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About the Law School

The Law School commenced its academic work on the 19th of December 2002 as the Faculty of Law of Jimma University. Later, the Faculty of Law and the Faculty of Humanities and Social Sciences were merged to form the College of Social Sciences and Law in 2009. As of 2014, it has been restructured as College of Law and Governance and it is joined by the Department of Governance and Development Studies.

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DETERMINING THE PERIOD OF ELECTION AFTER POSTPONEMENT CAUSED BY COVID-19: THE CASE OF ETHIOPIA

Zelalem Shiferaw Woldemichael*

Abstract

Like the case in many States, Covid-19 has disrupted the election process of Ethiopia. It forced the government to postpone the national election which was scheduled for August 29/2020 and bypass the legal requirement of holding the national election every five years. The Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution, hereafter) does not explicitly set out when the election should take place in the event postponing it is necessitated by an emergent situation such as an outbreak of a pandemic. Notwithstanding this Constitutional lacuna, the House of the Federation (HOF), one of the Houses of the Federal Parliament, handled the matter and decided by interpreting the Constitution that the election should be held within 9 months but not later than one year after the control of the pandemic. In this article, I have assessed whether the HOF had the authority to determine the election period.

Keywords: *Constitutional interpretation, Election, House of Federation, postponement of the election, transition*

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1. Introduction

The Covid-19 pandemic was first reported in Ethiopia on the 13th of March/2020.[1] As with the cases in most states of the world, the pandemic has spread in Ethiopia at an alarming rate and large numbers of confirmed cases have been observed. From 3 January 2020 to 3 December 2021, as the WHO reported, there have been 371,803 confirmed cases with 6,784 deaths.[2]

The Pandemic has caused severe socio-economic consequences. A study conducted by members of the UN country team in Ethiopia has revealed that though Ethiopia was, in several aspects, better positioned developmentally to withstand and address the crisis posed by CIVID-19 than many Southern Saharan African States, its macro-economic situation encountered some level of vulnerabilities caused by the pandemic. Evidence indicated that the country risked debt distress, low levels of domestic resource mobilization, high inflation, high unemployment, and significant pressure on the exchange rate of the Birr (Ethiopian currency).[3]

Besides, the outbreak of Covid-19 affected the election process in Ethiopia. On March 28/2020, the National Electoral Board of Ethiopia (NEBE) announced that it cannot conduct the sixth general election which was scheduled for August 29/2020, due to the Covid-19 related restrictions brought by the emergency laws and proposed its postponement.[4] The emergency laws were adopted by the Federal government to contain the spread of the pandemic.[5]The House of Peoples'

[1] First Case of Ethiopia Covid-19 Confirmed in Ethiopia,(May 11/2020),http:www.afro.who.int/news/first
[2] World Health Organization, Ethiopia Situation, https://covid19.who.int/region/afro/country/et
[3] UN Ethiopia, Socio-Economic Impact of COVID-19 in Ethiopia(2020),(November 21/2021), file:///C:/Users/user/Downloads/UN-Socio-Economic-Impact-Assessment-FINAL.pdf
[4] Reuters, Ethiopia postpones August election due to corona virus, June 15/2020), https://www.reuters.com/article/us-ethiopia-election-idUSKBN21I2QU,
[5] Embassy of the Federal Democratic Republic of Ethiopia, London, UK, Ethiopia Declares a State of Emergency to Curb Transmission of Corona Virus,(September 21/2021), https://www.ethioembassy.org.uk/ethiopia-declares-state-of-emergency-to-curb-transmission-of-coronavirus/

Representatives (the HPR), one of the Houses of the Federal bicameral Parliament[6], approved the proposals of the NEBE.[7].The HPR decided that the election should take place after the return of normalcy. It remarked that determining the exact election period can only be made through Constitutional interpretation. Consequently, it referred the case to the HOF--the other House of the Federal Parliament empowered to interpret the Constitution.[8] On June 10/2020, the HOF in its second regular session decided that the election should be organized after 9 months but earlier than one year since the control of the pandemic.[9] The election was finally held on June 21/2021.[10]

The national (general) election involves the election of the members of the HPR.[11] The FDRE Constitution has provided that the members of the HPR shall be elected for a term of five years.[12] Accordingly, national elections are expected to be held every five years. Due to an emergency, however, it may be impossible to conduct the election within this period. The FDRE Constitution has not included an explicit provision when the election should, in such cases, be held. The HOF has filled this gap through Constitutional interpretation.

In this Article, I have assessed whether the HOF has the power to determine the election period through Constitutional interpretation. The discussions are presented as follows: I will first look at the wisdom of analyzing the issue of competence over the determination of the election period.

[6] The FDRE Constitution established a federal Parliament comprising two Houses: The House of Peoples' Representatives and the House of the Federation (Article 53). As the upcoming discussions will elucidate, only the HPR has the power of legislation.
[7]Ethiopian Parliament Approves Resolution to Postpone General Elections, (May 11/2020), http://www.ezega.com/Newsdetails/7921/Ethiopian-Parliament-Approves-Resolution-to-postpone-General Elections
[8] Parliament Endorses Constitutional Interpretation Option for National Election, (May11,/2020), http://www.hopr.gov.et/web/guest/-/parliament-endorses-constitutional-interpretation-option-for-national-election. The cconstitutions of some States have regulated the issue. The Constitution of Afghanistan under Article 147 provides that an election postponed due to emergency should take place within two months after the termination of the emergency. The Constitution of India (Art.83) requires that the term of office of Parliament after the termination of an emergency decree which prolonged the election shall not exceed six months.
[9] Fanabc, House Extends Federal, Regional State Councils' Term, (June 10/2020), https://www.fanabc.com/english/house-of-federation-begins-2nd-regular-session/
[10] BBC News, Ethiopia elections 2021: Abiy Ahmed faces first vote amid conflict (December 5, 2021),
[11] As defined under Art.2 (6) of Proclamation No. 1162/2019 (The Ethiopian Electoral Political Parties Registration and Election's Code of Conduct Regulation Proclamation) General election means the election of members of the HPR and the Regional States Councils conducted following relevant laws.
[12] FDRE Constitution, Art 54(1)

Next, I will present an overview of the HOF as it will help readers to easily understand the arguments related to the competence of the HOF to handle election matters. Then, I will argue that the HOF is not competent and lacks the legal authority to determine the election period. The discussions will end up by summarizing the key issues.

2. Identifying an organ competent to determine the election period: why it matters?

The competence to set the election period should be analyzed in light of the profound significance that free and fair elections will have in transforming the country into a democracy. Unlike the cases in the preceding national elections of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) regime, the sixth national election was able to instill hope in the majority of the public that it will enable them to freely elect their representatives.[13]The underlying reason seems to be the milestone steps the newly constituted political party which came out of the EPRDF following a political reform in 2018—the Prosperity Party took to transition the country into a democracy.[14] The reformed government ruled by the Prosperity Party, for example, released several political prisoners, allowed some groups that went into exile to participate in the election process, and repealed laws that the EPRDF used to stifle dissent such as the Anti-terrorism law.[15] The Prime Minister, Dr.Abiy Ahmed, winner of the 2019 Noble peace prize, appointed in the course of the reform, has publicly announced that among the top priorities of his government will be holding a credible election.[16]

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[13] The Guardian, 'These Changes are unprecedented': How Abiy is upending Ethiopian Politics, (Jun https://www.bbc.com/news/world-africa-57513115e 13/2020), https://www.theguardian.com/world/2018/jul/08/abiy-ahmed-upending-ethiopian-politics

[14] The EPRDF which ruled the country for over 27 years did not assume power through a genuine democratic election. All the general elections organized after the downfall of the Derg regime in 1991 were replete with controversies. In the aftermath of all of the elections, there were clashes between protesters and the Police. The brutal excessive measures that the government deployed to quell the dissent have caused egregious human rights violations including dozens of deaths, abuses, and violence. The government used the draconian laws it passed such as the Anti-terrorism Proclamation to silence the protests and diminish the political space.

[15] Eega News, Ethiopia Approves New Anti-Terrorism Law Consisting of Death Penalty, (June 13/2020), https://www.ezega.com/News/NewsDetails/7623/Ethiopia-Approves-New-Anti-Terrorism-Law-Consisting-of-Death-Penalty

[16] Reuters, Ethiopia PM meets opposition parties, promises fair elections,(December 05/2021), https://www.reuters.com/article/us-ethiopia-politics-idUSKCN1NW0Y1

Though the reformed government was able to garner huge support from the public, it could not adequately sustain stability and curb the proliferating human rights violations that commenced before the reform. Tragic incidences in the form of internal displacement and violence have occurred in various parts of the country. According to the 2019 report of IOM, Ethiopia recorded the third-highest number of new displacements worldwide in 2018 with 3,191,000 internally displaced persons. It clarified that a significant portion of these displacements was induced by conflict largely related to ethnic and border-based disputes. Concerns have been expressed by civil society organizations such as Amnesty International and the Human Rights Watch that much remains to be done by the incumbent government to halt the severe human rights violations perpetrated by security forces in the various parts of the country, in particular in Oromia and Amhara regions.[17]

A fair and free election is of paramount significance to States like Ethiopia that are facing multi-dimensional problems resulting from a political transition. As the IDEA stressed, the significance of elections becomes high when they take place in countries experiencing democratic transition. Conducting a genuine and democratic election will help to establish a system of government that can ensure observance of human rights and rule of law. In this regard, paramount care should be placed in determining the organ which should handle the task of fixing the election period. Assigning this power to an organ that lacks competence and legal authority will bring adverse consequences on the outcome of the election in two ways: First, it may lead the public to lose confidence in the entire election process. This will, in turn, have bearing on the legitimacy of the new government. Trends have revealed that diminished trust in the institutions involved in an election process undermines the legitimacy of the elected representatives.[18] Second, an organ that

[17] Read, for example, Amnesty International, Ethiopia: Rape, extrajudicial executions, homes set alight in security operations in Amhara and Oromia, (December 06, 2021), https://www.amnesty.org/en/latest/news/2020/05/ethiopia-rape-extrajudicial-executions-homes-set-alight-in-security-operations-in-amhara-and-oromia/,Human Rights Watch, Ethiopia, Events of 2019,(December 06,2021), https://www.hrw.org/world-report/2020/country-chapters/ethiopia
[18] Read, for example, Nicholas Kerr and Anna Lührmann, Public trust in elections: The role of Media Freedom and Election Management Autonomy, Working Paper No. 170, (June 12/2020), http://afrobarometer.org/sites/default/files/publications/Working%20papers/afropaperno170_public_trust_in_electio

lacks technical competence to deal with the election period will not be able to suggest an election period that ensures sufficient time for candidates, political parties, and NEBE to prepare for the election.

As indicated in the backdrop of this discussion, the sixth national election has taken place on June 21/2021 based on the Constitutional interpretation by the HOF. As I will discuss in detail in the following section, the HOF is an organ that has the power to interpret the FDRE Constitution. An important question that needs an immediate response, hence, is: does the HOF have the authority to handle this matter? This will require us to look first at whether the election period can be determined through Constitutional interpretation. Before indulging in the details of this issue, let's first acquaint ourselves with the composition and powers of the HOF.

