law and Conflict Resolution*, 2012 4 (3), p. 33.
[2] S 5(1), Legitimacy Act, 1929.
[3] *Ibid*. S 5(2).
[4] *Lawal v. Younan* (1961) 1 ALL NLR 245; (1959) WNLR 155; (1961) NSCC 130.
[5] Akin to the extant 42(2) of the 1999 Constitution.
[6] C.C.,Ani (n.4) P.89
[7] E., Chianu, *Law of Succession* (Lagos; New System Press Limited, 2019) p.244.
[8] (1960) 5 FSC 84; (1960) SCNLR 192; (1960) NSCC 48.
[9] E.I, Nwogugu, *Family Law in Nigeria*. (Lagos: Heinemann,2001) Reprint p. 295. See also G.A, Agu, E.A, Odike, *Modern Nigerian Family Law and Succession* (Enugu: Renaissance Publishers Limited, 2005) p. 163.
[10] (1951) 13 WACA 804.

that the legitimacy or otherwise of the children should be determined by the deceased's personal law.[1] The Court, therefore remitted the question as to the status of legitimacy of the children to a lower Court. It was subsequently held by the Court that heard the reference that the children of the four women who were married under Customary Law were legitimate by birth but refused to grant the status of legitimacy to the other children of the concubines on grounds that it will offend public policy despite the fact that they were acknowledged. The trial Court in *Alake v. Pratt,* [2] considered it contrary to public policy to place children born outside lawful wedlock on the same pedestal as legitimate children on basis of acknowledgement. The decision was however set aside on appeal by the appellate Court In *Philips v. Osho*,[3] the legitimate children treated the Plaintiffs (who were born out of wedlock) as part and parcel of the family. They were also even given some properties and took part in decision making of the family. When dispute cropped in, the Plaintiffs relying on *Ogun Modebe v. Thomas*,[4] made an ardent and forceful argument that based on the past relationships, the Defendants were estopped from denying their legitimacy and as such prayed the Court to order an account of all proceeds received as rent by the Defendants. Their claim was dismissed by the Supreme Court on ground of illegitimacy.

However, in *Taylor v. Taylor*,[5] the three Plaintiffs were blood siblings born out of wedlock, two of them were born before their father married the Defendant under the Marriage Act. The Defendant conceded that her husband acknowledged the paternity of the Plaintiffs. For some 13 years after the death of their father intestate, the Defendant collected and appropriated the rent of the house that the estate left behind. In an action, the Plaintiffs sought for account of all the monies the Defendant received as rent. *Coker J*. held for them as the acknowledgement of paternity by their father ipso facto legitimized them and for the purpose of succession, the Defendant was awarded one third of the estate and the children were to share the remaining two thirds equally. It deserves mention that the party who intends to rely on proof of his paternity by acknowledgement is saddled with the task of proving that such acknowledgement took place. In *Obasohan v. Obasohan*,[6] the failure of the Appellant to prove by concrete evidence that the deceased acknowledged his paternity ruptured his right of succession to the *Igiogbe*.

3.3 Proof by Genetic Testing (DNA Test)

A Deoxyribonucleic Acid (DNA) is the genetic material present in every cell of the human body and almost all other organisms. Virtually every cell within the human body has identical DNA.[7] Even though the DNA pattern in the human genome between individuals are identical in over 99% of cases, a small number of differences are used to distinguish all humans; making each individual's genetic material unique except in cases of identical multiple births.[8] These dissimilar patterns are utilized in DNA-based identity for parentage identification, resolution of immigration cases and criminal investigations.[9] Parentage identification involves paternity and maternity testing. Whereas it is easy to identify the mother of a child only DNA testing can confirm paternity. DNA paternity testing remains the most reliable and precise type of paternity testing feasible. Every individual has two copies of genetic material; one is inherited from each biological parent. When the paternity of a child is under contention, a party is expected to present for genetic testing at the request of the opposing party.[10] Various DNA sequencing, amplification, and testing techniques are currently in use with an accuracy rate of up to 99.99%. Children can be tested at any age using umbilical cord blood specimen at birth, blood samples known as Restriction Fragment Length Polymorphism or buccal swab (or buccal scrap).[11] If the DNA pattern between the child and the alleged father do not match on two or more DNA probes, then there is no genetic relationship between the two.[12] If the DNA patterns between the child, mother and the alleged father match on every DNA probe, the likelihood of parenthood is 99.9%.[13] In the Western world, this paternity testing has a significant legal implication when it comes to ascertaining child custody, provision of financial support and inheritance rights.[14]The importance of DNA testing cannot be overemphasized as its use over the years has metamorphosed

[1] (1954) 14 WACA 116.
[2] (1955) 15 WACA 20.
[3] (1973) ULR (P. 111) 316; (1972) 1 ALL NLR.
[4] FSC 357/1962 (Unreported).
[5] (1960) Lagos LR 286 cited in Chianu (n.36) p. 236.
[6] (2019) LPELR-47187 (CA).
[7] National Library of Medicine (NLM). MedlinePlus Genetics. What is DNA? 2021. https://medlineplus.gov/genetics/understanding/basics/dna/
[8] Saad R. Discovery, development, and current applications of DNA identity testing. Proc (Bayl Univ Med Cent). 2005;18(2):130-133. doi:10.1080/08998280.2005.11928051
[9] *Ibid*.
[10] FindLaw. Paternity Blood Tests and DNA. 2018. Available at: <https://www.findlaw.com/family/paternity/paternity-tests-blood-tests-and-dna.html#> Accessed on 10/4/2021 at 4:50 pm.
[11] <https://family.Find Law.com/paternity/paternity-test-blood test and dna.html>. Accessed on 16th July, 2020 at 7: 46pm.Cited in C.C Ani (n.4).
[12] *Ibid*.
[13] *Ibid*.
[14] Schanfield, M.S. Deoxyribonucleic Acid | Parentage Testing. Editor(s): J. A. Siegel. Encyclopedia of Forensic Sciences, Elsevier. 2000;

from a tool for determining paternity, resolution of some immigration issues to an instrument for solving crimes.

In Nigeria, there are increasing cases of absconding fathers who avoid parental responsibility by denying paternity. Also cases of spinsters who abdicates parental responsibility by dumping products of unwanted pregnancy by the roadside or in a ditch.[1] DNA testing offer an accurate and confidential way of learning the facts because delaying finding out the truth increases the risk that a child could bond with someone who is not their father , causing emotional trauma to both parties if they eventually discover they are not related at a later date. Recently, a Judge of Delta State High Court has expressed the emotional trauma he passed through upon the discovery via DNA testing that he is not the biological father of three children from his marriage with his former wife.[2] The pertinent question is, would it have amounted to injustice if the said Judge had instituted an action in Court challenging the paternity of the three children and instead of opting for genetic testing the Court adopted the legal presumption contained in Section 165 of the Evidence Act to ascertain the paternity? Secondly, would it not be a clear case of miscarriage of injustice if during the dissolution of marriage between the Judge and the wife, the Court mandates the Judge to pay certain sum of money as maintenance on the basis that the children being products of a valid marriage are deemed children of the man. It is without doubt that an application of DNA test at an earliest time would have saved the Judge both the emotional or psychological trauma he may experience at a later date.

4.0 Attitude of Nigerian Courts toward the Use of DNA Testing in the Determination of Paternity

Although the Nigerian Court recognizes DNA test as an acceptable way of establishing paternity, however, they are not amenable to the application of DNA testing. This may be attributed to the unceasing application of the highly reverenced presumption of law that a child born during the subsistence of a valid marriage is presumed a child of the man. Although the Court of Appeal in *Ibeabuchi v. Ibeabuchi*,[3] agreed with the submission of Counsel for the Respondent that the paternity of a child can be determined by DNA Test, the Court however stated that DNA testing is not the only way to determine the paternity of a child. Furthermore, where the presumption as provided under S 165 of the Evidence Act can be applied successfully, there would be no need for DNA Testing. In a rather strange and odd facts of *Anozia v. Nnanni & Anor.*,[4] the Appellant; a Legal Practitioner instituted the suit against the 1st Respondent (who was at that time is a married woman) and the 57 year old 2nd Respondent (the product of an alleged sexual relationship between the Appellant and the 1st Respondent). The Appellant prayed the trial Court to order the 2nd Respondent to subject himself to a DNA test in a bid to ascertain his paternity. Upon the refusal of his application, he appealed to the Court of Appeal. Although the Court agreed that DNA could be applicable and relevant where there is dispute as to the paternity of a child or where there is disputing claim or uncertainty as to the paternity of an individual, the Court nevertheless applied the presumption of law because it was common ground that at the point the purported sexual intercourse took place, the 1st Respondent was validly married coupled with fact that the woman out rightly denied having sexual intercourse with the Appellant. The Court reinforced their decision by holding that the 2nd Respondent is an adult and that the said application was intended by the Appellant to use the Court to prove his case and consequently the application was thrown out.

In the earlier cited Islamic case of *Rabiu v. Amadu*,[5] although not bordered on the use of DNA testing to prove paternity, the Appellant in this case relied on a medical report which revealed that at the time the Appellant married the Respondent, she was already 20 – 22 weeks old pregnant. The Court of Appeal upheld the decision of the Upper Area Court that refused to act on the medical report. In resolving the issue as to whether expert evidence is used to determine paternity, the Court relied on *Tabsiratu Al Hukkam* Vol. 1 page 100 and stated that the opinion of an expert cannot be relied upon to ascertain paternity in relation to the children of a free woman but can be used to establish paternity in case of children of a slave woman, whose two masters had intercourse with her during the period of purity. The Court observed that since in the instant appeal there was no claim that the Respondent was a slave, there was therefore no need for any test to establish paternity. Finally, the Court held that since it was a delivery within wedlock and within the lawful period of gestation the legitimacy of the child would be presumed.

5.0 Conclusion and Recommendations

This paper analysed the application of the presumption of legitimacy in the determination of paternity of children and pointed out the hardships which strict application has caused in many occasions. It further considered other

Pages 504-515, <https://doi.org/10.1006/rwfs.2000.0472>. Accessed on 10/4/2021.

[1] E.A., Iyamu-Ojo, *et al*. 'Requirement to Consent to DNA Testing: A Case for Reform in Nigeria'. *International Journal of Criminal and Forensic Science* (2017) 1 (1), p. 11.

[2] https://www.premiumtimesng.com/news/headlines/440030-dna-confirms-three-children-from-my-ex-wife-not-mine-judge.html. Accessed on 19th April 2021 at 1:09 pm.

[3] *Supra.* (n.16).

[4] (2015) LPELR-24277 (CA).

[5] *Supra.* (n.18).

methods of ascertaining paternity especially as enumerated in *Okolonwamu & Anor. v. Okolonwanu & Ors.*[1] The paper maintained that DNA testing is the most reliable method especially given the recent surge in paternity fraud cases and the ever improving DNA technology now saving many from the injustice arising from the presumption. Indeed, if DNA testing was employed in *Okolonwamu & Anor v Okolonwamu & Ors*,[2] *Rabiu v Amadu,*[3] *Ibeabuchi v. Ibeabuchi*[4] in ascertaining the paternity of the child, the Court may have arrived at a different conclusion. Thus, this paper advocates for a paradigm shift to the use of genetic testing by the Nigerian Courts as a conclusive proof of paternity which will obviously eliminate the psychological trauma experienced at a later date by both child and father upon the discovery that they don't share blood ties. It will also go a long way in curbing the increasing cases of extramarital affairs recorded in Nigerian homes which its devastating effect ranges from dissolution of marriage, domestic violence and the killing of a spouse by a partner.

[1] *Supra.* (n.21).
[2] *Ibid*.
[3] *Supra.* (n.18).
[4] *Supra.* (n.16).

Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.111, 2021

Permanent Sovereignty over Natural Resources and Contract Stability in Transnational Petroleum Investment Contracts

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Abstract
This paper makes a critical analysis of the principle of permanent sovereignty over natural resources and contract stability as applicable to transnational petroleum investment contracts. It considers the extent to which these concepts affect foreign direct investment in the petroleum industry. This work further demystifies the theory of contract stability as a panacea to the tense environment contrived by the principle of permanent sovereignty over natural resources. The doctrine of *pacta sunt servanda* as applicable to stabilization clauses is considered towards explicating how it procures stability in oil investment contracts. In this wise, other like devices like renegotiation, *clausula rebus sic stantibus,* etc are not left out, particularly as they introduce some element of flexibility and attenuate the hardships that might arise due to strict insistence on the application of principle of *pacta sunt servanda* to the dynamics of the petroleum industry. This work adopts the synthesis and analysis as well as the comparative methodology in reviewing the relevant materials consulted in the course of this work. It argues that parties to transnational petroleum contracts should pursue stability in such agreements through the employment of such devices that ensure flexibility within the context of a dynamic petroleum industry.
Keywords: Permanent Sovereignty, Contract Stability, Petroleum Investment Contract, Stabilization Clauses
DOI: 10.7176/JLPG/111-09
Publication date: July 31st 2021

1. Introduction

It is beyond dispute that the 'black-gold' (i.e. petroleum) is the main stay of most countries where it abounds in commercial quantities and in Nigeria, accounts for more than 80 percent of government revenues. Thus, it can be reasonably expected that government, through legislations and policy implementations will aim at boosting her income from that sector of the economy, particularly in view of her sovereign rights over her mineral resources. See section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended); section 1 of the Petroleum Act; and section 1 of the Minerals and Mining Act. Indeed, this trend is a necessary precipitate of the evolutionist principle of resource nationalism as provided in articles 1 and 2 of the United Nations Declaration on Permanent Sovereignty over Natural Resources adopted by UNGA Resolution 1803 (XVII) of 14th December 1962, and particularly sees developing countries take all steps necessary to ensure that they exercise permanent sovereignty over their natural resources and maximize the benefits accruing from the exploitation of such natural resources (Mato 2012).

However, the government is definitely not the only stakeholder in the petroleum industry. Indeed, international oil companies (IOCs) occupy a strategic position in the industry, in view of the enormity of their investments and operations in the industry. In this regard, transnational mining agreements became the most viable option, particularly as regards the fact that petroleum exploitation involves relatively high capital and expertise requirements, usually beyond the affordability of developing countries (Mato 2012). Indeed, such contractual relationship with IOCs are nigh inevitable.

Considering the extent of the effect governmental policies and legislations may have on the operations and investments of IOCs, it is not uncommon for the latter to be seen expressing fears over risks associated with transnational investments, particularly the risk of the host nation 'expropriating' their investments especially in countries prone to unstable political and economic environments. Faced with transnational investment transactions, IOCs will usually be seen demanding guarantees for the observance of the traditional doctrine of *pacta sunt servanda* as part of the conditions for their investments. This legal axiom literally means that 'agreements must be kept'. See the cases of *Alade v ALIC (Nig) Ltd & Anor (2010)12 SC (pt. II) 59 at 95; Ekiadolor v Osayande (2010)6 NWLR (pt. 1191) 423*. In *Sapphire v National Iranian Oil Company (1967)35 ILR 136 at 181*, it was held thus: "It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule *pacta sunt servanda* is the basis of every contractual relationship." The overall aim of such demands for guarantee by the IOCs is to ensure contractual stability by binding the host country to refrain from taking such unilateral action that would deprive IOCs from maximum enjoyment of their benefits under such contractual arrangements.

2. The Concept of Permanent Sovereignty over Natural Resources

The end of the Second World War saw the dissolution of many colonial empires. Previously subjugated nations thus became independent and sovereign States (Akinsanya 1978). Many of these nations were well endowed in

natural resources. As a facet of sovereignty and self-determination, these resource-rich nations demanded the right to exploit their natural resources for the purposes of economic development and to better their prospects of economic growth (Miranda 2012). This goal was based on the perceived need to assert themselves on issues such as the control of their natural resources which were largely in the hands of foreign companies (Asante 1979). It was felt that, this state of affairs made nonsense of their newly acquired sovereignty and undermined their desire to develop and exploit their natural resources (Asante 1979). Within the parameters of this goal was the need to reconsider the agreements formalized prior to their independence, a plethora of which were perceived as 'inequitable and onerous (Wart *et al.* 1988).' This was certainly the case in *Aminoil v Kuwait* (1982)21 ILM 976 where the concession was granted to Aminoil before Kuwait had obtained her independence from Great Britain.

The need of developing countries to assert authority over natural resources led to the birth of the international law principle of permanent sovereignty over natural resources (Barrera-Hernández 2006). The principle of permanent sovereignty over natural resources essentially dictates that resource rich nations should have control over their natural resources. However, that control is contingent upon the State utilizing the resources for national development. In addition, in exercising the rights attached to this principle the State must act within the parameters of international law.

2.1 Evolution of the Principle of Permanent Sovereignty over Natural Resources

The principle of permanent sovereignty over natural resources evolved through various United Nations General Assembly (UNGA) Resolutions, such as UNGA Resolution 523 (VI) on Integrated Economic Development and Commercial Agreements made on 12th January 1952. However, arguably the 'landmark resolution' was UNGA Resolution 1803 (XVII) (Hossain & Chowdhury 1984; Duriugbo 2006). The evolution of the principle eventually culminated in the Charter of Economic Rights and Duties of States (CERDS) which as the name suggests highlights the rights and duties of States. The evolution was in four phases (Duriugbo 2006).

During the first phase, which occurred between 1952 and 1962, various resolutions were passed relating to the principle of permanent sovereignty over natural resources. The focus was on the right of mineral rich countries to utilize their natural resources as part of their sovereignty which in turn was a facet of self-determination (Duriugbo 2006). The first of these was UNGA Resolution 523 (VI) of 12th January 1952 which recognized the right of under-developed countries 'to determine freely the use of their natural resources' with the added proviso that they do this in order to advance the economic development of their nations. The sentiments expressed herein, were echoed in the subsequent UNGA Resolution 626 (VII) of 21st December 1952 (Hyde 1956), which is seen as the genesis of the doctrine of permanent sovereignty over natural resources (Miranda 2012; Duriugbo 2006; Yackee 2009). Similar sentiments were re-echoed in UNGA Resolution 837 (IX) of 14th December 1954. Under the UNGA Resolution 1314 (XIII) of 12th December 1958, it was recognized that the right to self-determination as affirmed by the 1966 International Covenant on Civil and Political Rights as well as the 1966 International Covenant on Economic, Social and Cultural Rights included 'permanent sovereignty over wealth and natural resources'. Consequently, the same UNGA Resolution 1314 (XIII) of 12th December 1958 established a Commission on Permanent Sovereignty over Natural Resources comprised of both developed and developing countries which was charged with conducting a 'full survey of the status of the permanent sovereignty of people and nations over their natural wealth.' The Commission was to pay particular regard to 'the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of under-developed countries.' Indeed, the UNGA Resolution 1515 (XV) of 15th December 1960 reemphasized the fact that whilst permanent sovereignty over natural resources had rights attached to it, these also comes with duties. Surveys conducted by the Commission culminated in the landmark UNGA Resolution 1803 (XVII) of 14th December 1962 (de Sá Ribeiro 2009; Weiss & Daws 2007). The key provisions of this Resolution are as follows: (a) the right of people's and nations to permanent sovereignty over their wealth and resources must be exercised in the interest of their national development and the well-being of the people of the State concerned; (b) the exploitation, development and disposition of such resources, as well as import of foreign capital required for these purposes should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities; (c) in cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law; the profits derived must be shared in the proportions freely agreed upon in each case between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources; (d) nationalization, expropriation, or requisitioning shall be based on grounds or reasons of public utility, security or the national interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by the sovereign State and other parties concerned,

settlement of the dispute should be made through arbitration or international adjudication; (e) the free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of State based on their sovereign equality; (f) international co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their natural wealth and resources; (g) violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace; (h) foreign investment agreements freely entered into by or between sovereign States must be observed in good faith. States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

The second phase occurred between 1962 and 1973. This period has generally been described as one characterized by nationalism and States exerting greater control over the exploitation over the exploitation of their natural resources (Warden-Fernandez 2000). It comes as no surprise therefore that this period also consisted of a number of resolutions adopting, reaffirming and reiterating the UNGA Resolution 1803 (XVII) of 14th December 1962 (Hossain & Chowdhury 1984). This included the UNGA Resolution 2158 (XXI) of 25th November 1966, Resolution 2386 (XXIII) of 19th December 1968, Resolution 2692 (XXV) of 11th December 1970, the United Nations Conference on Trade and Development (UNCTAD) Resolution 88 (XII) of 19th October 1972, and UNGA Resolution 3171 (XXVIII) of December 1973. In addition, a Working Group on the Charter of Economic Rights and Duties of States was established by the UNGA Resolution 45 (III) of 18th May 1972 and enlarged by the UNGA Resolution 3037 (XXVII) of 19th December 1972 and UNGA Resolution 3082 (XXVIII) of 6th December 1973.

The third phase occurred during the Sixth Special Session of the UNGA which took place on the 1st of May 1974. This Session eventually led to the adoption of the Declaration on the Establishment of a New International Economic Order (NIEO) vide UNGA Resolution 3201 (S-VI) of 1st May 1974 and the Charter of Economic Rights and Duties of States vide UNGA Resolution 3281 (XXIX) of 12th December 1974 (Schrijver 1997). There are many rights emanating from these international instruments. For example, paragraph 4 of the Declaration on the Establishment of a New International Economic Order restates the need for each State to exploit its mineral resources for its development and further provides that in order to safeguard these natural resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation including the right to nationalization and the transfer of ownership to its nationals, this right being an expression of the full sovereignty of the State. Similarly, article 2(2)(c) of the Charter of Economic Rights and Duties of States quite explicitly postulates that States have the right to 'nationalize, expropriate or transfer ownership of foreign property.' The condition attached is that the State pays 'appropriate compensation' which is to be settled under the auspices of domestic law and domestic tribunals, unless otherwise agreed. Article 2(1) of the same Charter provides that the State can freely dispose of its natural resources. It is as a result of this right that States possess the authority to enter into agreements with multinational corporations. It is imperative however, that these agreements are freely entered into. See the decision in *Texaco Overseas Oil Petroleum Co. & Anor v The Government of the Libyan Arab Republic (1978)17 ILM 1 at 66 - 67*. Whilst a State can enter into an agreement, a question that has been intensely debated is whether a State can unilaterally abrogate these agreements (Paasirvirta 1989). Under the doctrine of permanent sovereignty over natural resources and as re-emphasized in article 2(2)(a) of the Charter of Economic Rights and Duties of States, the State also has the right to regulate and supervise foreign investment and further has the right to nationalize foreign owned property (Schrijver 1997). However, with this right also comes the duty to observe the tenets of international law vis-à-vis the taking of foreign owned property. This includes the duty to compensate foreign owned corporations. Furthermore, there is duty to utilize the natural resources in a way that advances economic development (Schrijver 1997).

The fourth phase is the aftermath of the adoption of the Charter. The evolution and acceptance of this doctrine is determined by examining treaties that have been concluded since 1974. It has been noted that myriad treaties do reflect the rights and duties espoused in the Charter. However, given the adoption of bilateral investment treaties, which advocate full rather than appropriate compensation, the universal acceptance of the Charter may be questioned (Hossain & Chowdhury 1984; Schrijver 1997).

2.2 Legal Status of the Principle of Permanent Sovereignty over Natural Resources

Because the Charter stems from a General Assembly resolution, there are questions as to whether the rights and duties contained therein are binding. On the one hand, it is argued that General Assembly resolutions are not binding (Crawford 2006). It is recognized that the General Assembly does possess 'quasi-legislative' functions (Sands & Klein 2009). However, it is difficult to argue that the General Assembly is a legislative organ (Sands &

Klein 2009). This is firstly owing to the fact that there is an objection to two-thirds majority binding the minority. Secondly, to bind States under General Assembly resolutions may circumvent the traditional treaty making process which, under some national constitutions, requires ratification in order for the State to be bound (Sands & Klein 2009).

On the other hand, to completely disregard the principles espoused in these General Assembly resolutions would be erroneous. Because of the general procedures that lead to the eventual vote and adoption of a resolution, it could be argued that they constitute evidence of customary international law (Sands & Klein 2009). A customary rule 'comes into existence only where there are acts of State in conformity with it, coupled with the belief that those acts are required by international law' (Bleicher 1969). General Assembly resolutions become customary norms on the basis that the General Assembly is itself a vehicle through which the States form and express the practice of international law are manifested (Sornarajah 2010). The resolution is drafted in such a way that it can win the support of the majority of the Assembly. Typically, more than a bare majority must be ensured before a vote will be called (Bleicher 1969). The resolution will often represent a harmonization of the conflicting views that might have been expressed, prior to the vote being called (Bleicher 1969). Therefore, by the time it is being adopted, it is an expression of the general consensus, which in turn can be construed as the formulation of a customary norm (Bleicher 1969).

Arguably, the General Assembly resolutions pertaining to permanent sovereignty over natural resources do form a part of customary law. This view has been supported by various arbitral tribunals. For example, in the case of *Libyan American Oil Company (LIAMCO) v Libya (1977)62 ILR 141*, the arbitrator held that, 'the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over natural resources'. This clearly shows that even arbitral tribunals recognize the general resolutions on permanent sovereignty over natural resources as evidence of customary law. This position was also reflected in *Texaco Overseas Oil Petroleum Co. & Anor v The Government of the Libyan Arab Republic (supra)*. Here the arbitral tribunal took the view that UNGA Resolution 1803 (XVII) of 14th December 1962 reflected the tenets of customary international law. The arbitral tribunal arrived at this conclusion on the basis that the said resolution referred to international law when it spoke of nationalization, and had received the universal assent of both developed and developing countries (Schwebel 1963). The arbitral tribunal further opined that UNGA Resolution 1803 (XVII) ought to be contrasted with the Charter of the Economic Rights and Duties of States which in the arbitrators view 'must be analyzed as a political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States' (Schwebel 1963; Lowenfeld 2003; Hossain 1980).

Furthermore, it could be argued that the resolutions pertaining to permanent sovereignty over natural resources are a reflection of rights and duties that already existed under international law (Gess 1964; Baxter 1980). For example, it was already generally recognized that the State had the right to nationalize (Schrijver 1997). Once the State nationalized they also had an obligation to pay compensation (Schrijver 1997). This is therefore another reason why it could be argued that the resolutions pertaining to permanent sovereignty over natural resources are generally binding.

In addition, the principle of permanent sovereignty over natural resources has been accepted by the International Court of Justice. This position was reflected in the decision in *East Timor* (*Portugal v Australia*) *(1995) ICJ Rep 90*. In more recent times the principle of permanent sovereignty over natural resources has gained more recognition. In the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (2005) ICJ Rep 168,* the International Court of Justice recognized permanent sovereignty over natural resources as a principle of customary international law but decided that the principle does not apply to situations of looting, pillage and exploitation of natural resources by members of the army of a State militarily intervening in another State. In the same case, Judge Koroma however contended that the acknowledgement of the principle as a customary norm implies that the rights and duties emanating from it remain in effect at all times, including during armed conflict and occupation. Given the fact that decisions of the International Court of Justice are a source of international law, it could thus be asserted that the principle of permanent sovereignty over natural resources as well as the rights and duties emanating therefrom is firmly accepted under international law, and that it is under this principle that States are able to enter into agreements with investors (Dufrense 2004; Maniruzzaman 2001). It is also arguable that under this principle, the word 'permanent' suggests that the State has the right to exit these agreements at any given time, regardless of an agreement not to do so (de Arechaga 1978). This is however not the case. Indeed, such a state of affairs portends serious dangers for transnational oil investments and highlights the need for stability in such investment agreements.

3. Contract Stability in Transnational Petroleum Investment Contracts

Of the plethora of concerns that haunt investors engaged in petroleum development, 'political risks' tend to appear at the forefront. A number of definitions, albeit similar, have been offered to define the concept of

'political risk'. Comeaux and Kinsella defined it as "… the risk that the laws of a country will unexpectedly change to the investor's detriment after the investor has invested capital in the country, thereby reducing the value of the individual's investment" (Comeaux & Kinsella 1994). Drawing a clear distinction from commercial risks or uncertainties that could arise as a result of a change in economic conditions, Wells defines political risks as "…those risks that are principally the result of forces external to the industry and which involve some sort of government action or, occasionally, inaction" (Moran 1998). Irwin illustrates that "[T]hese risks can take different forms including disruption of equity participation (by dilution or expropriation), forced renegotiation of contracts, forced contracting procedures, avoidance of agreed commitments, revision of regulation, or any political/cultural change which may impact priorities and disrupt your business plans" (Moran 1998). Indeed, investors are much wary of these risks when in particular the host state's level of political governance is generally rated as poor and unstable (Humphreys *et al.* 2007). Understandably, investors anticipate such risks since they remain unavoidable and inherent to the nature of long term projects such as petroleum development (Kolo 1994). To avoid such augury from becoming a reality, ostensibly, investors demand guarantees from the government. Such contractual guarantees are believed to be a vaccine for such risks (Johnson 1994). Such a measure is principally aimed at creating, *inter alia*, a stable fiscal regime that would otherwise be vulnerable to the unilateral whims and caprices of the government, an unflattering situation no investor wishes to be at. It is not therefore a coincidence that several contractual guarantees feature in a number of petroleum investment agreements (Maniruzzamann 2007). With oil having a volatile world price and the nature of investment in the sector destined to be for a relatively longer period, one cannot overemphasize the significances of maintaining the stability of contractual undertakings. It should however be noted that even such guarantees could be crumbled into dust in just a twinkling of an eye.

It follows therefore that stability of contractual agreements is the major means of investment protection at the disposal of IOCs. This is usually achieved by inserting certain clauses in contractual agreements with their host countries to ensure that future changes in policy or legislation of the host country does not affect the existing agreement (Mato 2012).

Such clamour for contractual guarantee is usually as a result of conflicts in interest between the government of the host country and the IOC. A major source of such conflict between host governments of developing countries and IOCs derives from the preoccupation of the IOCs with stability and predictability in contractual relations on the one hand, and the persistent demands of host governments for a more flexible contractual regime on the other (Mato 2012). This is because the underlying objectives of the two parties are significantly divergent. While host governments aim at promoting economic growth and development through such foreign investment, the multinationals are merely concerned with maximization of profit at the least risk (Gao 1994). The insistence of IOCs on the traditional doctrine of *pacta sunt servanda* is premised on the stability and predictability of contractual relations which the doctrine affords. Such clauses (otherwise referred to as stabilization clauses) inhibit governments from unilaterally interfering with their agreement with IOCs and give the IOCs the leeway to operate. On the other hand, host countries would want a contractual regime which is flexible in view of the ever changing circumstances of the petroleum industry.

The doctrine of *pacta sunt servanda,* though indicative of the fact that no party is entitled to unilaterally modify a contract, is not in any way suggestive of the fact that the contract is immutable, after all, parties cannot contract to commit a crime or to perpetuate an illegal act, such as fraud, duress and misrepresentation. In such cases, any attempt to invoke the doctrine of *pacta sunt servanda* so as to preserve the contract will fail. See the cases of *ACB Ltd v Alao (1994)7 NWLR (pt. 358) 614*; *JFS Investment Ltd v Brawal Line Ltd & 2 Ors (2010)12 SC (pt. 1) 110*; *Chief AN Onyuike III v GF Okeke (Unreported) Supreme Court of Nigeria Judgment in Suit No: SC/430/74 delivered on 5th May, 1976*. Thus, it has been argued that a rigid application of the principle of *pacta sunt servanda* to stability clauses in transnational petroleum contracts involving IOCs derogates from the sovereign rights of the host country to her natural resources such that the applicability of the doctrine need be relaxed. Converse arguments however maintain to the effect that since the host countries willingly conclude such contracts in exercise of their sovereign powers, the applicability of the doctrine cannot amount to a derogation from their sovereignty but is rather an affirmation of same. Though neither view has succeeded in eroding the other, it may safely be asserted that there is currently a gradual but remarkable modification of the traditional concept through the mechanism of incorporating revision clauses (otherwise called renegotiation clauses) into such transnational petroleum agreements (Dolzer & Schreuer 2012).

Apart from the stabilization and renegotiation clauses, political risk insurance, hardship clauses and dispute settlement clauses are also veritable in procuring a relatively stable and viable environment for petroleum investment contracts to thrive (Subedi 2012). These contract stabilization devices will be considered in some detail.

3.1 Background to the Concept of Stabilization Clauses

Usually, when a host State is entering into an investment contract with an investor, the former is prepared to

accept whatever terms are dictated by the latter (Ng'ambi 2014). This is largely influenced by the fact that the host State often needs the investor's capital to exploit its natural resources. Thus if it does not put itself in an adequately competitive position, it runs the risk of the investor seeking alternative jurisdictions in which to utilize their capital (Ng'ambi 2014). The investor is clearly in a stronger position during the negotiation stages of the contract because they are relying on a bargaining power derived from the States need for foreign capital (Woodhouse 2006). Once the agreement is signed, and operations commence, it is the State that becomes the stronger party and the investor becomes the weaker party. This is because the State has various prerogatives at its disposal. It could therefore utilize these to override previous contractual undertakings which in turn may jeopardize the investor's prospects of making a profit in the host State (Sornarajah 2010).

Thus, of concern to an investor when entering into an investment agreement is whether the host government will abide by the terms of that agreement for the entirety of its term. It is clear that an ordinary contract, without stabilization clauses, will generally be governed by the municipal law of the host State (Ng'ambi 2010). From the investors' perspective, this means that the law can be altered at any time by the legislature of the host State and these laws can be amended in a way disadvantageous the investor. Such a state of affairs puts the investor in a somewhat precarious position, especially in instances where a nationalistic mood sweeps the host State (Maniruzzaman 2009). The advanced stages of the resource nationalism cycle typically occur in times when the investor is making windfall profits from the investment (Vivoda 2009). In times like these the host State will reconsider the agreements and will seek to maximize the benefits attained from their natural resources (Waelde & Ndi 1996). They may consider altering tax legislation, so that they may gain a proportion of the windfall profits, or to achieve the effect of significantly reducing the investor's profits or simply make it more onerous or expensive to run operations in a given jurisdiction (Nwaokoro 2013). A good example is the Nigeria Liquified Natural Gas Project. Despite the numerous guarantees granted the partner investors in the project by the Nigerian government which guarantees are even statutorily encapsulated in the Nigeria LNG (Fiscal Incentives, Guarantees and Assurances) Act, the country has gone ahead to enact some legislations including tax laws adversely impacting cum limiting those guarantees. An example is the Niger Delta Development Commission (Establishment, etc) Act, the constitutionality of which was upheld by the Court of Appeal in the case of *NDDC v NLNG Ltd (2010) LPELR-CA/PH/520/2007*. The host country may even terminate the contract prematurely and nationalize assets belonging to the investor by utilizing the legislative process (Waelde & Ndi 2006; Al-Faruque 2006).

As a buffer against this, foreign investors thus insist on the insertion of stabilization clauses in transnational investment agreements, particularly in the oil industry (Emeka 2008). These provisions are aimed at precluding host states from taking legislative or administrative measures, which impede on the commercial interests of the investor (Bernardini 2008). Thus, the State undertakes not to utilize its legislative and administrative prerogatives in a way that will have a detrimental effect on the investor. The agreement may even go on to specify what actions are prohibited. This may include, for example, an undertaking not to raise taxes for a period of time, otherwise referred to as tax stability clauses. These provisions are created for the protection of the investors, because the host government have various mechanisms at their disposal which could potentially jeopardize the foreign investor's legitimate expectations of making a profit out of their investments. They protect the investment by rendering the agreement immune from national law (Mann 1973). The inclusion of these clauses are not just a major concern for investors but also other stakeholders such as lending financial institutions (Maniruzzaman 2009). The lending institutions are typically the ones that will finance the projects. They too will need assurances that they will get their money back from the investor, once they make a borrowing (Ng'ambi 2014).

Stabilization clauses are designed to stabilize or freeze the essential provisions of the agreement by strictly prohibiting any legislative or administrative act which derogates from or is otherwise inconsistent with the provisions of the agreement or the legal environment of the transaction. Stabilization clauses seek to insulate the contract from unilateral alteration. It is therefore a derivate or precipitate of the principle of *pacta sunt servanda.* Stabilization clauses are directed against: (a) arbitrary increase in taxes; (b) amendment of municipal laws of the host country which may affect the existing agreement; (c) expropriation, nationalization, and any other form of intervention in the enterprise.

3.2 Types of Stabilization Clauses

As already highlighted above, investors will invariably insist on the insertion of stabilization clauses in their transnational oil investment agreements. These clauses 'specifically seek to secure the agreement against future government action or changes in law' (Curtis 1988). The clause purports to do so by immunizing the contract from the municipal law by internationalizing it (Maniruzzaman 2005; Fatouros 1980). Thus, at least in the abstract, any alteration in the law should have no effect on the agreement whatsoever if it contains a stabilization clause (Montembault 2003).