3. The House of the Federation: Composition and Powers

A comparative study on bicameral parliaments has revealed that States establish second chambers mainly to ensure the representation of diversities in the Parliaments. Second Chambers, for example, may carry out representation through the constituent units (such as States, provinces, or regions).[19] They may also be structured to represent communities with specific religious, ethnic, language, or cultural identities.[20] The upper House of the Ethiopian Parliament, the HOF, is established to ensure the participation of the Nations. Nationalities and Peoples (ethnic groups) in the functions of the Parliament. The members of the HOF are elected to serve for a term of five years by the legislative branches of the constituent units (States).[21]The States councils may also hold elections to have the representatives elected by the people directly.[22]This option, nonetheless,

ns.pdf,to analyze how the loss of trust of the public in the electoral Management Body of Nigeria seriously hampered the legitimacy of the constituted government following the 2007 election.
[19] Elliot Bulmer, Bicameralism(International IDEA Constitution-Building Premier 2,2017),at 5
[20] See *id*
[21] FDRE Constitution,Art.61(3) and Art.67(2)
[22] See *id*

has never been used by the State Councils and no legislation has so far been adopted by States to regulate this matter.[23]

The HOF is unique as compared to the second chambers of other federal States in so far as its role in the legislative process is concerned. Though Second Chambers in several federal States portray disparities in their mode of participation in the initiation of legislation and veto power during the adoption of legislation, among others, they engage in the legislative process.[24] This legislative power is perceived as an important vehicle for the exercising of shared rule as the constituent units participate in the enactment of federal legislation that affects them.[25] As Ronald L.Watts wrote, the entrenched participation of the different regional groups in the Second Chambers is one manifestation of an effective operation of a federation.[26] This is not, however, the case in Ethiopia. The HOF does not participate in the law-making process. The legislative task is solely bestowed upon the lower House—the HPR.[27]

The HOF is also unique as compared to the Second Chambers of other States in that it shoulders the task of Constitutional interpretation.[28]The underlying reasons for assigning this task to the HOF, as the legislative history of the FDRE Constitution reveals, are as follows: First, it was believed during the drafting process that the Constitution should only be interpreted by its authors, i.e., the Nations, Nationalities, and Peoples. The HOF which comprises the representatives of the Nations, Nationalities, and Peoples, hence, is best suited to interpret the Constitution.[29] Second, the drafters felt that the judiciary, if assigned with the task of constitutional interpretation, may give meaning to the provisions of the Constitution in its way without giving due consideration to

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[23] ACE Electoral Knowledge Network, Elections in Ethiopia, Background and Electoral System (December 06/2021), https://aceproject.org/ace-en/topics/vo/annex/voy/voy_et/mobile_browsing/onePag

[24] Anna Gamper, Legislative Functions of Second Chambers in federal Systems, *Perspectives on Federalism*,Vol.10,Issue 2,2018,at 121

[25] See *id*

[26] Ronal L.Watts, Federal Second Chambers Compared,(November 23/2021), http://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_AssessoratoEconomia/PIR_Areetematiche/PIR_Federalismofiscale/PIR_SeminarioIlprocessofederaleinItalia/watts%20intervento.pdf

[27] FDRE Constitution,Art.55

[28] FDRE Constitution,Art.62(1)

[29] Assefa Fiseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation, Mizan Law Review,Vol.1,No.1(2007),at 11

the intention of the authors of the Constitution.[30] There is, in fact, an ongoing debate regarding whether Courts are stripped of the power to interpret the Constitution.[31]

The HOF will not directly consider applications for Constitutional interpretations. The applications are first investigated by the Council of Constitutional Inquiry (CCI) established by the FDRE Constitution.[32] The CCI has eleven members comprising the President of the Federal Supreme Court, the Vice President of the Federal Supreme Court, Six legal experts, appointed by the President of the Republic on recommendation by the HPR, and three persons designated by the HOF among its members.[33] The powers and duties of the CCI are further elaborated by the Proclamation adopted by the federal government in 2013.[34]The CCI investigates Constitutional disputes submitted to it and forwards its recommendations to the HOF when it finds that the matter needs Constitutional interpretation.[35]The authority to pass a final decision on the recommendations of the CCI rests on the HOF.[36]

4. Determining the Period of Election Postponed by an Emergent Situation: Can it be done by the House of the Federation?

To consider whether the HOF could set the election period through Constitutional interpretation, it is essential first to understand what Constitutional interpretation is.

Although the Constitution categorically grants the HOF the power to interpret the Constitution, it has not included a straightforward provision explaining what Constitutional interpretation means.

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[30] *See id*

[31] *See id*, Read also Yonatan Tesfaye Fesseha, Whose Power is it Anyway: The Courts and Constitutional Interpretation in Ethiopia, *Journal of Ethiopian Law*,vol.xxii,No.1(2008),Assefa Fiseha, Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience, *Netherlands International Law Review*(2005),Takele Soboka Bulto, Judicial Referral of Constitutional Disputes in Ethiopia; From Practice to Theory, *19 Afr. J. Int'l & Comp. L. 99 2011*

[32] FDRE Constitution, Art.82(1).

[33] See *id*,Art.82(2)

[34] Proclamation No 798/2013,A Proclamation to Re-enact for the Strengthening and Specifying the Powers and Duties of the Council of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia

[35] FDRE Constitution, Art.84(1)

[36] See *id*,Art.83(2)

To get some insight on the notion underlying Constitutional interpretation, it will be of great help to cumulatively read Articles 83 and 84 of the Constitution. Article 83 provides:

> (1) All constitutional disputes shall be decided by the House of the Federation.
> (2) The House of the Federation shall, within thirty days of receipt, decide a constitutional dispute submitted to it by the Council of Constitutional Inquiry.

Article 84(2) reads:

> Where any Federal or state law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of the Federation for a final decision.

Looking at these provisions along with their Amharic versions, it is possible to draw that constitutional interpretation is pursued on cases that involve constitutional disputes or constitutional issues.[37] The dispute or issue can be submitted to the Council of Constitutional Inquiry (CCI), which the HOF organizes, either by the court or any interested party.[38] The CCI investigates the matter and forwards its recommendations to the HOF should it find that the case requires constitutional interpretation.[39] Since the matter has originated from courts, a constitutional dispute or issue necessarily involves litigants who are under controversy on a concrete case. The matter is referred to the CCI when, in the opinion of the courts, the issue presented demands constitutional interpretation. The phrase ''…or interested party…" under Article 84(2) above appears to refer to any person whose interest may be affected by the case, including, in fact, the litigant parties.

[37] The Amharic versions of the above Articles use the terms 'constitutional dispute' and constitutional issue; interchangeably. Under the Amharic version of Article 83(2), the word *'Constitutional dispute'* is translated as 'የህገ-መንግስት ጉዳዮች'(Constitutional issues). A similar mode of translation is adhered under Article 84(1). Under Article 83(1), however, it is translated as የህገ-መንግስት ክርክር ጉዳይ (Constitutional dispute).
[38] The HOF is assisted by the CCI established under the Constitution and organized by it (Articles 62(2) and 82(1)). It has eleven members the composition of which is overwhelmingly dominated by individuals with legal background. The main task of the CCI is investigating constitutional disputes and issues on the cases submitted to it and forward its recommendations to the HOF should it find that the case requires constitutional interpretation.
[39]FDRE Constitution, Art.84(3)(b)

Referral to the CCI by the court or interested party is made “where any Federal or State law is contested as being unconstitutional”. As rightly argued by many constitutional law experts including Yonatan Fisseha, the reading of the above provisions does not warrant us to conclude that constitutional dispute is limited to claims that contest the constitutionality of Federal or State laws.[40] By way of illustration, the Constitution has explicitly mentioned these claims to qualify as constitutional disputes or issues. As such, it has not exhaustively mentioned claims which constitute constitutional dispute or issue. Hence, claims that challenge the constitutionality of customary practices, decisions, and practices of a government or other authority should be regarded as constitutional disputes or issues.[41]

The Proclamation adopted to specify the powers of the CCI mentioned above has buttressed the above approach through expanding the competence of the HOF. According to this law, the CCI may investigate cases alleging the unconstitutionality of any law or customary practice or decision of government organ or official and submit its recommendation to the HOF if it finds that the matter needs constitutional interpretation. Such cases can be submitted by applicants who pursued their case either through courts or administrative organs.[42]

The HOF, under this Proclamation, has also jurisdiction over non-justiciable matters. Article 3(2) (c) states: “constitutional interpretation on any nonjusticiable matter may be submitted to the Council by one-third or more members of the Federal or State councils or by Federal or State executive organs”. Taking into account the fact that this provision cross-refers to Article 3(1), we can realize that submitting non-justiciable matters wants the fulfillment of two conditions: i. the

[40] Yonatan Tesfaye Fesseha, Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia, *Journal of Ethiopian Law*, Vol. XXII No. 1, at 134

[41]Some scholars have favored this stance basing their argument on the Amharic version of Article 84(1) which translated constitutional dispute into ‘የሕገ-መንግሥት ጉዳዮች’ (Constitutional issues). The tenet of the argument is that as the Amharic version, which has final legal authority in case of contradiction or difference with the English version, helps to capture broader maters including those challenging the constitutionality of laws. In my view, nonetheless, this line of argument does not present a strong case for expanding the scope of matters that should be subject to Constitutional interpretation. As I pointed out above, this translation is not used consistently. The Amharic version of Article 83, which specifically deals with constitutional interpretation, has translated ‘Constitutional dispute’ as የሕገ-መንግሥት ክርክር ጉዳይ (Constitutional dispute).

[42] See *id,* Art.3(2)

application should allege unconstitutionality of any law, customary practice, or decision of an organ of government or official, and ii. It should secure the support of one-third or more of the members of the Federal or State councils or the Federal or State executive. To sum up, a constitutional dispute or issue, under the above Proclamation, involves the ascertainment of the constitutionality of a law, customary practice, and decision of a government organ or official.

But, on some occasions, some constitutional provisions may be found to be vague, contradictory, and ambiguous. For example, the provisions delineating the powers of the main branches of the government may appear to be contradictory. The content and scope of constitutional provisions may be far from clear. Applying these provisions may turn out to be challenging. Without the existence of the conditions noted above, however, the HOF cannot engage in constitutional interpretation and elaborate on the content and meaning of the provisions. It may address the ambiguity, contradiction, or vagueness of the provisions while determining the constitutionality or otherwise of a given law, customary practice, or decision of a government. In the absence of the issue of constitutionality, the HOF can do this only through the advisory opinion it may render per Article 4(2) of Proclamation No.251/2001.[43] This opinion, however, will not have a legally binding force.[44]

Coming back to our case, the first issue that we should investigate is: Is the determination of the election period a constitutional dispute or issue? Referring to the above provisions of the Proclamation specifying the powers of the CCI, one can without difficulty identify that this kind of matter does not qualify as a constitutional dispute or issue. It does not contest the constitutionality of law, customary practice, or decision of a government organ or official. It is, rather, a question that seeks to point out the period when an election should take place without making any link with the provisions of the Constitution. As the matter does not match

[43] This provision reads: "…the House shall not be obliged to render a consultancy service on cconstitutional interpretation". Implicit in this provision is that the House can render cconstitutional interpretation upon request though it is not bound to do so.
[44] Advisory opinion, as it is widely agreed, is a non-binding interpretation of an adjudicatory organ over a legal question.

constitutional dispute or issue, the HOF cannot pass a decision through constitutional interpretation. Instead, the HPR could have requested the HOF advisory opinion on the matter. The HOF could decline to undergo interpretation as it is not obliged to do this as indicated above.

Besides, there exist other grounds that render the decision of this matter by the HOF worthless. Through fixing the voting period, the HOF cannot meet the purposes of constitutional interpretation envisaged under Proclamation No.251/2001.[45]Article 11(1) of same provides: "The final decision of the House [the House of the Federation] on constitutional interpretation shall have a general effect which therefore shall have applicability on similar constitutional matters that may arise in the future". If we assume the matter to require constitutional interpretation, the decision of the HOF may not be relevant for future similar constitutional matters. It is reasonably expected that the HOF while setting the election period, had taken into account the nature and intensity of the crisis that Covid-19 caused in the election process.[46] It is very unlikely for a pandemic that may erupt in the future to pose a similar impact on the election process. The capacity of the government to cope with a crisis at such a time may also be different from the government of the day. It will be daunting for the HOF to come by a decision that fits all such future situations.