There are various types of stabilization clauses. The first type is the 'stabilization clause *stricto sensu*'

(Curtis 1988). This clause seeks to ensure that the law existing at the time of the contract will continue throughout the life of the project (Al-Faruque 2006). Such a clause will, in theory, freeze the municipal law of the host State from the day that the contract is concluded until the contract itself expires. An example of such a clause is that contained in the Concession Agreement of 1933 between Iran and the Anglo Iranian Oil Company. It stated that the:

> Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities (Paasivirta 1990).

This implies, on a broader level, that if any legislative changes are made by the host State same will not in any way alters the rights and obligations contained in the agreement itself. It therefore follows that in the event where there is a conflict between the provisions of the contract and any subsequent legislation, the former will always take precedence (Al-Faruque 2006). Included within this category would be tax stability clauses. Again these simply stipulate that during the stability period, no new taxes will be introduced by the host State that override the incentives that may be contained in the agreement (Ng'ambi 2014).

Another type is the 'intangibility clause' (Curtis 1988). These are provisions within the contract which denote that the contract cannot be altered or abrogated without the mutual consent of the parties (Al-Faruque 2006; Dolzer & Schreuer 2012). With this type of clause the State does not actually surrender any legislative or administrative prerogatives *per se*. However, like the *stricto sensu* clauses, they do seek to prevent the State from unilaterally altering the terms of the contract. An example of such a clause is the one contained in article 17.2 of the Production Sharing Contract of Indonesia between Pertamina and Overseas Petroleum Investment Corporation and Treasure Bay Enterprise Limited which provides that: "This contract shall not be annulled, amended or modified in any respect, except by mutual consent in writing of the parties hereto" (Al-Faruque 2006).

The third type of stabilization clause one might encounter is the 'economic stabilization clause' (Al-Faruque 2006). An example of this is contained within the agreement between the Republic of Gabon and Vanco Gabon Ltd. It reads as follows:

> [T]he State guarantees to the Contractor, for the duration of the contract, the stability of the financial and economic conditions insofar as these conditions result from the Contract and from the regulations in force on the Effective Date.
>
> These obligations resulting from the Contract shall not be aggravated, and the general and overall equilibrium of the Contract shall not be affected in an important and lasting manner for the entire period of validity hereof. However, adjustments and modification of these provisions may be agreed upon by mutual consent (Al-Faruque 2006).

This type of clause either prohibits the State from passing a law or taking administrative action that render the contract more onerous or expensive to perform or ensures that in an instance where the government does pass such a law the government can examine these adverse economic consequences and restore the economic equilibrium for the investor (Al-Faruque 2006).

3.3 The Effect of Stabilization Clauses

There is much academic debate surrounding the precise effect of stabilization clauses (Paasivirta 1990). There are two clearly identifiable categories in this respect. There are those who argue that stabilization clauses do offer absolute protection to the investor on the one hand. On the other hand, there are those who are diametrically opposed to this. Ng'ambi, who belongs to the former category, argues that stabilization clauses do offer absolute protection to the investor based on the fact that arbitral tribunals respect the sanctity of contracts thus endorsing maxim *pacta sunt servanda*. In order to ensure this absolute protection however, investors must also ensure that there is an arbitration clause so that the case is determined in a neutral forum (Ng'ambi 2014).

Stabilization clauses effectively do grant absolute protection to the investor. They purport to do this by circumventing the possibility of an agreement being prematurely terminated or modified by an Act of the legislative arm of the host State (Suratgar 1962). Thus, if a transnational oil investment agreement contains within it a stabilization clause and the host State proceeds to nationalize assets belonging to the investor, then the former would be committing an illegal act.

Stabilization clauses immunize the agreement from municipal law by internationalizing it (De Vries 1984; Coale 2002; Cantegreil 2011). This effectively means that the agreement becomes subject to international law. Therefore, obligations and remedies available to both parties are also of an international character (Amador

1959). One of those international obligations is the international law principle of *pacta sunt servanda.* This principle essentially espouses that agreements freely entered into shall be enforced according to their terms (Garner 2004; Carbonneau 1998). This is obviously not an absolute rule (Atiyah & Smith 2006; Peel 2011). This principle is as applicable to agreements between the host State and private corporations as it is to agreements between the former and other States (Wehberg 1959). *Pacta sunt servanda*, stems from respect for the sanctity of contracts. It is not an absolute rule. However, the default position is to lean against unilateral termination of existing agreements (Jennings 1961). Thus, once a contract is entered into, its terms must be upheld and respected.

It has been argued that because the contract is 'immune from an encroachment by a system of municipal law', in the same manner as a treaty between two international persons, the contract is elevated to the status of a treaty. For this reason, it is only subject to international law (Mann 1973). This is partly the basis upon which the absolute protection theory has been opposed.

On a conceptual level, arguments abound as to whether a contract with a private investor is equivalent to a treaty. In *Amoco International Finance Corp. v Government of the Islamic Republic of Iran (1987)15 Iran-US CT Rep 189,* the tribunal took the view that internationalizing a contract is elevating the status of a contract to that of a treaty. Doing so elevates the status of a private corporation to that of a State.

It must however be noted that divergent opinions abound on this issue. This opposition is based on the premise that, by its very definition, a treaty is an agreement between two States. It can never be concluded between a State and an entity, like a multinational corporation which is not a subject of international law. Furthermore, a treaty involves the mutual surrender of sovereign rights and these are rights which the investor does not have the capacity to surrender (Sornarajah 2000; Chatterjee 1988). The clause may stipulate that the proper law of the contract is international law or other general principles of law; however, this does not automatically transform the contract itself into an international agreement within the definition espoused in the Vienna Convention on the Law of Treaties (Schachter 1991; Amerasinghe 1964). These sentiments were re-echoed in the case of *Saudi Arabia v ARAMCO (1963)27 ILR 165 - 167* where the tribunal rejected the contention that the concession should be assimilated to an international treaty governed by the Law of Nations. It was further held that the law applicable in this case should be that of Saudi Arabia because this is the law of the country with which the contract has the closest natural and effective connection, unless another law is designated by the conclusive conduct of the parties.

A State can limit its legislative powers on account of an international agreement with another State. Thus, generally speaking, if there is a treaty in place and the State violates it through legislative means then this will have international consequences. It does not follow however that a contractual agreement with an individual or corporation can have the same effect (Wolff 1950). It would thus appear that an agreement between a State and a corporation falls outside the scope of the Vienna Convention on Treaties. It therefore, cannot be said to be a treaty or tantamount to one. However, as an exception to this rule, it is now generally accepted that a contract can be elevated to an international level, where there is an umbrella clause in a bilateral investment treaty between the host State and the home State of the investor (Schill 2009).

A further view espoused by opponents to the absolute protection theory is that, private relations are not governed by international law as such. Thus, applying international law to private relations is misplaced and attempting to do so is like trying to apply, 'the matrimonial laws of France or England to relations between cats and dogs' (Sereni 1959). This is a relatively weak argument, considering the myriad sources of international law that private entities are able to rely upon in the modern era (Ng'ambi 2012).

Opponents of the absolute protection theory have simply dismissed it as, "essentially self-serving…designed to support a very partisan, capitalist approach to contractual disputes" (Bowett 1988). Indeed, it has been seen that there are conceptual problems with equating a contract to a treaty. For this reason it is difficult to accept this as a basis for binding a State to agreements which contain stabilization clauses (Ng'ambi 2014). Given these views one might, therefore, hesitate in arriving at the conclusion that stabilization clauses are inherently valid and enforceable (Nwaokoro 2013; Crawford & Johnson 1986). Although there is no consensus in the academic debate on this matter, it would appear that there are an overwhelming number of cases in support of holding States to undertakings made through stabilization clauses. The basis of this is the sanctity of contracts, as encapsulated by the maxim *pacta sunt servanda*. This means that all agreements must be upheld. After all, under the principle of the sanctity of contracts, it is the will of the parties that serves as the foundation of their agreement. The insertion of stabilization clauses in agreements in the first place, is an expression of that will and for this reason, stabilization clauses should be upheld (Muchlinski 2007).

3.4 Stabilization Clauses vis-à-vis Permanent Sovereignty over Natural Resources

There are doubts as to whether stabilization clauses can limit a State's inalienable prerogatives (Chatterjee 1988). See the decision in *Oscar Chinn's Case (1934) PCIJ Series A/B No. 63, 23*. One of such prerogatives is the right to nationalize foreign owned property in exercise of State sovereignty (Bernardini 2008). State sovereignty is the

concept that States are in complete and exclusive control of all the people and property within their territory, and also includes the idea that all States are equal. In other words, despite their different land masses, population sizes, or financial capabilities, all States, ranging from tiny islands of Micronesia to vast expanse of Russia, have an equal right to function as a State and make decisions about what occurs within their own borders. If all States are equal in this sense, then a State does not have the right to interfere with the internal affairs of another State. See the *Anglo-Norwegian Fisheries Case (U.K. v Norway) (1951) ICJ Rep 3*. The sovereignty of Nigeria as a State is guaranteed by sections 2(1) and 14(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). See the decision in the case of *Inspector-General of Police v All Nigeria Peoples Party & Ors (2007)18 NWLR (pt. 1066) 457*. Indeed, stabilization clauses appear to be incompatible with the principle of sovereignty of the State in that they purport to impose unlimited constraints on the legislative competence of the host country. Sonarajah supports this view and opines that the acceptance of the principle of permanent sovereignty over natural resources would mean that a State cannot validly agree not to change the terms of an agreement on the exploration of its natural resources (Sornarajah 2010).

It is arguable that a State cannot surrender its sovereign prerogatives because these are often imperative if the State is to function. Thus, it is unclear whether a stabilization clause requiring the subjugation of the State to mandatory rules of international law can produce such typical effect. However, there is a possibility that the reliance induced by the stabilization clause entitles the injured party to compensation for any damage caused by the said nationalization. This should be the case even where the breach of the stabilization commitment is not in itself declared illegal by the arbitral tribunal (Sornarajah 2010; Cotula 2008; Te´llez 2012). Indeed, the decisions of some arbitration tribunals seem to uphold the principle of permanent sovereignty over natural resources in such instances, though such cases are in the minority. An example is the decision in *LIAMCO v The Government of the Libyan Arab Republic (1977) ILR 141*. Even in this case, the arbitrator acknowledged that ordinarily, the contract could not validly be terminated without the "mutual consent of the contracting parties, in compliance with the said principle of the sanctity of contracts and particularly with the explicit terms of Clause 16 of the Agreements." However, having found that the nationalization was non-discriminatory and for a public purpose, the arbitrator declared it as lawful. Apparently, this view at best constitutes an exception to the general rule of applicability of the principle of *pacta sunt servanda* to stabilization clauses rather than a parallel rule on its own. Another exception appears to have been created in the case of *Aminoil v Kuwait (supra),* where it was stated that the overall effect of a stabilization clause is to be determined by considering the object and purpose of the clause in the particular contract. Thus, it may be argued that this case decided that there is no absolute principle on the applicability of stabilization clauses but rather each clause is to be considered on the basis of its own merits, regards being had to the tenure of the contract accommodating the clause. In that case, the tribunal held that the purpose behind the stabilization clause in the agreement was to protect against confiscatory termination and takeover and as such, if the takeover is not confiscatory, it would not amount to a breach of the stabilization clause. Since the government had made an offer of monetary compensation, the tribunal held that taking was not confiscatory and did not amount to a breach. Also, the fact that the clause did not expressly and unambiguously prohibit or limit the right to nationalize and the fact that the duration of the contract was considered unreasonably long (60 years) was taken into consideration by the tribunal in coming to the decision that the stabilization clause did not apply to prevent nationalization. Also, in *Amoco International Finance Corp. v Government of the Islamic Republic of Iran (supra)*, the need for the stabilization clause to expressly prohibit nationalization for same to be declared unlawful was emphasized. Also see *EnCana v Republic of Ecuador (2006) LCIA Case UN3481, 49*.

On the other hand, it has also been argued that stabilization clauses are valid and do not derogate from the sovereign rights of a State. This appears to be the dominant view, considering the plethora of arbitral cum judicial authorities that have adopted same. See the decisions in *Lena Goldfields Arbitration (Case 1) (*Lena Goldfields Limited v USSR) *(1929-30)5 ADIL 3; Ruler of Qatar v International Marine Oil Company Ltd (1953)20 ILR 534; Revere Copper & Brass Inc. v Overseas Private Investment Corporation (1978)17 ILM 1321; Methanex Corp v United States of America, Award of 5 August 2005 (at Part IV, Ch D, para 7); Parkerings-Compagniet v Lithuania, Award, 11 September 2007, ICSID Case No. ARB/05/8, para 332*. Thus, in *Government of Saudi Arabia v Arabian American Oil Co. (1963)27 ILR 117,* the arbitral tribunal while rejecting the well canvassed argument that interpreting a stabilization clause so as to preclude the host State from passing certain legislation in the public interest would be an encroachment on the doctrine of permanent sovereignty over natural resources, held that "nothing can prevent a State from binding itself irrevocably… and from granting to the concessionaire irrevocable rights." The effect of the above is that a State cannot go back on its decision once it has renounced the right to exercise some of its powers. Once the State has accepted a stabilization clause it gives the investor a 'legitimate expectation' which the government cannot then go back on, as decided in the case of *BP Exploration Co. (Libya) v The Government of the Libyan Arab Republic (1979)53 ILR 297*. Thus, the general rule remains that sovereignty cannot be cited as an excuse for the State's failure to fulfill its contractual obligations, as decided in the cases of *Texaco Overseas Oil Petroleum Co. & Anor v The Government of the*

Libyan Arab Republic (supra); *AGIP v. Peoples Republic of Congo (1982)21 ILM 726; LETCO v Liberia (1989)2 ICSID Reports 343.*

According to Chowdhury, when a State makes commitments in stabilization clauses, it does so in the exercise of the sovereignty which inheres in it and not in derogation thereof (Hossain & Chowdhury 1984). Even Koskemeni agreed that "States…had been able to bind themselves because they were sovereigns. If they were not able to bind themselves - and thus receive the benefits they were looking for - then they could not really be sovereigns…." (Koskemeni 2011). In *Government of Kuwait v American Independent Oil Co. (1982)21 ILM 976,* the tribunal held that the nationalization was arbitrary and awarded damages against the host country. Also, in *Texaco Petroleum Co. Ltd & California Asiatic Oil Co. v The Government of the Libyan Arab Republic (1979)53 ILR 398*, the arbitrator awarded damages assessed on the principle of *restitutio in integrum.* A similar decision was also reached in *Sapphire International Petroleum Ltd. v. National Iranian Oil Co. (NIOC) (1967)35 ILR 136.*

In order to escape the liability which may arise from the breach of a contract, host countries may prefer to insert clauses which will enable them alter their contract with the IOCs. Such clauses may provide that nothing in the contract including any provision on arbitration shall prevent the host country from exercising her inalienable rights.

4. The Concept of Renegotiation Clause

In order to make room for flexibility in long-term agreements, renegotiation or review clauses are incorporated into such agreements. Renegotiation clauses are contractual mechanisms which give the parties the option to review, discuss and adapt the terms of a contract. These typically take effect either upon the occurrence of a triggering event or during specific intervals (Gotanda 2003). If the triggering event has the effect of altering the contractual equilibrium that exists between the parties, then there exists the possibility of adapting the contract. This is provided that the parties agree to such adaptation or provided that the clause itself prescribes adaptation by a third party. The legal validity of these clauses is undisputed because they are inserted by the free will of the parties (Al-Faruque 2008).

Renegotiation may be intra-contact, extra-contract, or post-contract. The insertion of a renegotiation clause into the contract facilitates intra-contract renegotiations (Salacuse 2013). This is because they occur within the framework of the agreement itself. This can be contrasted with extra-contract renegotiation, which as the name implies occur outside the framework of the existing agreement. The fundamental feature of these renegotiations is that one party was requesting the alteration of pre-existing contractual obligations even though there was no provision for this in the agreement itself (Salacuse 2013). Post-contract renegotiations occur upon the expiration of the contract. Although the parties, in the abstract, are relieved of their obligations once the contract has elapsed, they may nonetheless attempt to renew their relationship (Salacuse 2013).

4.1 Difference between Renegotiation Clauses and Stabilization Clauses

Renegotiation clauses can be contrasted with stabilization clauses. In the latter case the aim is to freeze the law so as to 'keep the original balance alive throughout the contract', whereas in the former case the aim is to keep the relationship alive by 'requiring the parties to strike a new balance wherever there are circumstances justifying a change in the original obligations of the contract' (Sornarajah 2010). The difficulty with rigid contractual arrangements, whether fiscal or otherwise, is that they cannot 'realistically persist in the face of the dynamic economic changes at the global and national level over ten years' (Mato 2012). The contractual framework should reflect this and acknowledge that the possibility of change is a normal and integral feature of international business (Mato 2012). This could be accomplished through the insertion of renegotiation clauses in the contract.

Although it is understandable that the investor would need some form of stability in their contracts, this position cannot be sustained in the long run. Indeed, stabilization clauses on their own cannot withstand the realities associated with long term contracts (Chatterjee 1988). No one questions the necessity of inserting some form of protective clause (i.e. stabilization clause) in the agreements (Foster 2005). However, the vicissitudes of the natural resource industry are a good enough reason to provide for some form of flexibility in long term agreements through renegotiation clauses. This facilitates renegotiations that can be conducted in instances where there are windfall profits or indeed in instances where the economic situation has become so onerous to the investor that they need to revise certain contractual terms to stay afloat. It is in the interests of the parties to renegotiate the contract as their relationship is an interdependent one and their interests inextricably linked (Al-Faruque 2008). Renegotiation does not undermine the stability of agreements. It actually provides a form of insurance against the resource nationalism cycle. Governments are more likely to react adversely, if they realize that the contract emphatically excludes the possibility future revision (Mato 2012). There would be far less inclination to nationalize or take any other draconian measures, if the terms of the agreement episodically be revisited, reopened and revised. Asante observes:

> If periodical review is recognized as a realistic feature of the investment process, financiers could take it into account in determining the financing agreements, and the renegotiation could be so timed as to coincide with the year in which the investor would have recouped his investment. Thereafter, both parties could agree on a reasonable rate of return for the investor (Mato 2012).

Despite their differences, the two clauses can co-exist within the same contract (Waelde & Ndi 1996). The combination may seem incongruous. However, the advantage of having the clause lies in the fact that governments and corporations alike are then under an obligation to renegotiate the contract in good faith, with the aim of restoring the contractual equilibrium.

4.2 Why Renegotiate?

The need to renegotiate is influenced by a plethora of factors. Chief among these is the fact that transnational oil investment contracts are long term agreements which, as a general rule, run for periods exceeding ten years. Indeed some may even run for sixty years as was the case in *Aminoil v Kuwait (Supra)*. Regardless of the time frame, it is within the realm of contemplation that episodically a concatenation of circumstances will necessitate the revisiting of certain contractual provisions (Al-Faruque 2008). Such a situation for example may be precipitated by a sudden windfall in commodity prices. There may also be a perception, whether misconceived or not, that multinational corporations are externalizing more profits from the natural resources of the host State than they are actually bringing in. This can further be compounded in instances where the State is in a relatively weaker bargaining position than the corporation (Al-Faruque 2008). The perceived unfairness of this may lead to political strife (Stevens 2008). Indeed, such a situation may lead to two potential consequences. If a friendly host government who may have previously granted favourable terms to the investor is in power they may wish to revisit the terms of the agreement. The incentives received by multinational corporations may possibly be reduced or even revoked so that the party in power may maintain their political hegemony. This is so as to obtain an equitable share of the profits generated by the multinational corporation as a result of the windfall. Such a move would be calculated to pacify an agitated people which in turn would generate the political mileage needed for the government of the day to maintain their political hegemony. The second potential consequence is that the political strife may lead to a change of government through democratic or indeed extra-democratic means. In such an instance the new government may seek to renegotiate the terms of the contract so as to reach a more equitable tax regime. Failure to renegotiate with an overzealous government may potentially lead to the outright nationalization of the investor's assets. The renegotiation clause acts as a buffer against such extreme consequences by aiding the parties in reaching an equitable solution 'which eventually facilitates stability in the contractual relationship by promoting confidence, trust and reliability between them' (Al-Faruque 2008). By inserting renegotiation clauses, the parties are minimizing the chances of a conflict occurring (Gotanda 2003).

It has further been advanced that culture is an influencing factor. Perceptions of how business ought to be conducted vary from culture to culture. Invariably, the business practices of capital exporting nations will be very different to those to the capital importing ones. As a result of this, differences may arise and it may be necessary to renegotiate the terms of the contract.

From the foregoing, it can be seen that renegotiation clauses are mutually beneficial to the host country and the IOCs. Changing circumstances in the world oil market make renegotiations necessary. Renegotiation clauses make for harmonious relations between the parties. Indeed, any modern investment contract, particularly in the oil industry is "an invitation to a ball" and the absence of flexibility in the contract may lead to acrimony.

4.3 The Renegotiation Process: Issues Arising

A number of issues arise from the renegotiation. The first element is to identify the circumstances that will lead to a renegotiation. This is what is referred to as the trigger event. The second issue that arises is the effect that the trigger event should have on the contract. The third issue that needs to be identified is the objective of the renegotiation. In other words: what are the parties seeking to achieve through the negotiation? Once these factors have been established, clear guidelines on the procedure for the renegotiation needs to be drawn by the parties. Finally, there must be a solution stipulated in case the parties fail to reach an agreement. This would normally mean referral to a third party to review the matter and possibly alter the terms of the agreement.

4.3.1 Triggering Event

The very first issue that must be identified is the event, or indeed concatenation of events, that will activate the process of renegotiation. This is referred to as the triggering event. Once the triggering event is identified, it will become the legal basis upon which the parties may then proceed to renegotiate (Al-Faruque 2008). As we have noted above, some clauses specify the precise events that will trigger a renegotiation. They may for example stipulate tax increases or the fluctuation or depreciation of commodity prices.

Precision in the language will serve to narrow the instances in which renegotiation between the parties can be initiated. Other clauses may utilize such general terminology as 'a substantial change in the circumstances existing on the date of the agreement' or 'a change of circumstances', thus widening the scope of events that may trigger a renegotiation. Some clauses may not even mention a trigger event at all (Al-Faruque 2008). An example of a clause which does not contain a trigger event is the OK Tedi Clause which utilizes more general terminology when it states, "The parties may from time to time by agreement in writing add to, substitute for, cancel or vary all or any of the provisions of this Agreement" (Al-Faruque 2008).

The advantage of having a narrowly defined clause is that the specificity contained therein leads to certainty which is good for both the State and the investor. This is owing to the fact that clearly defined events will, in theory, circumvent an opportunistic party from requesting renegotiation in instances outside the scope of the terms defined in the contract (Al-Faruque 2008). It is argued that difficulties typically arise in the event where the triggering event is not sufficiently defined in the agreement (Dolzer & Schreuer 2012). However, there is a danger that the terms can be so stringent that it leads to precisely the type of rigidity identified in stabilization clauses. A wide definition is advantageous in that it allows for some form of flexibility. However, there is also a danger that it can be so wide that it leads to uncertainty. This fact notwithstanding, a wider definition at least allows for the type of flexibility that in the long run will certainly protect the investor's interests whilst protecting the States sovereignty. Furthermore, it is rather difficult to envisage and thus account for every conceivable eventuality in the contract (Bernardini 2008). For this reason it is better to have a wide definition that will capture every reasonable eventuality that may not be envisaged by contractual draftspersons.

The possibility of either of the parties initiating vexatious renegotiations is averted by the fact that arbitral tribunals tend to define the triggering events very narrowly (Al Qurashi 2005). Clearly, this leads to some consternation on the part of both parties, since express contractual language will not totally eliminate the risk (Fox 1998).

4.3.2 The Effect of the Change on the Contract

Renegotiation and adaptation clauses apply only in exceptional circumstances (Bernardini 2008). Again this could be defined in the clause itself by determining the effect of the triggering event on the actual relationship of the parties. If the effect on the parties does not manifest, then again there is no legal basis for renegotiation. It could be drafted in a way that the triggering event causes a 'disproportionate prejudice', 'substantial detriment', 'substantial economic imbalance' on the parties' relationship or simply materially affects 'the economic and financial basis of the agreement.' They could also use a term like, 'the consequences and effects of which are fundamentally different to what was contemplated by the parties at the time of entering the agreement' (Bernardini 2008). Neither of the parties may be allowed to demand performance during renegotiation.