Besides, the HOF is not competent to grapple with technical issues associated with the election. The nature of its work and rules of procedure do not allow it to come up with an election period that comforts the contesting political parties and individuals. After all, what it finally produces is a decision that reflects its finding-but not an outcome of a negotiation. Article 10 of Proclamation No.251/2001 puts forward: "The House may, before it passes a final decision on constitutional interpretation, call upon pertinent institutions, professionals and contending parties to give their opinion". The wording of the provision signifies that the concerned parties mentioned are only

[45] Proclamation No.251/2001, Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation
[46] Read also Addis Standard, News Alert: HOF Approves CCI's Recommendation to Extend Both Houses, State Councils Term Limit; Constitutional Expert Raises Concern,(December 06/2021), https://addisstandard.com/news-alert-hof-approves-ccis-recommendation-to-extend-both-houses-state-councils-term-limit-constitutional-expert-raises-concern/

called upon to give their opinion to assist the HOF to get a better picture of the matter. As such, it will not pursue a consultative process to reach a decision that promotes the interest of contending parties. It should also be emphasized that as the text of the provision indicates, this is not a mandatory procedure that the HOF must in all cases implement.

Finally, pursuing the process through the HOF will not offer an opportunity for political parties and individuals who may be aggrieved by its decisions to appeal. With a procedure that does not adequately entertain the views of political parties and other stakeholders, it will be hardly possible for the HOF to hand down a decision that is agreeable to all. Unfortunately, the decision of the HOF is final and cannot be reversed through appeal. A lesson can be learned from some emerging democracies which opened such opportunities. In Sri Lanka, for example, opposition political parties have petitioned the Supreme Court to delay the parliamentary election which the country's Election Commission postponed until June 20.[47] In Liberia, the President's decision to postpone election during a state of emergency can be challenged before courts as the writ of habeas corpus cannot be suspended even during a state of emergency.[48]

In the light of the above justifications, it becomes more convincing that NEBE is more suited to the scheduling of the election period and related activities than any other organ of the government. In ordinary times, it has been considered that NEBE is entrusted to do this job under Proclamation No.1162/2019. The nature and purpose of its establishment reveal that NEBE can also execute this duty in the event regular election periods are disrupted due to an emergent situation. The Constitution has established it as an independent institution to conduct the general election impartially.[49] Its term of office is distinct from the HPR and the cabinet though it is accountable to the former.[50] Unlike these organs, its mandate will not expire on October 05/2020. The application of Proclamation No.1162.2019 and other subsidiary laws detailing its operation will not be

[47] DW, Coronavirus keeps Sri Lanka without a Functioning Parliament, (June 5/2020), https://www.dw.com/en/coronavirus-keeps-sri-lanka-without-a-functioning-parliament/a-53615108
[48] Constitution of the Republic of Liberia,1986, Art. 87
[49] FDRE Constitution, Art. 102
[50] Proclamation No.1133/2019, National Electoral Board of Ethiopia Establishment Proclamation, Art.3(2)

suspended when the term of office of the incumbent HPR and cabinet expires on October 05/2020. NEBE retains its power to set the schedule of voting dates and preceding activities including registration of voters, registration of candidates, and election campaign.[51]

An election period should enable the contestant political parties and citizens to adequately participate in the election process. Contestant political parties and citizens may find the fixed period insufficient to carry out essential activities such as election campaigns if the period is set without their involvement. This may pose a detrimental impact on the credibility of the election. The problem may exacerbate if the time fixed favors the incumbent ruling party.[52] In this regard, there is a high tendency for the HOF to cause this consequence as it passes decisions without accommodating the views of contestant political parties.

As a state in a transitional democratic process, critical issues like this one must be addressed following a participatory approach. The working rules of NEBE promote this approach. Key activities of the electoral process such as the setting of time table for voter registration are carried out by NEBE in consultation with political parties.[53] It has ample opportunities to determine the election period in a consultative and participatory approach. Its decision can also be further improved to promote the interest of contestant political parties during approval by the HPR.

This modality, in addition, presents another option for political parties and citizens to require reconsideration of the fixed election period. We have considered above that the constitutionality of the decision of any government organ can be challenged through the HOF. Political parties or citizens can nullify this decision through the HOF if they can sufficiently establish that the fixed period constrains the right to participation or other constitutionally protected rights of citizens.

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[51] Proclamation No. 1162/2019,The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct, Arts.19, 30, and 47(1) respectively
[52] Kofi Annan Foundation, Confidence in Elections and the Acceptance of Results, A Policy Brief of the Electoral Integrity Initiative, Policy Brief No.1, at 20, (June 13/2020), http://aceproject.org/ero-en/misc/confidence-in-elections-and-the-acceptance-of
[53] Proclamation No.1162/2019, *supra* note 51, Arts.19(1)

CONCLUSION

Unlike the Constitutions of States such as India, the FDRE Constitution has failed to expressly point out the approaches to be followed in the event the national election is disrupted by an unforeseen emergent situation such as the outbreak of Covid-19. It does not mention when an election in such cases should take place. The impact of this lacuna has presented a challenge in Ethiopia when holding the sixth national election became daunting due to the Covid-19.

The government has decided that the Constitutional silence on the issue should be filled by Constitutional interpretation. The HOF passed a decision based on the recommendation it received from the CCI that the election should be held within nine months but not later than one year after the control of the Pandemic. Following this decision, the election was conducted on June 21/2021. In this piece, I have examined whether the HOF could fill the Constitutional silence on the election period through Constitutional interpretation.

I have generally argued that the matter could not be resolved through Constitutional interpretation. The HOF lacks both Constitutional authority and technical competence to determine the election period. The joint reading of the FDRE Constitution and the Proclamation elaborating the powers of the CCI shades light that the HOF is empowered to undergo Constitutional interpretation when the matter presented to it involves a justiciable or non-justiciable claim that challenges the Constitutionality of any law, customary practice, or decision of an organ of a government official. The issue of determination of the election period does not fit this condition as it does not involve the issue of constitutionality. I have also indicated that pursuing the process through the HOF will deny aggrieved stakeholders to challenge the decision through appeal given that the decision of the HOF is final. Finally, I have argued that the HOF may face difficulty in setting an election period that best advances the interests of the contestant political parties as it is not strictly required to consult the opinion of the contestant political parties while determining the election period. The NEBE, on the other hand, is best suited to seize this task. It has the legal authority and technical

competence to deal with this issue. Its working rules also promote the engagement of contestant political parties while adopting decisions.

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A Scrutiny of Foreign Direct Investment Regulation in Light of Evolving National Security Concerns in International Investment Law

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Abstract

In the last three decades, international investment has grown fast. It has impacted almost every state and all sectors of the economy. However, nowadays, the increase in the flow of FDI from developing and emerging countries to developed economies resulted in the adoption of FDI screening on national security grounds. For this, among other things, the sudden relevance of Sovereign Wealth Funds, the changing national security environment, the need to protect core or foundational technologies or critical infrastructures, strategic sectors or industries, and the fear of the socioeconomic effects of M&As of domestic firms by foreigners become evolving national security threats and to introduce tight national security review system.

Though national security is a buzzword, still it lacks a definite meaning in international investment law. Thus, there are times when FDI screening systems use it as a disguise protectionist measure, or as a tool to pursue other economic or strategic goals not achievable by domestic investment and other related laws. Due to its evolving, ambiguous, and context-specific nature of national security and security-related grounds, FDI screening systems' scope of review becomes broader. This problem would be worse when a dedicated policy, legal rules, and institutional structures are absent. For this, this article is aimed at demystifying its meaning, application, and effects of evolving national security in different U.S., China, and EU screening systems.

Keywords*: International Investment Law, Evolving National Security Concerns, FDI Regulation, FDI Screening, US, China, EU, and Africa*

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Introductory Remarks

International investment has grown fast over time; foreign direct investment (FDI, hereafter) flows are higher than ever and impact almost all countries and all sectors of the economy.[1] In recent years, it has been a principal engine of global economic growth. Both developed and developing states have obtained substantial benefits. It has created jobs and increased tax revenue to host states, and enabled MNEs to compete for and earn profits abroad to home states.[2]

To developing countries, emerging economies, and countries in transition, FDI is increasingly serving as a source of economic development and modernization, income growth, and employment via bringing macroeconomic growth and welfare-enhancing processes.[3] FDI is also key to the global economy in financing current account imbalances,[4] and supports development efforts through financing economic growth over the long term and finally eradicates poverty through transferring knowledge and technology, creating jobs, boosting overall productivity, enhancing competitiveness and entrepreneurship.[5]

Notwithstanding that FDI have the aforementioned significance, it doesn't guarantee (but encourage) economic growth. Economic studies uncovered that FDI didn't lead to increased economic growth in developing countries; it would rather depend on the state at stake, the nature and use of FDI as well as its regulation.[6] Foreign investment may not bring meaningful economic development. Foreign investment is good for an economy; but not a panacea, however. According to the dependency economic theory, it causes resource outflow to developed home states, and to achieve their desired return, foreign investors may be engaged in corrupting the ruling class and politicians. This unlawfully enriches those in power at the expense of the poor.[7] That means the benefits of FDI don't arise spontaneously and [distributed] evenly across countries, sectors, and local communities, albeit it is an integral part of an open and effective international economic system and a major catalyst to development.[8] While it is ascertained global investment is advantageous and necessary to bring economic prosperity worldwide, foreign acquisition of companies also causes problems for the government to balance the benefits of foreign investment

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[1] Carlos Esplugues, *Foreign Investment, Strategic Assets and National Security,* 1st edition, Intersentia, (2018), p. 23, [hereinafter Carlos, *Foreign Investment, Strategic Assets and National Security*].
[2] David Marchick and Matthew Slaughter, *Global FDI policy: Correcting a Protectionist Drift*, The Bernard and Irene Schwartz Series on American Competitiveness, Council on Foreign Relations, CSR No. 34, (2008), p. V, [hereinafter David and Matthew, *Global FDI policy: Correcting a Protectionist Drift*].
[3] OECD, *Foreign direct investment for development: Maximising benefits, minimising costs*, (2002), p. 5.
[4] David and Matthew, *Global FDI policy: Correcting a Protectionist Drift*, pp. 13-24.
[5] United Nations, *Monterrey Consensus of the International Conference on Financing for Development*, (2003), p. 9.
[6] Leon Trakman, Foreign Direct Investment: Hazard or Opportunity, *Geo. Wash. Int'l L. Rev., 41*, (2009), p. 5.
[7] Getahun Seifu, Regulatory Space in the Treatment of Foreign Investment in Ethiopian Investment Laws, *The Journal of World Investment & Trade*, *9*(5), (2008), pp.405-426.
[8] OECD, *Foreign direct investment for development: Maximising benefits, minimising costs*, p. 3.

with national security concerns. Especially, post-September 11 [terrorist attack on the U.S.], world security policies increasingly become imperative for corporate transactions.[9]

1. Global FDI Development, Regulatory Issues, and Policy developments at Glimpse

Notwithstanding the aforementioned strains and approaches, the recent history of FDI is that of success.[10] FDI flows are by far faster than have the flows of goods and services. Worldwide flows of FDI, from 1990 to 2006, increased by 12.4% annually, as contrasted from a 7.7% increment in total exports of goods and services, and 5% of overall economic growth.[11] The rise of FDI is mainly due to enabling environment countries created through liberalizing their national entry requirements to Multinational Enterprises (hereinafter MNEs), especially since the 1980's the investment climate has been conducive for foreign direct investors.[12]

In 2007, world annual FDI inflows rose to $1.9 trillion from an average of $50 billion during 1981-1985. Later, by the end of 2007, till it was failed by 15% due to the financial crisis and recession, world FDI flows had accumulated to a stock of $15 trillion by over 80, 000 state-owned MNEs having more than 800, 000 foreign affiliates. Still, though there was a decline, the stock of FDI is [anemically] increasing and the level of flows is above the 1980s.[13]

As it is conveyed in the foregoing paragraphs, the FDI underlying trend shows a continually falling annual growth rate: in the 1990's it was 21%; from 2000-2007 it reached 8%, and post-crisis it much lowered to 1%.[14] Accordingly, global FDI flows sustained their slide in 2018, decreasing by 13% to $1.3 trillion. This third year's consecutive decline of annual FDI flows is due to large-scale repatriations of accumulated foreign earnings by U.S. MNEs, within the first two quarters of 2018, as a result of tax reforms introduced in the same country at the end of 2017.[15]

The global FDI challenges being observed are more related to investment policy measures. A more critical stance towards foreign investment is observed in new national investment policy measures. 112 measures affecting investment were introduced in some 55 economies in 2018. More than 1/3 of the measures introduced new restrictions and regulations which is the highest number for the [last] two decades.[16] As a reason for their measures, countries chiefly mentioned national security

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[9] Bashar Malkawi, Balancing Open Investment with National Security: Review of US and UAE Laws with DP World as a Case Study, *U. Notre Dame Austl. L. Rev., 13,* (2011), p. 153, [hereinafter Bashar, Balancing Open Investment with National Security: Review of US and UAE Laws with DP World as a Case Study].

[10] *See generally* Carlos, *Foreign Investment, Strategic Assets and National Security.* The recent success history of FDI resulted regardless of the existence of some structural limitations expressed in terms of the lack of an overwhelming international legal framework on FDI or the absence of a single and commonly agreed notions of FDI itself.

[11] UNCTAD, *World Investment Report, Transnational Corporations, Extractive Industries and Development*, (2007), p, [hereinafter UNCTAD, World Investment Report 2007].

[12] Karl Sauvant, *FDI Protectionism is on the Rise*, The World Bank, Policy Research Working Paper 5052, (2009). p. 3, [hereinafter Karl, *FDI Protectionism is on the Rise*].

[13] *Id.,* Karl, *FDI Protectionism is on the Rise*, p. 2.

[14] UNCTAD, *Special Economic Zones*, World Investment Report, (2019), p. 5, [hereinafter UNCTAD, World Investment Report 2019].

[15] *Id.,* UNCTAD, World Investment Report 2019, p. 12.

[16] *Id.,* UNCTAD, World Investment Report 2019, p. 15.

concerns regarding foreign ownership of critical infrastructure, core technologies, and other sensitive business assets. Moreover, twice as many as in 2017, 22 large M&A proposals were withdrawn or blocked for regulatory or political reasons.[17]

Since free capital movements beget concerns about loss of national sovereignty and other possible adverse consequences, attitudes and policies towards liberalization of international capital flows have been subject to considerable controversy. Even more than other types of capital flows, since FDI involve a controlling stake by often large MNEs that are powerful to be governed by domestic authorities, it has historically given rise to such concerns. That is why governments have sometimes put restrictions on inward FDI; though a reconsideration of these restrictions has been made under formal agreements on such capital flows after an increasing consensus about the benefits of inward FDI reached in recent decades.[18]

Although attracting investment remains a priority and new investment policy measures tailored towards liberalization via removing or lowering restrictions for foreign investors in a variety of industries; administrative procedures are continually streamlined or simplified, and several countries provide fiscal incentives in specific industries or regions, coincidentally, screening mechanisms for foreign investment are also getting a prominence.[19]

Depending on how state governments balance the benefits and shortcomings, approaches to FDI (both inward and outward) have been changed in the past and they will most probably change again in the future. A new era of FDI slowdown may occur for reasons of the current wave of nationalism and protectionism attached to it. States may also be compelled to limit the flow of outward FDI when there is no robust economic growth that overcomes the negative effects of globalization in the job markets. To control the national economy or just because they consider enough FDI has been attracted, states may also be inclined to be more selective concerning inward FDI through restricting areas of FDI or by limiting it on national security grounds.[20]

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[17] *Id.,* UNCTAD, World Investment Report 2019, p. 16; Rumu Sarkar, Sovereign wealth funds as a development tool for ASEAN nations: from social wealth to social responsibility, *Geo. J. Int'l L., 41,* (2009), p. 621; Bashar, Balancing Open Investment with National Security: Review of US and UAE Laws with DP World as a Case Study, p. 154. Especially, SWFs which are government investment vehicles (state-owned or state-controlled) funded by foreign exchange assets and managed separately from official reserves; and having high risk-tolerance, no explicit liabilities, and high long-term investment horizons have undertaken several high-profile acquisitions, nowadays.

[18] Stephen Golub, Measures of restrictions on inward foreign direct investment for OECD countries, *OECD Economic Studies*, *Issue 1,* (2003), p. 88-122.

[19] See generally UNCTAD, World Investment Report 2019. According to the report, from 2011 onwards, while at least 11 countries have introduced a new screening framework, existing regimes have made at least 41 amendments. As a new regulation, disclosure obligations of foreign investors expanded; statutory timelines of screening procedures extended; and civil, criminal or administrative penalties introduced upon failure of respecting notification obligations. Among the changes under the existing regimes, sectors or activities subject to screening added; triggering thresholds lowered; and the definition of foreign investment broadened.

[20] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 3; Karl Sauvant, *Driving and countervailing forces: A rebalancing of national FDI policies,* (2009), p. 262, [hereinafter Karl, *Driving and countervailing forces: A rebalancing of national FDI policies*].

As far as sovereign states exercise power within the international legal fora, national security is an exception to international law. Likewise, national security concerns also come to the limelight of the international investment law regime to protect host states' interests. Now, this practice has been recognized under international investment treaties and international investment tribunals. The problem comes when we question whether this exemption provision can balance the interests between international investors and host states. Since protectionism is uprising throughout the world, national security exception which is recognized in international [investment] law is exposed for abuse by host states.[21]

In recent years, as discussed in the foregoing paragraphs, national investment policies are increasingly giving national security prominence, and, as a result, it started to encompass wider national economic interests. Intensified threats of terrorism have also further accentuated national security concerns before national authorities.[22]

Though each country is sovereign to screen foreign investment for national security grounds, recent trends pose the following policy challenges:

Firstly, countries use different concepts of national security. National security has been approached by domestic policies from a relatively narrow definition of security and security-related industries to the broader interpretation outstretching investment review procedures to critical infrastructures and strategic industries. Secondly, countries vary as to the content and depth of investment screening processes and they also require prospective investors' information to different extents and amounts. Thirdly, concerning the possible consequences when an investment is taken sensitive from a national security perspective, countries do have considerable differences. Thereupon, policy measures bear outright or partial investment prohibitions or investment authorization under certain [stipulated] conditions. For this, different entry conditions are adopted for foreign investors in different countries for similar or even the same economic activities. Besides, whereas sector-specific foreign investment restrictions need to be ostensibly defined and made transparent, limitations based on national security grounds make them less predictable and pave room for disguised investment protectionism.[23]

From legal parlance, as it is evidenced by the security exceptions of the 1948 GATT, economic security has essentially become similar to national security and it is prioritized by countries worldwide. National security has not yet been defined either in the U.S. or Japan, which are much familiar with this concern. But there is a legal reference about this concept from the U.S. Supreme Court Justice Hugo Black's concurring opinion on the Pentagon papers in 1971. According to him, national security is defined as *"a broad and vague generality"* And, any endeavor to enact regulations on FDI related to national security suffers from ambiguity and varied interpretations

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[21] Ji Ma, International Investment and National Security Review, *Vand. J. Transnat'l L.*, *52*, (2019), p. 899.
[22] UNCTAD, *World Investment Report, Investor Nationality: Policy Challenges*, (2016), p. 94, [UNCTAD, *World Investment Report 2016*].
[23] *Ibid,* UNCTAD, *World Investment Report 2016.*

in U.S. and Japan. For this, the 1988 Exon-Florio amendment which gives the U.S. president a veto power to halt foreign takeovers perceived to hamper national security can be mentioned.[24]

Yet again, the U.S. adopted the FIRRMA in August 2018 to update and further fortify the CFIUS which is empowered to review *covered foreign investment transactions*[25] like any M&As or takeovers bearing foreign control of any person in interstate commerce in the U.S. FIRRMA is signed to regulate evolving national security threats not addressed by the pre-existing enactments that CFIUS has been working on.[26] Likewise, last April, the EU has also enacted an FDI screening regulation framework on security grounds to protect strategic sectors from foreign state-backed acquisitions of key European technology and infrastructure sectors. Many individual countries are also introducing new national security review mechanisms and are reshuffling their investment policies. All these evolving national security review practices inevitably result in significant influences on FDI flows worldwide.[27]

2. (Re)defining and Conceptualizing the Traditional Notions of National Security

There is neither a universal consensus on what national security does mean nor what it contains. It is vaguely and indeterminately understood to encompass several goals beyond the conventional conception of securing national survival.[28] To encapsulate the common elements in various conceptions of security would, *inter alia,* be found useful for rational policy analysis by unclogging comparison of one type of policy from another, first, it is quite essential to define and conceptualize what (national) security does mean.[29]

The earliest, national security centers on military might, now it has a broad range of facets, all of which connotes the non-military or economic security of the nation and the values supported by the national society. Principally, the concept of *national security* is developed in the U.S. after World War II. Americans understand national security as a must-to-have condition to maintain the

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[24] Rikako Watai, US and Japanese national security regulation on foreign direct investment, *Asia Pacific Bulletin No. 219,* (July, 2013), pp. 1-2, [hereinafter Rikako, US and Japanese national security regulation on foreign direct investment].

[25] 50 U.S. Code § 4565 - Authority to review certain mergers, acquisitions, and takeovers, , LII / LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/uscode/text/50/4565 (last visited Apr 17, 2020). The term 'covered transaction' means *any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.*

[26] New policy on foreign investment and national security is open to abuse, BUSINESSLIVE, https://www.businesslive.co.za/bd/opinion/2019-02-25-new-policy-on-foreign-investment-and-national-security-is-open-to-abuse/ (last visited Apr 17, 2020), [hereinafter BusinessLIVE, New policy on foreign investment and national security is open to abuse].

[27] Control Risks, *Navigating National Security Rules in the Global Economy*, FORBES, https://www.forbes.com/sites/riskmap/2019/05/02/navigating-national-security-rules-in-the-global-economy/ (last visited Apr 17, 2020).

[28] Melvyn Leffler, National security, *The Journal of American History*, 77(1), (1990), pp. 143-152.

[29] David Baldwin, The concept of security, *Review of International Studies, 23*(1), (1997), p. 6, [hereinafter David, The Concept of Security].

survival of the state through the use of economic power, diplomacy, power projection, and political power. [30]

Before sixty years ago, connoting national security as *an ambiguous symbol*, Wolfers further emphasized this garbling term with the essence of its ambiguity as follows: *"It would be an exaggeration to claim that the symbol of national security is nothing but a stimulus to semantic confusion, though closer analysis will show that if used without specifications it leaves room for more confusion than sound political counsel or scientific usage can afford."*[31] Wolfers, in using the term *specifications* above, need to instill in us the concept of national security to be understood as both an end (as policy objective by itself), and as a means (as national security policy used to accomplish other policy objectives).[32] He stressed approaching the concept of national security from both perspectives so that its ambiguity would be meaningful, and it can be conceived virtuously.