4.3.3 The Objectives of the Parties in Renegotiation

The precise obligations of the parties in the course of renegotiation must be defined (Bernardini 2008). Subjective wording such as 'removing the unfairness' or 'adopting an equitable revision' may be utilized (Bernardini 2008). Alternatively an objective wording like 'restoring the original contractual equilibrium' can also be used (Ng'ambi 2014). The LASMO clause talks of making 'necessary changes to this Agreement to ensure that the contractor is restored to the same economic conditions which would have prevailed if the new law and/or regulation or amendment had not been introduced' (Berger 2003).

The objectives of either party may be very different. The host government may seek to achieve diverse goals through a renegotiation of the petroleum contract, e.g. to gain greater control of the economy for the government and citizens; to secure an increase in revenue from the project; to promote economic self-reliance; to combat economic imperialism; to implement an ideology; to implement a policy of joint venture between foreign investors and state corporations; to obtain government control of major productive enterprises; to promote state monopolies; or to gain access to new technology, etc (Al-Faruque 2008). The investor may also have their own objectives during the renegotiation process. Their interests may lie in the economic viability of continuing with the contract in its original form. Tied to this, they will also be interested in restoring the equilibrium of the contract. Indeed there may be cases where the investor discovers that a particular find is not as economically viable as initially anticipated. Perhaps they may also seek to renegotiate in instances where the price of a commodity has depreciated. In whatever scenario, just like the host State, the investor will require the terms of the contract to be renegotiated from time to time (Al-Faruque 2008).

4.3.4 The Procedure for the Renegotiation

The procedure for the renegotiations should clearly stipulate the parties' obligations (Bernardini 2008). Invariably, renegotiation clauses are cryptic on the actual obligations of the parties. How do the parties thus decipher what these are? It is advanced that regardless of the formulation of the renegotiation clauses the parties can decipher what their obligations are by looking at the inherent functions of the renegotiation clause. These are threefold. The first is to compel the parties to "cooperate in the renegotiation procedure in an efficient manner" (Berger 2003). That is to say that the parties should act in a manner that is aimed at successfully reaching a solution by adopting a flexible attitude and consideration for the needs of the other party (Berger 2003).

The second function of the clauses is to adapt the contract to, and only to, the changed circumstances (Berger 2003). There is no justification for altering and restructuring the entire contract unless this is actually stipulated in the contract itself. The third function of these clauses is to maintain and control the commercial balance of the contract while adapting it to the changed circumstances (Berger 2003). It should certainly not lead to a situation whereby one party seeks to exploit the other party's weakness so as to obtain a commercial advantage. Thus, the obligations of the parties during the renegotiation process are as follows: (a) keeping to the negotiation framework set out by the clause; (b) respecting the remaining provisions of the contract; (c) having regard to prior contractual practice between the parties; (d) paying attention to the interests of the other side; (e) giving appropriate reasons for one's own adjustment suggestions; (f) making an effort to maintain the price-performance relationship taking into consideration the parameters regarded as relevant by the parties; and (g) avoiding an unfair advantage or detriment to the other side (i.e. the "no profit - no loss" principle). These factors can serve as a mere starting point in determining the parties' obligations in each case. However, this also has to be determined in conjunction with the actual wording of the renegotiation clause. Further consideration must be paid to the nature of the contract and the intention of the parties (Berger 2003).

4.3.5 Course of Action Should the Renegotiation Fail

It is possible for the parties to fail to reach an agreement during the renegotiation process, in which case renegotiation is said to have failed. This is a potential pitfall in having a renegotiation clause in the contract. Clearly, the clause imposes a duty on the parties to negotiate in good faith and same must be concluded within a reasonable period of time. Failure to do this may amount to breach of contract (Peter 1995).

However, even though there is a duty to negotiate, this does not mean that there is an actual obligation for the parties to come to an agreement subsequent to the renegotiation proceedings (Salacuse 2000), as decided in the cases of *Railway Traffic Case (Lithuania v Poland)*, (1931) *PCIJ Series A/B No. 42 at 116* and *North Sea Shelf Case (1969) ICJ Rep 4 at 47, paragraph 85*. This position was also quite succinctly highlighted by the tribunal in *Aminoil v Kuwait (supra)* and also in *Wintershall A.G. v Qatar (1989)28 ILM 795.* In the event that the parties do fail to reach an agreement, it is recommended that the matter be referred to a third party such as an arbitrator. The renegotiation clause itself or the agreement should provide for such referral. The role of the arbitrator would be to examine the matter and then amend the agreement on behalf of the State and the investor.

However, one problem which the parties might face is that arbitrators will be reluctant to adapt the contract unless the parties confer on them the authority to do so. Another problem may arise if the parties go for arbitration at the International Centre for the Settlement of Investment Disputes (ICSID), established by the 1965 Convention for the Settlement of Investment Dispute between States and Nationals of other States (ICSID Convention). Because there needs to be an actual legal dispute, arbitrators may deny jurisdiction in the case at all. This is owing to the fact that failing to agree during the process of negotiation does not necessarily constitute a 'legal dispute' under ICSID.

4.4 Renegotiation of Contracts without Renegotiation Clause

Even in the absence of a renegotiation clause in a long term agreement, there still may be alternative avenues through which the host State may realize flexibility in their agreements (Mato 2012). Renegotiation in such situations may be made possible under the principle of *clausula rebus sic stantibus*, literally meaning 'things thus standing' or better put that 'a fundamental change in basic circumstances of a contract justifies a revision'. This doctrine entitles a party to a treaty/contract to which it applies to escape his obligations by rendering same inapplicable because of a fundamental change in circumstances. See article 62 of the 1969 Vienna Convention on the Law of Treaties. If parties had contemplated the occurrence of the changed circumstance the doctrine does not apply and the treaty/contract remains effective. *Clausula rebus sic stantibus* only relates to changed circumstances that were never contemplated by the parties. See the *Fisheries Jurisdiction Case (United Kingdom v Iceland) (1973) ICJ Rep 3*. Under this rule there may be an obligation to renegotiate if there is a change of circumstances. Thus, the principle entails that in the event of an unforeseen change of circumstances that destroys the economic viability of a contract the parties may be permitted to renegotiate the contract or refer the matter to a tribunal for amendment or termination as decided in the case of *Establishment of Middle East Country X v South Asian Construction Co. (1987)12 YCA 97, 109*. This however contrasts with the position in *AMCO Asia v Indonesia (1984)23 ILM 351* and *Hungarian State Enterprise v Yugoslav Crude Oil Pipeline (1984)9 YCA 69, 70*.

In order to activate and depend on the *clausula rebus sic stantibus* principle, there must either be a contractual term to this effect or the applicable law must provide for it (Berger 2003). Application of the doctrine varies from jurisdiction to jurisdiction. Two factors however do bring some form of commonality. Firstly, the courts in most jurisdiction respect the fact that *pacta sunt servanda* is the overriding policy of contract law. Secondly, whilst the courts recognize that *clausula rebus sic stantibus* is one of the exceptions to this rule, they are only willing to apply it in limited circumstances, thus averting the potential for misuse of the principle (Horn 1995). The principle is thus useful in ensuring equity and justice and protects the legitimate interests of both

contracting parties. Thus, it is submitted that the principle of *clausula rebus sic stantibus* is not diametrically opposed to *pacta sunt servanda*. In fact, the two principles complement each other like two sides of a coin. The former simply tempers the rigidity of the latter by ensuring that contracts are enforced in a more equitable and dynamic manner (Hossain 1980). The approach of the courts is best summed up by Arbitrator Lalive in *Indian Cement Co v. Pakistani Bank (1980) ICC Case No. 1512 at 128 – 129* where he opined that:

> The principle "*rebus sic stantibus*" is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts. Whatever opinion or interpretation lawyers of different countries may have about the 'concept' of changed circumstances as an excuse for non-performance, they will doubtless agree on the necessity to *limit* the application of the so-called 'doctrine *rebus sic stantibus*' (sometimes referred to as "frustration", "force majeure", "*imprevision*", and the like) to cases where compelling reasons justify it, having regard not only to the fundamental character of the changes, but also to the particular type of the contract involved, to the requirements of fairness and equity and to all circumstances of the case.

The principle of fundamental change of circumstances (*rebus sic stantibus*) is certainly one that is recognized under customary international law, as decided in the *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdictional Phase) (1973) ICJ Rep 3*. This principle is found in article 62 of the 1969 Vienna Convention on the Law of Treaties which highlights the grounds upon which a State may withdraw from a treaty. Article 62(1) states that, provided the circumstances were unforeseen a State may withdraw from a treaty in instances where: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. Article 62(2) further provides the principle may not be invoked in instances where the said treaty establishes a boundary or where the fundamental change is a direct consequence of a breach committed by the invoking party.

Note that the application of the principle of *clausula rebus sic stantibus* is limited to exceptional cases. Indeed for it to apply, the occurrence of the fundamental changes must not be traceable to the will of the parties. Thus, the emergent event must not be reasonably foreseeable or foreseen by the parties at the time of the contract and also, the emergent event must be capable of rendering the obligation of one party so onerous that if it had been contemplated at the time of the contract the affected party would not have entered the contract, as decided in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) (1998)37 ILM 162*. Though it is arguable that both the Vienna Convention on the Law of Treaties and the *Gabcikovo-Nagymaros Project Case* dealt only with treaties and not transnational contracts between multinational corporations and the host government, it may nevertheless serve as persuasive authority on the point. Although it is just in draft form, the sentiments expressed in the UN Draft Code of Conduct for Transnational Corporations do provide an indication of the potential direction that the United Nations may eventually go with the principle of *rebus sic stantibus* as applicable to contracts between host countries and transnational corporations. Article 5 of the aforementioned draft code states that a transnational corporation should respond positively to requests for renegotiation of agreements in instances:

> …marked by duress, or clear inequality between the parties, or where the conditions upon which such a contract was based have fundamentally changed, causing thereby unforeseen major distortions in the relations between the parties and thus rendering the contract unfair or oppressive to either of the parties. Aiming at ensuring fairness to all parties concerned, review or renegotiation in such situations should be undertaken in accordance with applicable legal principles and generally recognized legal practices (Horn 1980).

Further evidence of this principle of *clausula rebus sic stantibus* is also found under the 2016 UNIDROIT Principles of International Commercial Contracts. The Principles, whilst recognizing *pacta sunt servanda* state that it is not an absolute rule. Article 6.2.2 states that there is an obligation to perform despite the hardship unless "the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished." The events must occur after the conclusion of the contract. Furthermore, the events must not have reasonably been taken into account at the conclusion of the contract and they must be beyond the control of the party seeking excuse. Paragraph (d) further provides that the party should not have assumed the risk of events. The commentary sheds

more light on what this actually means. It says that even though certain risks may not have been undertaken expressly, the element of risk may be implied from the very nature of the contract. A person that enters a speculative transaction is deemed to assume a certain degree of risk even though he or she is not fully aware of them at the time that the contract is being concluded. In the event of hardship, article 6.2.3 provides that the disadvantaged party is 'entitled to request renegotiations.' Such a request must be made without undue delay and should state the grounds upon which it is made. Paragraph (2) provides that this request for renegotiation does not in itself give the disadvantaged party the right to withhold performance. Paragraph (3) states that in an event where the parties fail to arrive at an agreement, they may take the matter to court. Paragraph (4) lays down that where the courts do find hardship, they may if reasonable either terminate the contract or adapt it 'with a view to restoring its equilibrium.' Article 7.1.7 provides for instances of force majeure and states that non-performance of a contract is excused if the party in breach can prove that it was as a result of an impediment beyond his or her control and as a result could not reasonably be expected to have taken that impediment at the time that the contract was being concluded nor could the party have avoid or overcome this impediment or its consequences. If the impediment is only temporary then the party is only excused for a reasonable period of time. The reasonableness of such a timeframe depends on 'the effect of the impediment on the performance of the contract.' Indeed there is also a duty to notify the other party of this impediment and its effect on the ability to perform. Failure to give such notification within a reasonable time frame may render the party in breach liable for any damages resulting from this. Excuse for non-performance is also recognised under article 79(1) of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG) which provides that a party may escape liability for failure to perform his or her obligations if the said party can prove that this was as a result of an impediment beyond his or her control and that could not have reasonably been taken into account at the time the contract was being concluded. Furthermore, the party must be unable to avoid or overcome its consequences. See the decision in the case of *Scafom International BV v Lorraine Tubes, 19th June 2009 [C.07.0289.N]* where the Belgian Supreme Court interpreted this as including force majeure. Thus, if there is an unforeseen change of circumstances which leads to the alteration of the contractual equilibrium, then this might under limited circumstances enable the parties to extricate themselves from performance of their contractual obligations.