Grizold, affirming several changes in the international community and emerging situations in Europe and the rest of the world after the 1990's cold war period, called modern states for revising and redefining the content of national security policy. Grizold, underscoring the diminishing role of the military factor which is mainly driven by the principle of armed security, insisted on a broader application of common security measures ensuring common security objectives of individual states, groups of states, and the international community. This could respond to the current needs of states that are thriving to understand security as a complex of ingredients encompassing multifarious economics, politics, social welfare, health, education, culture, ecology, military affairs, and so on.[33] Nobilo also defined national security as a complicated combination of political, economic, military, ideological, legal, social, and other internal and external factors helping individual states to maintain their sovereignty, territorial integrity, physical survival of their population, political independence, and to bring a balanced and rapid social development.[34]

Nobilo's, definition enlists relatively holistic features of national security with their complicated relationship and the states' reason for juxtaposing these numerous features and attempts of legitimizations for attaining their purposes sought. Seemingly, this concept of national security depicts the current challenges regarding evolving national security concerns in general and in the world of FDI regulation. In addition to the trial to define and answer the claim for a redefinition of the term, Nobilo's conception also pinpoints that the modern concept of security, explicitly or

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[30] National security, SCIENCEDAILY, https://www.sciencedaily.com/terms/national_security.htm (last visited Apr 17, 2020).
[31] Arnold Wolfers, "National security" as an Ambiguous symbol, *Political Science Quarterly*, 67(4), (1952), p. 483.
[32] David, The Concept of Security, pp. 5-26.
[33] Anton Grizold, The concept of national security in the contemporary world, *International Journal on World Peace*, 11 (3), (1994), pp. 37-38, [hereinafter Anton, The concept of national security in the contemporary world].
[34] Mario Nobilo, The Concept of Security in the Terminology of International Relations, *Political Thought*, (1988), pp. 72-73.

implicitly, is made up of all significant and diverse elements of security from the state, societal and human security perspectives.[35]

According to Dimitrijevic, national security helps to ensure the existence of a political community and the nation; protect territorial integrity; maintain political independence; ensure the quality of life, and keep vital interests of the state.[36] The quest for an analogous and broadening definition of national security comprising resource, environmental and demographic issues, etc. could help us to cope with a complex environment we have confronted, nowadays.[37] So, redefinition of national security in light of vital economic and political interests determining fundamental values and survival of a state is quite essential than ever.[38] Therefore, the upcoming discussions on national security concerns will also take the evolving and broad conceptualizations into account and will try to expound the current understandings and practices in the world of FDI regulation.

3. The Current Essence of Evolving National Security and Security Related Concerns in International Investment Law

In customary international law, the host state has an absolute right of control, which is unaffected by treaty, over the entry and establishment, and the whole of the process of foreign investment. From the outset, the right of a state to control the entry of foreign investment is unbounded because it is a right that stems from sovereignty. That means the entry of any foreign investment can be debarred by a state; albeit that a sovereign entity can cede its rights even over a purely internal matter based on a treaty.[39]

Though modern states do have fidelity with an open economy, they can have a considerable amount of regulatory means to control the economy. Especially, as of the 2008 global economic crisis and recession of liberalization, foreign investment regulation is escalating, particularly, in developed countries. Investment protectionism which evidences controls over the entry of foreign investment is carried out using, *inter alia*, national security as one means. Such investment controls are also found in developing countries and this may arise when they respond to an economic crisis.[40] Hence, undisputedly, regulating foreign investment through imposing restrictions for national security grounds is the sovereign right of host countries. And, it is left to host countries to define national security and screen circumstances bringing this interest to fall at risk. If so,

[35] Anton, The concept of national security in the contemporary world, pp. 37-53.
[36] Vojin Dimitrijevic, The Concept of Security in International Relations, *Beograd: Savremena Administracija*, (1973), p. 11.
[37] Jessica Mathews, Redefining security, *Foreign Affairs*, 68(2), (1989), p. 162.
[38] William Bundy, Priorities and Strategies in Foreign Policy: 1985-1989, *Presidential Studies Quarterly,* 15(2), (1985), p. 261.
[39] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 4th edition, Cambridge University Press, (2018), p. 88, [hereinafter Sornarajah, *The International Law on Foreign Investment*].
[40] *Id.,* Sornarajah, *The International Law on Foreign Investment*, p. 77.

determination of whether foreign investment is a menace to national security and pass decisions therewith is the broader discretionary power of states concerned.[41]

The national security issue is quite common in a liberal country where multifarious cases show that foreign investors are rejected for national security reasons or subjected to other measures after the establishment of their investment. It would rather be anomalous when national security reason is invoked to the protection of strategic industries and critical infrastructures, and at times of economic crisis as well. So, when this paper questions why and how these evolving national security concerns arise, the following justifications will come at frontline; these are:[42]

3.1. ***The Growing Global Threat Perception***

Firstly, although the Cold War has surcease, there are several local and regional conflicts, and terrorist attacks as well. This has substantially further supersized the global threat perception, and as a consequence actual or perceived threats to national security become multitudinous. Accordingly, foreign investment policies cannot ignore this progress and begin to probe whether an investor from a country that is labeled as an actual or potential adversary or where the investors themselves are perceived as a potential national security threat.[43]

3.2. **The Huge Wave of Privatization**

Secondly, the last decades have resulted in an abrupt wave of privatization that caused many countries to sense that they are more vulnerable to security risks than ever before. Foreign control over vital domestic industries like energy, telecommunications, transportation, or water is believed to have its possible implications for national security. However, if these aforementioned strategic industries remain under state ownership, governments might not be anxious that they could fall under foreign influence. And, in many countries where a substantial number of industries were privatized, the possibility of foreign takeovers becomes real.[44]

3.3. **For Reasons of Competitiveness**

Thirdly, countries may be having a sentiment that domestic ownership of strategic industries is beneficial for competitiveness. Specifically, the concern of competitiveness has a significant development dimension for developing countries. Once economic competitiveness is dropped, and economic and social development are abated, the next fate is a severe financial and social crisis. Hence, from this proposition, the relation between national security and foreign investment does matter. Among the case which drew much attention regarding this issue is the state-owned China National Offshore Oil Corporation (CNOOC) takeover attempt of Unocal, the ninth-largest oil firm in the U.S. in 2005. The bid which brought the proposal for the takeover was canceled by the U.S. Congress for reasons of alleged unfair competition and the risk of technology leakage.

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[41] UNCTAD, *The Protection of National Security in IIAs*, *Series on International Investment Policies for Development,* (2009), pp. 3-15, [hereinafter UNCTAD, *The Protection of National Security in IIAs*].
[42] *Ibid,* UNCTAD, *The Protection of National Security in IIAs.*
[43] *Id.,* UNCTAD, *The Protection of National Security in IIAs*, p. 26.
[44] *Id.,* UNCTAD, *The Protection of National Security in IIAs*, pp. xv, 14, 19, 56, & 135.

Finally, CNOOC's attempt to takeover become ineffective and Unocal was merged with the U.S.-based Chevron Corporation.[45]

3.4. **To Safeguard Strategic Industries and/or Critical Infrastructures**

Fourthly, though infrastructure transactions have long been catchy to national security review regulators, recently they have begun to heighten the sensitivity of the issue because of shared recognition that investments in infrastructure pave for increased access to population centers and facilities. And, this would, in turn, widen the gate for parties having bad intent to involve in sabotage or surveillance. For this, Australia, Canada, UK, Germany, and Belgium governments, and recently EU's Europe-wide FDI screening frameworks upgraded foreign investment review on national security grounds mainly to avert the long-range impact of Chinese industrial policies. Reviews on the electricity grid and power networks inbound investment by China's State Grid Corporation can be good examples.[46]

The terms strategic industries and critical infrastructures are usually dubbed as a single concept and used synonymously; some other times they are used as two different terminologies. Here below, for bringing their appropriate use, the terms are used as to the context and wordings applied in different countries and documents. Regarding the usage of these terminologies, beyond the language game, identifying sectors the foreign investment controls are purported to safeguard is also difficult. Some countries, such as the U.S. consider how foreign investment could affect national security and critical infrastructure, while other countries consider only on impacts to certain industries like residential real estate, agriculture, broadcasting and newspapers, health services, airlines, gambling, telecommunications, electricity and other utilities, and transportation.[47]

Governments trying to privatize critical infrastructure assets have encountered a significant challenge to maintain national security while sustaining the benefits of global economic liberalization. As indicated under the introductory section, post 11 September 2001, the positive contributions of FDI to an economy began to be questioned and compromised when, concomitantly, national security threats are ascertained. In the world of economic liberalization where privatization and deregulation attracting foreign investors are quite common, as a feasible economic strategy, critical infrastructures become controlled and owned by foreign corporations and governments. And, associated with their higher dependence on information and communications technologies and their inherent susceptibility to physical and cyberattacks, critical infrastructures are easily exposed to cyber threats, which in turn, jeopardizes national

[45] *See generally* UNCTAD, *FDI from Developing and Transition Economies: Implications for Development*, World Investment Report, (2006).
[46] National security investment reviews go global: key policy themes and recommendations, , FINANCIER WORLDWIDE, https://www.financierworldwide.com/national-security-investment-reviews-go-global-key-policy-themes-and-recommendations (last visited Apr 17, 2020).
[47] Laura Fraedrich and et al, Foreign Investment Control Heats Up: A Global Survey of Existing Regimes and Potential Significant Changes on the Horizon, *Global Trade and Customs Journal*, 13(4), (2018), pp. 141-156.

security. For this, governments become so anxious about security threats on critical infrastructures.[48]

Global security, nowadays, is entwined with a range of economic, privacy, and national security concerns. Principally, regarding cybersecurity concerns, there are two general divisions: actions targeting to damage a cyber system (cyberattacks); and actions that exploit, without causing damage, the cyberinfrastructure for unlawful purposes (cyber exploitation).[49]

Regarding what critical infrastructure does mean, the U.S. Critical Infrastructure Act of 2001 defined it as follows*: "those systems and assets, whether physical or virtual, so vital to the U.S. that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."*[50] Based on this definition, the U.S. has identified and listed out eighteen critical infrastructure sectors.[51] Likewise, South Africa when it deals with the question of national interest, in its national security review, the following critical infrastructures: defense, sensitive technology, security infrastructure, the supply of vital goods and services, enablement of espionage, foreign relationship, economic and social stability, and terrorism are listed out. [52] Unlike the U.S., critical infrastructure has not been defined in South Africa. It is left to the Minister of Police to declare an infrastructure as critical infrastructure after consideration of the application, the recommendation of the Critical Infrastructure Council, and any other information which he or she deems appropriate.[53]

Concerning critical infrastructures, safeguarding national security seem somehow complicated. This is because, by the time when the internet and digital trade agenda were developed based on inseparability, openness, and interoperability, they were guided by national and international digital standards for their better use. [54] As the potential damage from cyberattack is exacerbated by the interdependence existing between critical infrastructures, governments are compelled to adopt national standards aimed at tightening national security protections. Despite using national standards and putting an increasingly positive impact on international trade, making use of them

[48] Tyler Moore and Sujeet Shenoi, Critical Infrastructure Protection, Fourth Annual International Conference on Critical Infrastructure Protection, (eds.), *Springer Science & Business Media, Revised Selected Papers*, 342, (2010), p. 17 ff., [hereinafter Tyler and Sujeet, Critical Infrastructure Protection].
[49] Alberto Oddenino, Digital standardization, cybersecurity issues and international trade law, *Questions of International Law, Zoom-in 51*, (2018), p. 35, [hereinafter Alberto, Digital standardization, cybersecurity issues and international trade law].
[50] 42 U.S. Code § 5195c-Critical infrastructures protection, LII/LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/uscode/text/42/5195c (last visited Apr 17, 2020).
[51] Agriculture and food; defense industrial base; energy; healthcare and public health; banking and finance; water; chemicals; commercial facilities; critical manufacturing; dams; emergency services; nuclear reactors; information technology; communications; postal and shipping; transportation; government facilities; and national monuments and icons.
[52] *See at* BusinessLIVE, New policy on foreign investment and national security is open to abuse.
[53] South Africa, *Critical Infrastructure Protection Bill*, National Assembly, (2015), Section 1 cum 20 (4).
[54] Alberto, Digital standardization, cybersecurity issues and international trade law, pp. 31-33.

to invoke national security exceptions bears wider interpretations and is a backlash to its inherent use. [55] At the end of the day, this would, in turn, adversely affect FDI.

3.5. **The Need to Control Natural Resources**

Fifthly, throughout the 1950s, faced with the legacy of colonialism and sustained foreign control over resources developing states cast about asserting their economic independence. For this, as one means of asserting economic independence, the UN General Assembly passed the first of seven resolutions on Permanent Sovereignty Over Natural Resources in 1952.[56] Then, in the late 1950s, the UN Commission on Permanent Sovereignty over Natural Resources was formed to study the question of national control over resources. Consequently, in 1962, the General Assembly passed Resolution 1803 declaring that the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.[57] This means the Resolution reasserted that the admission of foreign investment was conditional upon the authorization, restriction, or prohibition of the state.[58] Once a foreign investment is admitted, it is regulated under national and international law.[59]

Therefore, stemming from the stronger need to control natural resources in some countries, new restrictions for foreign investors are introduced or renegotiations on existing investment contracts are called for. Particularly, in the extractive industries, the restrictions become tight. All these policies are often prompted by national security considerations.[60]

3.6. **State-owned Enterprises (SOEs) and Sovereign Wealth Funds (SWFs)**

In the six places, the role of state-owned enterprises and SWFs from the south become more vibrant and rampant so that this further toughen national security concerns in connection with foreign investment. Here, the fear is that their goodly financial power could enable them in a position to buy up any industry they would like to have. Besides, there is also trepidation that they would not only pursue economic goals but also other political objectives.[61]

Nowadays, SWFs are used as a new form of traditional state activity or management of public funds.[62] They are directly or indirectly state-owned, state-funded or state-managed investment

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[55] Tyler and Sujeet, Critical Infrastructure Protection, p. 18.
[56] Andrew Newcombe and Lluís Paradell, *Law and practice of investment treaties: standards of treatment*, Kluwer Law International BV, (2009), p. 387.
[57] UN, General Assembly resolution 1803 (XVII) of 14, Permanent Sovereignty Over Natural Resources, (1962), DECL.2, p. 2.
[58] Stephen Schwebel, The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources*, ABAj*, *49*, (1963), p. 463.
[59] Antony Anghie, *Imperialism, sovereignty and the making of international law, (37),* Cambridge University Press, (2007), pp. 216-220.
[60] UNCTAD, *The Protection of National Security in IIAs*, pp. xv-xvi, 1, 4, 19 & 72.
[61] *Ibid,* UNCTAD, *The Protection of National Security in IIAs.*
[62] Larry Backer, Sovereign investing in times of crisis: global regulation of sovereign wealth funds, state-owned enterprises, and the Chinese experience, *Transnat'l L. & Contemp. Probs., 19,* (2010), p. 3.

vehicles established by national governments for macroeconomic reasons,[63] and managed independently of other state financial institutions.[64] Hence, state-owned enterprises, as bearers of states and commercial interests, emphasize strategic acquisitions like advanced technologies on non-market terms so that investment policies related to national security revive and start to pay due attention.[65]

In the U.S., an obligatory investigation is adopted in case of foreign government-controlled investment; in the Russian Federation, State-owned enterprises cannot have majority interests in businesses entities having strategic importance for national defense and state security, plus governmental approval is mandatory even for minority stakes; and in Australia, foreign government investors have to meet additional notification requirements and generally must obtain prior governmental approval.[66]

In sum, increased FDI flows from SWFs and state-owned enterprises have resulted in new concerns about the impact of such investment on national security and brought a ripple effect of legislation and guidelines to govern sovereign investment.[67]

3.7. **The Problem of Economic Crisis**[68]

Last, in the seventh place, in addition to the aforementioned reasons, the economic crisis has also triggered national security concerns in recent years. Regarding this, the Argentina case that happened at the beginning of this century can be a good example. To respond to the crisis, the Argentinian government took several measures that restricted operations of foreign investors like transfer restrictions on the already established investments in the country. Unlike the previous national security grounds like restrictions to protect strategic industries usually at the entry of foreign investments, national security issues invoked by the economic crisis is a post establishment measure on foreign investments.

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[63] Cornelia Hammer and et al, Sovereign wealth funds: current institutional and operational practices, *IMF Working Paper,* WP/08/254, (2008), p. 6.

[64] Victoria Barbary and Bernardo Bortolotti, Sovereign Wealth Funds and Political Risk: New Challenges in the Regulation of Foreign Investment, World Scientific Book Chapters, in: Zdenek Drabek and Petros Mavroidis (eds.), *Regulation of Foreign Investment Challenges to International Harmonization*, World Scientific Publishing, (2013), p. 313.

[65] State-owned enterprises, international investment and national security: The way forward, OECD INSIGHTS BLOG, (2017), http://oecdinsights.org/2017/07/19/state-owned-enterprises-international-investment-and-national-security-the-way-forward/ (last visited Apr 17, 2020).

[66] UNCTAD, World Investment Report, *INVESTMENT AND NEW INDUSTRIAL POLICIES*, (2018), pp. 160-161.

[67] Karl Sauvant and Jennifer Reimer, *FDI perspectives: Issues in international investment*, (eds.), 2nd edition, Bepress, Vale Columbia Center on Sustainable International Investment, (2012), p. 95.

[68] It should be noted that there is a key difference between national security interests in respect of strategic industries and/or critical infrastructures on the one hand, and with regard to economic crisis on the other hand. In case of the former, measures taken by host countries usually have a precautionary character (from foreign takeovers), whereas in the latter case, measures do have a reactive nature (to mitigate or alleviate the already happened trouble) since it is a post-establishment investment policy measure.

Argentina, to invoke national security reasons and impose restrictions on foreign investors, took domestic upheavals and social tensions to reflect internal security interests as justifications. Similarly, since this kind of severe economic crisis can affect any country, especially developing countries, the Argentinian scenario will also be a case in any other country. Concerning the Argentinian case, some investment treaties bind public emergencies with national security. This is because; economic crises do result in public emergencies, in that the conditions of poverty and hunger that they bring about are bound to create violent disturbances. On that ground, the possibility of equating economic crisis with military threats may arise.[69]

4. Demystifying Evolving National Security and Security Related Concerns in International Trade Law

With the decentralized and hybrid feature, international investment law is constituted of the fragmented and multisource area since its development is linked to fill the gaps of the conventional public international law concerning the protection of the interests of private economic actors, following the unsuitability of diplomatic protection for executing commercial contracts. The emergence of international investment law is related to resolving disputes between investors mainly from developed capital-exporting countries and developing capital importing nations. Yet, the solutions gained from diplomatic protection were weak and since customary law found it impotent to afford investors further rights and protection, states began to conclude treaties. And, that is the reason why FDI has inadequate multilateral solutions connected to WTO treaty provisions that slightly deal with FDI with a strong bilateral and regional focus.[70]

Therefore, even if FDI merits global regulation due to its scope and significance, yet, neither a comprehensive, clear, and overwhelming international legal framework nor developed institutional structure is established. When international trade and FDI regulation departed in the post-colonial period, FDI left without a standalone regulatory tool while trade has got GATT. [71] The lack of an FDI legal framework does have its direct implication to the problem of responding to evolving national security concerns.

Currently, there is an approach towards agreements on investment including general exceptions which oftentimes befitting host state measures tailored to achieve increasing national security interests and important public policy objectives. To achieve some fundamental legitimate interests

[69] Sornarajah, *The International Law on Foreign Investment*, pp. 458-459.
[70] Ralph Lorz, Fragmentation, consolidation and the future relationship between international investment law and general international law, In Freya Baetens, (ed.), *Investment Law within International Law: Integrationist Perspectives*, Cambridge: Cambridge University Press, (2013), pp. 483-484; Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 30; Joost Pauwelyn, Rational Design or Accidental Evolution?, The Emergence of International Investment Law, In *The Foundations of International Investment Law: Bringing Theory into Practice*, by Zachary Douglas and et al, (eds.), Oxford University Press, Oxfor Scholarship Online, (2014), p. 14-18; Roberto Echandi and Pierre Sauvé, *Prospects in international investment law and policy*, (eds.), World Trade Forum, Cambridge University Press, (2013), p. 167.
[71] Carlos, *Foreign Investment, Strategic Assets and National Security,* p. 29*;* Efraim Chalamish, The future of bilateral investment treaties: A de facto multilateral agreement, *Brook. J. Int'l L., 34,* (2009), p. 303.

of the state, many international investment agreements are increasingly enclosing non-precluded measures clauses. Yet, the final number of treaties enclosing such clauses is still minimal.[72]

Most of the provisions enclosing non-precluded clauses don't meet evolving national security issues; they would rather rely on the traditional clauses found in the WTO treaties that emphasize international trade so that they pay a very narrow and partial treatment of FDI using the main provisions - art. XXI GATT and art. XIVbis GATS. Here comes a direct interplay between the regulation of international trade and the regulation of FDI. For this, this relation promotes the transfer of case law solutions and academic exchange or positions on the interpretation of WTO treaty provisions into the world of FDI regulation. But this interaction may not be healthy since there is no straightforward response and solutions there, and the extrapolation of those non-precluded exceptions (by which national security is the one) and reproduction to FDI with their dubious meanings and potential use may cast a problem.[73]

The ambiguousness and broadness of the concept of national security are not only restricted in the academic but also prevail in the practical world. Although it is indisputable that national security should be protected, there is no international agreement that clearly defines national security.[74] The right to protect essential security interests of the state, without directly referring to national security as also indicated above, is vaguely stated in WTO principles which gives nation-states a wider discretion to define their essential security interests.[75]

When we refer to different multilateral or bilateral trade agreements like OECD investment instruments, NAFTA as well as Bilateral Investment Treaties (hereinafter BITs) states have the authority to decide over the issue of their respective essential security interests. Some intergovernmental organizations, without setting a multilateral governing structure, stipulated a platform for participant states and nudge them on how to strike the balance between safeguarding security interests and attracting foreign capital through FDI. For this, national security and essential security interests remained self-judging. But OECD formulated three principles, transparency, predictability, and accountability in the determination of essential security interests.[76]

To evaluate a specific FDI project on security grounds, different countries use different bases.[77] National interest is used in Australia; national economic security in China; public order, public security and the interest of national defense or economic patriotism in France; net benefit for

[72] Tarcisio Gazzini, The role of customary international law in the field of foreign investment, *The Journal of World Investment & Trade,* 8(5), pp. 691-715.
[73] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 17.
[74] Can Zhao, Redefining Critical Industry: A Comparative Study of Inward FDI Restrictions in China and the United States, MA Thesis, University of Victoria, (2015), p. 25.
[75] WTO, Marrakesh Agreement, *The General Agreement on Tariffs and Trade* (GATT), Arts. XXI: Security Exceptions, (1947), p. 13.
[76] OECD, Freedom of Investment, National Security, and 'Strategic' Industries, *Progress Report by the OECD Investment Committee*, (2008), pp. 1-6.
[77] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 74.