Note that the doctrine is somehow similar to the common law doctrine of frustration. Thus, though English common law maintains the principle of *pacta sunt servanda,* it yet recognizes that there may be instances where a change of circumstances renders the contract impossible to perform. In such an event the contract is said to be frustrated. As was stated by Lord Simon in *National Carriers Ltd v Panalpina (Northern Ltd) [1981] AC 675 at 700*:

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances….

The doctrine of frustration discharges the parties from any duty to perform (Atiyah & Smith 2006). This event however should not be self-induced, as decided in the case of Maritime National Fish v Ocean Trawlers [1935] AC 524. In addition, it must have been unforeseeable, as decided in Walton Harvey Ltd v Walker & Homfrays Ltd [1931] 1 Ch 274. It should be noted at this point however, that the doctrine of frustration, like rebus sic stantibus, is only applied in limited circumstances. Moreover, it is established that the mere fact that commercial realities have changed leading to increased costs or an adverse effect on one party's profit making capacity, does not in itself amount to a frustrating event, as decided in the cases of Tennants (Lancashire) Ltd v C S Wilson & Co Ltd [1917] AC 495 (HL); Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 (HL); and Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93 (HL). However, the doctrine of rebus sic stantibus at international law differs from the English common law doctrine of frustration in that whereas renegotiation and adaptation necessarily follow in the former, in the latter case the court does not have the power to modify or amend the contract in the event that they do find that the contract has been frustrated. All they can do is discharge the parties of any pre-existing duty to perform (Treitel 1994).

The English position contrasts slightly with the more liberal approach of the United States of America (Al Qurashi 2005). Section 2-615 of the USA Uniform Commercial Code as well as section 268(2) of the USA Restatement (Second) of the Law of Contracts recognizes the principle of 'commercial impracticability.' This doctrine allows the parties to request a renegotiation in instances where circumstances have altered so radically that performance of the contract is no longer economically viable (Kolo & Wälde 2000). Indeed, the change of circumstances must be unanticipated at the time that the original contract was being signed and must be so

financially damaging to the party, with the possibility of even driving the said party to bankruptcy, as decided in Alumnium Co of America v Essex Group Inc, 449 F. Supp. 53 (W.D. Pa. 1980). Although the position in the United States of America is slightly wider than under English Common Law we can see that it is still very narrow.

Judges under the civil law systems appear to be slightly more empowered than their common law counterparts. The general rule is that *pacta sunt servanda* is the prevailing principle when one contracts under the civil law. However, this rule only subsists if the underlying circumstances which were essential in the conclusion of the agreement continues to exist (Kolo & Wälde 2000). The principle of *rebus sic stantibus* applies once there is a fundamental change in circumstances, as the courts find no justification for holding the parties to contracts which were deemed impossible to perform. It does not follow of course that the parties are permitted an easy escape from their contracts. Certain conditions do need to be met and these are encapsulated in the German principle of *Störung der Geschäftsgrundlage* and the French principle of *Imprévison* (Kolo & Wälde 2000).

Paragraph 313 of the German Civil Code propounds the principle of *Störung der Geschäftsgrundlage*. Under this principle, the parties are no longer bound to their contractual obligations in instances where unforeseen events have led to a drastic alteration of the essential circumstances that subsisted when the contract was formalized. The disrupted economic equilibrium should be so unbalanced that the contract no longer has any real value to the affected party (Markesinis *et al.* 2006; Mezzacano 2011; Geiger 1974). In contrast to their common law counterparts the German courts do not only have the power to terminate a contract, they can also adapt it in instances of changed circumstances as codified in paragraph 313 of the German Civil Code (Mezzacano 2011).

The principle of *rebus sic stantibus* is also found in the French doctrine of *imprévison* (Geiger 1974; Nicholas 1992). It is implied from this theory that contracts between the French government (or an emanation of the same) can only subsist as long as the fundamental circumstances contemplated by the parties are still in existence (Culda 2010). In order for *imprévison* to arise, two essential requirements must be met: (a) the change of contractual circumstances must not be due to any fault attributable to the debtor; and (b) the contract must not contain any provisions related to the adaptation (indexing or renegotiation) to the new circumstances (Culda 2010). However, this principle in the French context emanates from French administrative law and applies only to administrative contracts concluded with the French government (Hossain 1980; Culda 2010). It does not apply to civil contracts and the French courts have episodically resisted any attempts to extend it to such contracts. This was clearly illustrated in the *Canal de Craponne Case* where the *Cour de Cassation* held that, the courts cannot – even in the interest of equity – take into consideration the time and circumstances in order to modify these agreements, and to substitute new clauses for those which have been freely accepted by the parties (Kapwadi 2012). This, it would appear, is in sharp contrast with the German position. Despite the French reluctance to apply this principle to civil contracts, it has been adopted by various other civil law jurisdictions such as Poland (article 269 of the 1932 Polish Civil Code), Italy (articles 1467 – 1469 of the 1946 Italian Civil Code), Greece (article 388 of the Greek Civil Code) and Egypt (article 147 of the Egyptian Civil Code).

From the above positions, it is clear that whilst the legal systems at both international and national level recognize the principle of *rebus sic stantibus*, they are only willing to apply it in limited circumstances so as to preserve the sanctity of contracts and other agreements entered into. Thus it is by no means certain that the contracts will be adapted by the courts. Therefore, if a contract is to have any guaranteed form of flexibility, it must be in the form of a contractual clause permitting the renegotiation and adaptation of the terms of the agreement. These clauses would be the mechanism through which renegotiation is facilitated between the host state and the investor (Hossain 1980).

5. Political Risk Insurance

One of the means through which investors can protect themselves against political risks which may bedevil investments particularly in the oil industry is through political risk insurance. Such insurance schemes include the Overseas Private Insurance Corporation (OPIC) and the Multilateral Investment Guarantee Agency (MIGA). There are also a number of private insurers such as the American Insurance Group (AIG), Lloyds of London, Sovereign Risk Insurance Limited, Chubb and Zurich Emerging Markets Solution (Maniruzzaman 2005).

OPIC operates with the backing of the government of the United States of America (Inniss 2010). It is required to operate on self-sustaining basis. As a result of this, the organization has recorded a profit for every year since its inception. The OPIC 'helps U.S.A businesses invest overseas, fosters economic development in new and emerging markets, complements the private sector in managing risks associated with foreign direct investment, and supports U.S.A foreign policy.' An advantage with OPIC is that it insures an investors assets for up to twenty years, which is longer than its private counterparts. It may also authorize loans (Inniss 2010).

MIGA operates under the auspices of the World Bank. It commenced operations in 1988 and has about 155 members. Article 2 of the 1985 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention) states that the main reason for the establishment of MIGA is to encourage the flow of investment to

developing countries. Article 11 of the MIGA Convention covers non-business risks such as nationalization, war or civil disturbance, breach of contract and any losses arising from any introduction of restrictions on the transfer of currency outside the host country by the government. Eligible investments are specified under article 12 of the MIGA Convention and include: equity interests, non-equity direct investment and any medium or long term forms of investment. Moreover, the investment must be made into a developing country as per article 14 of the MIGA Convention.

6. Hardship Clauses

The parties could also rely on hardship clauses, if these are contained in the transnational oil investment agreement. These are utilized for different purposes in contracts. Typically, the purpose of these clauses is to deal with any potential hardships that may arise provided they are beyond the contemplation or control of the parties. When such eventualities arise, it gives the parties the right to request the suspension or termination of the contract (Konarski 2003). An example of a hardship clause is the ICC Model Hardship Clause, *viz*:

1. A party to a contract is bound to perform its contractual duties even if its events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.
2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:
   (a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that
   (b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.
3. Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract (ICC 2003).

It must be noted that these types of clauses are not so popular in transnational oil agreements (Horn & Kröll 2004). This is owing to the fact that investors feel that they lead to contractual instability and may provide an easy avenue through which the host State may evade its contractual responsibilities (Horn & Kröll 2004). Because, in their view, the term hardship cannot be defined with great precision, such a clause may lead to a situation whereby the parties to the contract will excuse their non-performance of a contract, by invoking, inducing or advancing the most spurious of claims (Horn & Kröll 2004). Such resistance has subsided somewhat over the years (Horn & Kröll 2004), as decided in the case of *Lemire v Ukraine (2002) YBCA 133 at 136*. Hardship clauses are also problematic if they provide for termination of the agreement when the hardship occurs. Termination is not an appropriate remedy for transnational oil agreements due to the fact that the investor has, by the time the hardship takes place, invested considerable sums of money on the project and supporting infrastructure (Horn & Kröll 2004).

Furthermore, *rebus sic stantibus* seems to apply more in instances where the parties are experiencing severe hardship or serious detriment arising from the changed circumstances. From the wording of the ICC Model Hardship Clause and the general principles applying to frustration, force majeure, *imprévision* and *Störung der Geschäftsgrundlage,* one would conceive that hardship clauses only apply to instances where the parties are experiencing some sort of hardship (not necessarily of such a degree required for the application of *rebus sic stantibus*). For these reasons it is more prudent for the parties to insert renegotiation clauses in their contract.

7. Dispute Settlement Clause (Mediation and Arbitration)

One of the concerns of the investor is having their disputes heard by a non-neutral forum such as the national courts, if a dispute was to arise with the host State (Sornarajah 2000). This is owing to the fact that the national courts, in developing countries at least, may not be fully independent of the executive. It is therefore within the realm of possibility that the national courts will render a decision against the investor even in the face of

incontrovertible evidence. One way to avert this is through the insertion of a dispute resolution clause which provides for arbitration or mediation (Ng'ambi 2014). The clause could even provide that the mediation or arbitration be embarked on where the parties fail to reach an agreement during renegotiation. Even in the absence of such a clause in the agreement, the parties may decide, either with or without a prior attempt at renegotiation, to submit their dispute to mediation or arbitration.

Mediation is a non-binding procedure which attempts to bring the parties together. This is fostered by a neutral third party, the mediator, who assists the parties in reaching their own decision. The advantage with this approach is that it brings the parties together, which in the long run makes it easier to engage in long term business transactions with one another. The difficulty with this approach however, is that is non-binding and therefore the parties can easily depart from any solutions propounded during the mediation proceedings (Ng'ambi 2014).

Another means through which the parties can resolve their disputes is through arbitration. Here, the dispute is heard by an individual or panel of individuals called the arbitral tribunal (Ng'ambi 2014). The tribunals obtain their jurisdiction from the arbitration clause (where one exists in the agreement) or from the terms of their appointment (where there is no arbitration clause in the agreement). The advantage with a decision rendered by a tribunal is that it is binding and enforceable (Ng'ambi 2014). Thus, in *Company Z (Republic of Xanadu) v State Organization ABC (Republic of Utopia) (1983)8 YB Comm Arb 94*, it was held that the arbitration clause is binding on the State. It was further held that an arbitral tribunal rendering an award in favour of the investor in no way encroaches upon the host State's sovereign right to alter its policies as it saw fit. This is owing to the fact that the tribunal did not claim the power to order specific performance; they only had the power to compel payment of an amount of compensation equivalent to performance.

If the parties had attempted renegotiation and failed to reach an agreement thereat, the arbitrator may consider the terms of the contract and decide whether the conditions set out in the contract for renegotiation have been met. Where the arbitrator finds that the conditions have not been met, then in the abstract the agreement would continue in full force. The term 'abstract' is used in view of the political realities of failure to adapt contracts that are perceived to be unfair. If however, the arbitrator finds that the conditions have been met, then three potential solutions could be propounded: (a) the arbitrator may ask the parties to go back and renegotiate the terms of the contract based on his or her findings; or (b) the arbitrator may simply terminate the agreement; or (c) the arbitrator may adapt the contract in a way that restores the contractual equilibrium (Ng'ambi 2014).