Canada or national security in Canada; national security, public order and public safety in Japan; and credible threat to national security in the U.S.[78] The problem is not only the different elusive bases or fluid terminologies but also no clear definition of these concepts habitually given by the legislator so that national governments and administrations do have very broad autonomy for interpretation.[79] The OECD Code of Liberalization, without defining this baffling term, simply allows member states to restrict FDI on the following basis/conditions: maintenance of public order or the protection of public health, morals, and safety; protection of essential security interests; and fulfillment of obligations relating to international peace and security.[80]

Though the aforementioned concepts are not clearly defined, for developed countries, national security, national essential security interests or related concerns may concern the acquisition of some national champions in certain areas of the economy by competitors from other countries, mostly from developing countries, and in some cases state-owned or controlled firms, or to the control or preservation of natural resources or technology chiefly having military or security concerns. On the other hand, for emerging countries, these concepts may have different usage, one concerned more with the control of certain strategic industries considered crucial for the economic development of the country.[81]

5. An Appraisal of FDI Screening Mechanisms on Evolving National Security and Security Related Grounds

5.1. Overview of National Security Review Typologies in Different Countries

States have the right to control the entry of FDI into their territory in an unlimited manner. Henceforth, the entry of any FDI is subject to control, or even exclusion by any host state. Despite its direct link to the sovereignty of the state, the exclusion is governed by the conditions set forth by those treaties to which the host state is a party, however. These treaties can ultimately limit its right to control FDI.[82] Given the limitations possibly found under respective treaties, countries have different types of FDI regulations for their national security and security-related grounds to protect their national security interests relative to foreign investment. These include:[83]

(1) prohibiting, fully or partially, foreign investment in certain sensitive sectors;[84]

[78] *Ibid,* Carlos, *Foreign Investment, Strategic Assets and National Security*; OECD, *International Investment Perspectives 2007: Freedom of Investment in a Changing World*, OECD Publishing, (2007), p. 61.
[79] Carlos, *Foreign Investment, Strategic Assets and National Security,* p. 75.
[80] OECD, *OECD Code of Liberalization and Capital Movements*, Part I: Undertakings with Regard to Capital Movements, Public Order and Security, Art. 3, (2019), P. 13, [hereinafter *OECD Code of Liberalization and Capital Movements*].
[81] *Ibid, OECD Code of Liberalization and Capital Movements,* p. 13.
[82] Sornarajah, *The International Law on Foreign Investment*, P. 88.
[83] UNCTAD, *World Investment Report 2016: Investor Nationality-Policy Challenges*, (2016), p. 97, [hereinafter UNCTAD, *World Investment Report 2016].*
[84] E.g. Algeria, Argentina, Brazil, Chile, China, Egypt, Ethiopia, India, Indonesia, Rep. of Korea, Mexico, Myanmar, Russian Federation, Turkey, and U.S.

(2) maintaining State monopolies in sensitive sectors;[85] and

(3) maintaining a foreign investment review mechanism for a list of pre-defined sectors[86] or cross-sectoral (across the board).[87]

As we have seen in the previous paragraphs, though there are both *ex-ante* and *ex-post* FDI regulations on national security and security-related grounds, FDI screening systems are designed to be used before the implementation of the FDI proposal (*ex-ante*) are gaining popularity worldwide.[88]

Here above, some countries maintain two or more types of FDI review mechanisms. For instance, a sector-specific review procedure is supported by a separate cross-sectoral review mechanism for other foreign investments. The cross-sectoral review mechanism may require all FDI proposals to enter and establish approval procedures or may only require the approval of FDI proposals that fulfill certain monetary thresholds. Some other times, cross-sectoral review mechanisms don't stipulate any prior notifications by investors; it is initiated at the discretion of national authorities instead.[89]

Taking disclosure requirements into consideration, most countries carry out national security-related FDI reviews by requiring investors to provide information at some point in the review process. The extent, nature, and timing of these information requirements differ substantially between countries, however.[90] In addition to basic information sought concerning the identity and nationality of the investor via the disclosure of business relationships, the structure of the group, and links with foreign governments,[91] many countries also require additional information: the investing company's financial statements, the origin of funds, methods of financing;[92] and list of people on the board of directors, agreements to act in concert, business plans, future intentions and sometimes even the reasons for the investment.[93]

5.1.1. **FDI Screening Mechanisms on Evolving National Security Grounds in the U.S.**

The U.S. FDI screening mechanism on evolving national security grounds emerged from the changing calculus of national security interests due to the growing economic and technological challenges making a difference in the structure of the global economy, diffusing the increasingly rapid global technology and, at the end of the day, debilitating the U.S. technological and

[85] E.g. Algeria Brazil, China, Egypt, Ethiopia, Finland, France, Germany, Italy, Rep. of Korea, Mexico, Myanmar, Russian Federation, and Turkey.
[86] E.g. Argentina, Brazil, Chile, China, Ethiopia, Finland, France, Germany, India, Indonesia, Italy, Japan, Rep. of Korea, Mexico, Poland, Russian Federation, Turkey, and UK.
[87] E.g. Canada, Finland, Germany, Rep. of Korea, Mexico, Myanmar, UK, and U.S.
[88] UNCTAD, *World Investment Report 2016*, p. 96.
[89] *Ibid,* UNCTAD, *World Investment Report 2016.*
[90] *Id.,* UNCTAD, *World Investment Report 2016,* pp. 99-100.
[91] E.g. Canada, China, Finland, France, Japan, and Italy.
[92] E.g. Canada, China, France, Japan, Italy, Mexico, Myanmar, Poland, Russian Federation, UK, and U.S.
[93] E.g. Canada, Finland, Japan, Italy, Rep. of Korea, Mexico, Myanmar, Poland, Russian Federation, and UK.

manufacturing preeminence.[94] This justifies why the concept of national security becomes wider to encompass economic security, critical infrastructure, and homeland security.[95]

National security regulation concerning FDI in the U.S. is traced back to 1987 when a Japanese computer company made a failed attempt to acquire the U.S. semiconductor company, Fairchild, during the Reagan administration. After a year, this gave rise to the Exon-Florio Amendment that empowered the U.S. president to block foreign takeovers perceived to pose a national security threat. Exon-Florio didn't clearly define national security and there was due restraint, however. Later, this Act caused the blocking of the China Aero-Technology Import and Export Corporation (CATIC) acquisition of the air parts manufacturer, MAMCO, in 1990 and made several foreign takeovers to renounce their plan in advance as in the case of Fujistu-Fairchild.[96]

Since the enactment of the Exon-Florio provision to the Omnibus Trade Act of 1988, the U.S. experience on perceived threats to national security from the foreign acquisition of a U.S. company are identified and grouped in the following three distinct categories:[97]

(a) The First Category of Threat: the proposed acquisition would make the U.S. dependent on a foreign-controlled supplier for goods or services crucial to the functioning of the US economy, including, but not exclusively, the functioning of the defense industrial base who could delay, deny, or place conditions on providing those goods or services;

(b) The Second Category of Threat: the proposed acquisition would allow the transfer of technology or other expertise to a foreign-controlled entity that the entity or its government could deploy in a manner harmful to U.S. national interests; and

(c) The Third Category of Threat: the proposed acquisition would allow insertion of some capability for infiltration, surveillance, or sabotage through a human or nonhuman agent, into the provision of goods or services crucial to the functioning of the U.S. economy, including, but not exclusively, the functioning of the defense industrial base.[98]

When we see the organs authorized to screen FDI on national security grounds, the U.S. with CFIUS has institutionalized national security review in FDI regulation and others are following this path though they have a fear of international retaliation that the establishment of this kind of

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[94] Panel on the Future Design and Implementation of US Exports, National Academy Sciences Staff and National Academy of Engineering Staff, *Finding common ground: US export controls in a changed global environment*, National Academies Press, (1990), pp. 1-27.
[95] Baban Hasnat, US National Security and Foreign Direct Investment, *Thunderbird International Business Review,* 57(3), pp. 185-196.
[96] Rikako, US and Japanese national security regulation on foreign direct investment, pp. 1-2.
[97] Theodore Moran, CFIUS and national security: Challenges for the United States, opportunities for the European Union, *Peterson Institute for International Economics*, *19*, (2017), p. 55.
[98] Theodore Moran, Foreign acquisitions and national security: what are genuine threats? What are implausible worries?, *Regulation of foreign investment: Challenges to international harmonization*, *21*, (2013), pp. 3-8; Thodore Moran, *Three threats: an analytical framework for the CFIUS process*, *(89),* Peterson Institute, (2009), pp. 1-6.

dedicated institutions for FDI screening in light of national security concerns could message.[99] Likewise, Australia has also established the Foreign Investment Review Board (FIRB), and other countries like Canada, France, and Germany entrusted the task to a specific ministry. And, regarding the final approval of the FDI proposal after the screening, it ends up with an administrative act, or by way of a contract or agreement between the host government administration and the foreign investor.[100]

CFIUS review, also called the Exon-Florio review, was established by an executive order in 1975[101] is chaired by the Secretary of the Treasury, and is comprised of different department heads[102] aimed at protecting national security as a single objective,[103] unlike other countries' broader investment reviews on national interest grounds.[104] In Exon-Florio Amendment, the U.S. president has delegated CFIUS an initial review and decision-making authority including taking mitigation agreements,[105] and investigative power.[106] Exon Florio empowered the U.S. president to initiate an investigation by CFIUS into national security effects on transactions giving rise to foreign control of a U.S. business or asset. The president could do this when s/he has *credible evidence* of national security threat and no other provisions of the law provide an adequate and appropriate remedy to protect the national security interests of the U.S. In exercising this authority, the president is duty-bound to report to congress and his/her decision is not subject to judicial review. This depicts the president's deference on national security concerns.[107]

Later, FINSA which is the first statutory codification of CFIUS guides on how to define, without directly defining, national security; introduced new rules ensuring the balance between national

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[99] Paul Connell and Tian Huang, An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States, *Yale J. Int'l L.*, *39*, (2014), p. 131.

[100] Jeswald Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, Oxford University Press, (2013), p. 109.

[101] The Executive Order, No. 11, National Archives, (1975). Available at: https://www.archives.gov/federal-register/executive-orders/1975.html (last visited Apr 17, 2020). As discussed below, CFIUS originally was established primarily to monitor and evaluate the impact of foreign investment in the United States.

[102] CFIUS membership are comprises the Secretary of Treasury (Chair) Secretary of State, Secretary of Defense, Secretary of Commerce, Secretary of Homeland Security, Attorney General, Director of the Office of Management and Budget, United States Trade Representative, Chairman of the Council of Economic Advisers, Director of the Office of Science and Technology Policy, Assistant to the President for National Security Affairs, and Assistant to the President for Economic Policy.

[103] Omnibus Trade and Competitiveness Act of 1988, H.R Rep., No. 100-576. The Exon-Florio section of the Act is not applicable to transactions which are outside the realm of national security.

[104] John Cobau, Legal developments in US national security reviews of foreign direct investment (2006-2008), *Sovereign investment. Concerns and policy reactions,* Oxford University Press, (2012), pp. 104-119.

[105] David Fagan, The US Regulatory and Institutional Framework for FDI, In *Investing in the United States: Is the US Ready for FDI from China?*, Edward Elgar Publishing, Elgar Online, (2009), pp. 45-84.

[106] David Marchick and Edward Graham, US national security and foreign direct investment. *Peterson Institute Press: All Books*, (2006), p. 34.