The first two options are well within the scope of the arbitral tribunal's competence. However, with respect to the third solution stated above, it must be emphasized that the powers of the tribunal are contingent on the authority they have been granted by the parties themselves, either through the medium of the arbitration clause in the contract, some subsequent agreement, or the terms of appointment of the arbitrator(s). Arbitral tribunals that have not been granted the authority to amend a contract on behalf of the parties cannot, as a general rule, do so since the express consent of the parties will required before the arbitral tribunal can move to adapt a contract (Al-Faruque 2008). This was certainly the position of the arbitral tribunal in *Aminoil v Kuwait (supra).* In this case, article 9 which contained the renegotiation clause stated as follows: "If as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties."

However, note that under the *kompetenz-kompetenz* rule, arbitrators are able to determine their own jurisdiction, as decided in the case of *Texaco v Libya (supra)*. That is to say, it is for them to decide whether or not they have the authority to determine a matter. Thus, article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration states that: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." The applicability of this rule, however, will depend on the arbitration clause itself coupled with the substantive law elected by the parties. The issue of jurisdiction is particularly important because if the arbitrators go beyond the scope of the powers conferred upon them, then this is a ground upon which the award may be refused recognition and enforcement. This rule is contained in article V(1)(c) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Once an award is rendered unenforceable by a competent authority under the law of the seat of the arbitration it makes it difficult, though not impossible, to seek recognition and enforcement in other jurisdictions. The process of seeking recognition and enforcement of non-domestic or foreign arbitral awards is fostered through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Article V(1)(e) of the 1958 'New York Convention' states that an award may be refused recognition and enforcement if it has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. As a result of this, potentially the parties may be foreclosed from seeking recognition and enforcement in other

jurisdictions (Russi 2008).

However, the term 'in which or under the law of which' as used in article V(1)(e) of the 1958 'New York Convention' is somewhat ambiguous (Russi 2008). This is especially so in instances where the actual seat of the arbitration differs from the applicable procedural law. Suppose for example that the parties select Country A as the seat of arbitration and the law of Country B to govern proceedings. It may be possible for the arbitrator to adapt contracts under the law of Country B but perhaps not possible to do so under the law of Country A. The predicament here is that if the award is set aside by a court in Country A it may be difficult to seek recognition and enforcement elsewhere because of the 'trump card' under article V(1)(e) of the 1958 'New York Convention'. This can occur despite the fact that the procedural law selected by the parties does in fact permit adaptation. As such this effectively frustrates the parties' choice of procedural law and leaves them with an unenforceable award despite the fact that they have strictly adhered to this procedural law (Russi 2008).

This position is further compounded by the fact that the interpretation of the term "foreign award" varies from jurisdiction to jurisdiction. This is because of the rather open-ended definition propounded under the 1958 'New York Convention'. Indeed, article I(1) of the 1958 'New York Convention' states that foreign awards are those which either are made in the territory of a State other than the State where the recognition and enforcement of such awards are sought or those which are not considered as domestic awards in the State where their recognition and enforcement are sought. This may lead to a plethora of unreasonable outcomes. Country A may consider awards rendered in its territory but under a different procedural law as 'non-domestic.' Country B on the other hand may consider only awards made within its jurisdiction as domestic regardless of the applicable procedural law. Thus, an award rendered in Country A but under the procedural law of Country B may be considered as 'non-domestic' by both. Conversely, an award rendered in Country B under the law of Country A may be considered as domestic by both. Now in the latter situation, supposing the award was upheld in Country A but set aside in Country B; recognition and enforcement may still be difficult to attain in other jurisdictions again despite strict adherence to the procedural law selected by the parties. Because of the confusion and fragmentation that this leads to, it should not be left to individual States to decide what is domestic and what is not (Russi 2008).

In order to determine whether an award is domestic or not it is proposed that the law should focus more on the procedural law and not on the seat of the arbitration (Russi 2008). Only the country whose law is chosen should be allowed to set aside the award. That way, the 1958 'New York Convention' is interpreted in accordance with the object and purpose of those that drafted it. The intention of the Convention was to ensure that awards are recognized in as many jurisdictions as possible. The idea that we should focus on the procedural law was also endorsed in the American case of *Bergesen v Joseph Muller Corp 710 F.2d 928 (2d Cir. 1983)* where the U.S.A District Court stated that awards not considered as domestic denotes awards made within the legal framework of another country.

If the parties elect to settle the matter under ICSID, there are questions as to whether the arbitrator has the competence or jurisdiction to adapt the contract in instances of changed circumstances (Bernardini 2008; Horn & Kröll 2004). This is owing to article 25 of the 1965 'ICSID Convention' which discusses the jurisdiction of the ICSID tribunal. That is to say, it is the provision which stipulates, 'the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings' (IBRD 1965). Under article 25(1) of the 1965 'ICSID Convention', the tribunal's jurisdiction extends to 'any legal dispute arising directly out of an investment.' Therefore, it is clear from the foregoing provision, that the matter before the ICSID tribunal must constitute a 'legal dispute' in order for the tribunal to accept it. If it does not amount to a legal dispute, then this would be a ground upon which any award rendered can be annulled under article 52(1)(b) of the 1965 'ICSID Convention'. The said provision states, that an award may be annulled where the tribunal manifestly exceeds its powers. Once this occurs, the award loses its binding force and as a consequence cannot be enforced in the territory of any contracting State under article 53(1) of the 1965 'ICSID Convention'.

The question that therefore arises is whether a failure to reach an agreement on the revision of specific terms of the contract, subsequently to renegotiation proceedings actually constitutes a legal dispute under the ICSID Convention. The difficulty is that the term was not defined in the 1965 'ICSID Convention'. In defining the term 'legal dispute', ICSID tribunal in the case of *Maffezini v Spain (2001)16 ICSID Rev- FILJ 212 at 245* relied on the definition propounded by the ICJ (Schreuer 2001) in the cases of *Mavrommatis Palestine Concessions Case (Greece v Great Britain) (1924) PCIJ (Ser. A) No. 2, 11* and *Case concerning East Timor (Portugal v Australia) (1995) ICJ Rep 90* wherein the ICJ had held that a legal dispute occurs when there is, "a disagreement on a point of law or fact, a conflict of legal views or interests between parties." Attempts at clarifying what was intended by those that drafted the 1965 'ICSID Convention' were also made in the Report of the Executive Directors submitted to member governments in 1965. Here, it was stated that:

> The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the

> Centre, mere conflicts of interest are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation (IBRD 1965; Bernardini 2008).

The views expressed in the report are accentuated by those of Delaume. In his view, reference to a legal dispute limits the scope of the arbitrator's jurisdiction to a review of the contractual rights and obligations of the parties in the light of the applicable law. In his view, issues such as non-performance or interpretation of the agreement would fall within the scope of the term 'legal dispute.' However, he goes on to say that, 'disputes regarding conflicts of interest between the parties, such as those involving the desirability of renegotiating the entire agreement or certain of its terms, would normally fall outside the scope of the Convention' (Delaume 1984). The consequences of this are far reaching. It is clear that if the parties fail to agree that the conditions necessitating the renegotiation process have actually occurred, as per the clause, then this constitutes a legal dispute. This is owing to the fact that this is a disagreement concerning the legal rights and obligations of the parties. Thus any dispute of the sort can be characterized as legal. In a similar vein, if following the unsuccessful renegotiation, one party feels the contract should subsist under the old terms and another feels that it ought to be terminated, then this too may constitute a legal dispute. Where the difficulty comes however, is if the parties fail to come to a consensual revision of the terms without fault on either side. In such a case, the arbitrator may be asked to intervene in a matter that does not exactly constitute a legal dispute (Bernardini 1998).

It is recommended therefore, that if the parties are to choose ICSID as the means through which they will settle all disputes arising out of the contract, they should in addition to this allocate the responsibility of adaptation to a third party operating outside of the mechanisms established under the 1965 'ICSID Convention' (Bernardini 1998). The 1965 'ICSID Convention' itself remains applicable in all other respects of the dispute except adaptation. Thus, if a dispute arises the parties still have recourse to the ICSID tribunal (Bernardini 2008). The advantage of such an approach is that it averts problems of jurisdiction and affords the parties the necessary flexibility needed to draft a renegotiation provision that is congruous with the specific needs of the parties.

The point must be made that where the host State unilaterally terminates a contract containing an arbitration clause, the clause itself will continue to subsist (Rosen 1993). This is owing to the principle of separability which establishes the rule that the arbitration clause embedded in a contract is considered as separate from the main contract (Rosen 1993). Therefore, even if the main contract elapses or is voided, the general rule is that the arbitration clause itself continues to subsist. A State cannot therefore prevent being subjected to arbitration proceedings by simply terminating the contract (Ng'ambi 2014). In *Libyan American Oil Company (LIAMCO) v Libya (1981)20 ILM 1 at 40,* the arbitrator, Mahmassani observed thus:

> It is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by that State of the contract in which it is inserted and continues in force even after that termination. This is a logical consequence of the interpretation of the intention of the contracting parties, and appears to be one of the basic conditions for creating a favourable climate of foreign investment.

Supplementing the arbitration clause could be a choice of law clause. This is a particularly sensitive legal issue because it would involve two conflicting interests (Dolzer & Schreuer 2012). On the one hand the State is interested in preserving and protecting its national sovereignty. On the other hand the investor wishes to choose a legal order that is stable and predictable (Dolzer & Schreuer 2012). Depending on the bargaining power of the parties there are a few possible outcomes. The choice of law clause could refer exclusively to the law of the host State. Alternatively, the parties could choose a law which operates outside the fray of the national law of the host State. They could for example choose international law or the law of some other jurisdiction. Another potential alternative is the selection of a combination of both national and international law (Dolzer & Schreuer 2012).

8. Conclusion

It has been seen that the discourse of foreign direct investment invariably involves long term agreements between the host State and the foreign investor. Pursuant to the agreement, the investor can utilize his capital to explore and exploit the host State's natural resource. The former then pays royalties and taxes to the latter. It has been seen however, that the long term nature of these agreements renders the investor susceptible to various risks, one of which is the resource nationalism cycle. This cycle begins when the host State, lacking in capital and expertise, will often solicit the aid of foreign investors. The latter in turn brings in the necessary capital, new technology and know-how to commence operations. It is the expectation of the investor to make a profit from the sunk investment. However, it has been seen that once operations commence, and the natural resource experiences a sustained upward trend, the host State will seek to exercise greater control over the natural resource. They do so because they wish to maximize the benefits from the exploitation of their natural resource.

In the quest to provide a balance between such competing interests, investors usually will demand for the provision of certain clauses in the contract aimed at guaranteeing a stable environment for the realization of the contract.

The general consensus among the arbitral awards is that stabilization clauses are binding upon the State. Failure to abide by this will have consequences. Thus, the principle of permanent sovereignty over natural resources does not override *pacta sunt servanda*. Entering into contracts is an act of sovereignty. The State cannot then invoke this very principle to prematurely exit these contracts. The difficulty with this however, is that it leads to contractual rigidity which is potentially insalubrious. Indeed, whilst the consequences of breaching a stabilization clause are a good deterrent to unscrupulous behaviour on the part of the State, one might argue that it is in the common interest of both parties to keep the investment going. The prices of natural resources are mercurial and industry patterns are likely to evolve. In either case, circumstances will change and the parties will inevitably have to change with them.

Good a thing, there are other devices which parties could contrive towards infusing some stabilizing flexibility into the contract. These include the renegotiation clause, political risk insurance, hardship clauses and dispute settlement clauses. It is advocated that contractual mechanisms are inserted which in turn will render the agreement more flexible. Even in the absence of such clauses, the flexibility afforded by renegotiation and adaptation of contracts may still be achieved under the principle of *rebus sic stantibus.*

However, the difficulty with relying on the principle of *rebus sic stantibus* lies in the fact that it is applied only in limited circumstances. Besides, while the legal system in some jurisdictions allows the courts the power to adjust the contracts under this principle, the courts in other jurisdictions may only be empowered to terminate the contract altogether. These myriad of possibilities and uncertainties lead to the conclusion that inserting renegotiation and adaptation clauses in the agreements may be the best way forward. The renegotiation clause should also stipulate what must happen if the renegotiation process fails. Where parties opt for arbitration, whether without or after an attempt at renegotiation, the arbitral tribunal should also be given the power to adapt the terms of the contract. Without such authority, there is a possibility that the award can be set aside under the 1958 'New York Convention', or annulled under the 1965 'ICSID Convention'. The flexibility facilitated by renegotiation and adaptation is necessary as it is the best means of simultaneously preserving the State's right to pursue legitimate public functions whilst still protecting the legitimate expectations of the investor.

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