[107] Christopher Tipler, Defining National Security: Resolving Ambiguity in the CFIUS Regulations. *U. Pa. J. Int'l L.*, *35*, (2014), p. 1227, [hereinafter Christopher, Defining National Security].

security and FDI; clarified the president's role in evaluating covered transactions, and explicitly authorized to use mitigation agreements resolving national security concerns.[108]

In 2018, FIRRMA maintaining the president's power to block or suspend proposed or pending foreign mergers, acquisitions, or takeovers of U.S. entities including through joint ventures that threaten to impair national security, further strengthened and modernized the current CFIUS process. FIRRMA requires CFIUS to take a more assertive role to safeguard both U.S. economic and national security interests, especially relative to the development of emerging or leading-edge technology, among other things, by expanding CFIUS's scope of review; introducing a discriminatory review of foreign investments based on country of origin and transactions connected to certain countries; shifting filing requirements from voluntary to mandatory and brought two-way investigation - expedite review, and greater scrutiny based on foreign governments control or stake having on the transaction, and stipulating some indicators that help the Congress and the president to determine whether a transaction could impair national security.[109]

5.1.2. **FDI Screening Mechanisms on Evolving National Security Grounds in China**

China has opened its market for foreign investment and can be the major recipient of FDI worldwide. This brought a fast increase in the number of M&As of domestic Chinese firms by foreign investors (particularly, foreign-owned enterprises). Consequently, increased FDI in the country resulted in optimizing the allocation of resources, fostering technical progress, improving business management levels, and these, in turn, advanced the technical capability and enlarged the Chinese economy in terms of performance and size. Concurrently, national security threats are also evident.[110] The general trend shows that China is moving towards a more expansive review of national security. It has established a national security regime of hard law associated with initiatives from both the Ministry of Commerce (MOFCOM) and the state council.[111]

The U.S.'s safeguarding measures are possibly having a great ideological influence on how China could adjust its foreign investment regulations and procedures.[112] China has long been mirroring the U.S.'s operational models in the most complicated legislative reforms and judicial practice. This means the continued use of CFIUS as a mechanism of economic protectionism has resulted in retaliation in the form of restrictions of U.S. foreign investment.[113] Consideration of the U.S.'s

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[108] *Id.,* Christopher, Defining National Security, pp. 1230-1231.
[109] James Jackson and et al, CFIUS Reform: Foreign Investment National Security Reviews, *Congressional Research Service*, (2019), PP. 1-2.
[110] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 305.
[111] Qingxiu Bu, China's National Security Review: a tit-for-tat response?, *Law and Financial Markets Review*, *6*(5), (2012), p. 347, [hereinafter Qingxiu, China's National Security Review: a tit-for-tat response?].
[112] Christopher Weimer, Foreign direct investment and national security post-FINSA 2007, *Tex. L. Rev.*, *87*, (2008), p. 684.
[113] James Carroll, Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security, *Emory Int'l L. Rev.*, *23*, (2009), p. 186.

use of national security review as a protectionist tool has resulted in a protectionist backlash from the side of China.[114]

Chinese national security review traced back to 2006 when MOFCOM promulgated the rules requiring the notification and review of M&As transactions that may impact China's national economic security. According to this rule, concerned parties are required to apply for approval from MOFCOM when the acquisition of a domestic enterprise by a foreign investor bears actual control; involves key industries; has factors imposing or possibly imposing material impact on the economic security of the state, and results in the transfer of actual control in a domestic enterprise which owns any well-known trademarks or Chinese historical brands.[115]

China's national security considerations are designed in a complex regime and are currently undertaken in an additional opaque level of regulatory review.[116] To regulate inbound M&As in sensitive industries and with the substantial increase in cross-border M&As, China has established a long-anticipated state-level national security review system undertaken by a multi-ministry panel which is jointly headed up by the National Development and Reform Commission (NDRC) and MOFCOM. To set national security review in motion, relevant government agencies or within upstream and downstream industries of the target should initiate a case. For this, MOFCOM as a gatekeeper works with relevant entities to obtain necessary details and additional government agencies with close relevance to a particular acquisition may also participate on an *ad hoc* basis.[117] With the greatest interest or expertise in the matter is designated to conduct most of the review and report back to the panel for each transaction, a lead agency is required.[118]

In sum, as compared to CFIUS, China has defined national security broader. CFIUS expressly precluded economic security though it practically considers economic issues affecting national security. The Chinese National Security Review Notice explicitly defined national security to include economic concerns as far as it has an impact on the domestic economy. However, it is not known when a transaction will be subject to national security review since industrial sectors falling within the ambit of the reviewing rules have not yet been identified or clarified.[119]

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[114] George Georgiev, The Reformed CFIUS Regulatory Framework: Mediating between continued openness to foreign investment and national security, *Yale J. on Reg.*, *25*, (2008), p. 134.
[115] Eileen Schneider, Be Careful What You Wish For: China's Protectionist Regulations of Foreign Direct Investment Implemented in the Months Before Completing WTO Accession, *Brook. J. Corp. Fin. & Com. L.*, *2*, (2007), p. 280, [hereinafter Eileen, Be Careful What You Wish For: China's Protectionist Regulations of Foreign Direct Investment Implemented in the Months Before Completing WTO Accession]
[116] Vivienne Bath, Foreign investment, the national interest and national security-foreign direct investment in Australia and China. *Sydney L. Rev.*, *34*, (2012), p.5.
[117] China Overhauls Its Foreign Investment Regulatory Regime | Global law firm | Norton Rose Fulbright, https://www.nortonrosefulbright.com/ru-ru/knowledge/publications/a885f4c3/china-overhauls-its-foreign-investment-regulatory-regime (last visited Apr 17, 2020).
[118] Qingxiu, China's National Security Review: a tit-for-tat response?, p. 347.
[119] Qingxiu, China's National Security Review: a tit-for-tat response?, p. 348.

Moreover, the interagency review system together with the application of competition law has created an institutional and rule overlapping which ostensibly affects predictability, transparency, and efficiency of the FDI screening system on national economic security in the country.[120]

5.1.3. FDI Screening Mechanisms on Evolving National Security Grounds in the European Union

With a traditionally open-door policy to FDI, the EU has been the world's largest exporter of international investment and the leading recipient of FDI in the world. [121] Fifty percent of all investment agreements concluded worldwide go to the current 28 [including the recently exited UK] EU member states. This refers that the EU is an open space committed to free trade and investment. And now, it becomes a major player in international investment law since the entrance into force of the Treaty of Lisbon,[122] Despite contending arguments, the Treaty of Lisbon has expanded the EU's common market policy to trade and investment, and it has also eased the regulation of non-EU or third-country investment access and treatment both by the Union and member states.[123] Although the Chinese total value of investments is still limited in the EU, the concern is growing higher across Europe following the foreign control of important European economies, particularly by China. And, since the Chinese investment is highly connected to the state, this caused a fear concerning politically driven FDI and, inter alia, the potential acquisition of key sectors of the European economy.[124]

On February 14, 2019, the European Parliament approved a regulation on the FDI Screening system amidst a global sprint to strengthen and establish FDI laws that are found in France, the UK, Germany, and Hungary as well as the U.S. and China. The regulation introduces formalizes and sets criteria among member states and with the commission maintaining individual member states' authority to screen (investigate, condition, prohibit, or unwind) FDI. In the regulation, the European Commission has been given the competence to intervene with an official opinion on the grounds of public order and security and it sets an official forum for member states to weigh in and potentially affect the course of foreign investment activities across the EU.[125]

The EU regulation on the FDI screening system has been adopted on last March 19, 2019; entered into force on April 10, 2019; and will be applicable from October 11, 2020, onwards established, for the first time, a framework for the screening of FDI into the EU via subjecting a broad category of foreign investments affecting security or public order. In doing so, the regulation is a tiebreaker

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[120] Qingxiu, China's National Security Review: a tit-for-tat response, p. 349.
[121] Julien Chaisse, Promises and Pitfalls of the European Union Policy on Foreign Investment—How will the New EU Competence on FDI affect the Emerging Global Regime?, *Journal of International Economic Law*, *15*(1), (2012), p. 52.
[122] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 377.
[123] Steffen Hindelang and Niklas Maydell, The EU's common investment policy–connecting the dots, In *International Investment Law and EU Law,* Springer, (2011), pp. 1-27.
[124] Carlos, *Foreign Investment, Strategic Assets and National Security*, p. 378.
[125] New EU-wide Foreign Direct Investment Screening System Approved, CLEARY INTERNATIONAL TRADE AND SANCTIONS WATCH, (2019), https://www.clearytradewatch.com/2019/02/new-eu-wide-foreign-direct-investment-screening-system-approved/ (last visited Apr 17, 2020).

for EU Merger Regulation that is used to review mergers, acquisitions, and joint ventures impeding an effective competition in the EU.[126]

In subject matter, the regulation allows whether a proposed FDI likely affects security or public order by identifying the non-exhaustive list of strategic sectors (critical infrastructure, critical technologies, critical inputs, sensitive information, and media freedom and plurality) with expansive definitions.[127] This means, unlike CFIUS, the regulation stops short of introducing any form of blocking way or suspension powers at the EU-level concerning foreign investment. It would rather introduce comprehensive cooperation and information-sharing framework between the Commission and EU member states, which will bring a material procedural (and timing) impact for European deal-making within the ambit Regulation in the future. It also nudges individual EU countries that do not currently have foreign investment controls in place to introduce new CFIUS-style review processes and screening mechanisms at the national level. Mainly, this will create a more complex procedural environment for certain categories of foreign investment activity in Europe ahead.[128]

The EU FDI Regulation also designed three different sets of cooperation and review mechanisms; these are:

5.1.3.1. **A Cooperation Mechanism for FDI Undergoing Screening**[129]

A member state screening any FDI under its national rules must provide detailed information on the transaction to the other member states and the Commission as soon as possible,[130]

When they determine that the FDI is likely to affect its security or public order, or that it has relevant information about that FDI, other member states may make a comment on the transaction to the Screening member state. The Commission may also give an opinion on the transaction to the screening member state when it considers that the FDI is likely to affect security or public order in more than one member state, or that it has relevant information concerning that FDI.[131] An opinion must be provided where it is justified in that at least one-third of EU member states do have concerns.[132] The Commission may also be requested by the screening member state to give an opinion or for other member states to provide comments, and the comments and the opinions need to be duly justified.[133] In doing so, the screening member state doesn't have an obligation to

[126] The new EU Regulation on the screening of Foreign Direct Investments | May - 2019 | A&L Goodbody, https://www.algoodbody.com/insights-publications/the-new-eu-regulation-on-the-screening-of-foreign-direct-investments (last visited Apr 17, 2020).
[127] REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, [E]stablishing a framework for the screening of foreign direct investments into the Union, Official Journal of the European Union, (19 March 2019), Art4, [hereinafter REGULATION (EU) 2019/452, A Framework for the Screening of FDI].
[128] Qingxiu, China's National Security Review: a tit-for-tat response?, p. 347.
[129] REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6.
[130] *Id.,* REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Arts. 6 (1) & 9 (2).
[131] *Id.,* REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6 (2) & (3).
[132] *Id.,* REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6 (3).
[133] *Id.,* REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6 (5).

reflect any opinion or comment received but to give due consideration. Lastly, the screening member state is free to pass the FDI review without delegation to the commission or any other supranational body.[134]

5.1.3.2. **A Cooperation Mechanism for FDI Not Undergoing Screening**[135]

This is a mechanism where the regulation enshrines an additional type of review out of a formal screening for FDI that is not screened by the member state in which the transaction takes place (affected member state). In this scenario, a member state which believes that the planned or completed FDI in a member state that is not undergoing screening is likely to impact its security or public order, or that it has relevant information concerning that FDI, may provide comments to the affected member state.[136]

5.1.3.3. **A Mechanism for FDI Likely to Affect Projects or Programs of Union Interest**[137]

For the need to protect projects or programs (a substantial EU funded or established by Union legislation concerning critical infrastructure, critical technologies, or critical inputs) which serves the Union as a whole or do have an essential contribution to its economic growth, jobs, and competitiveness, the Commission may issue an opinion addressed to the member state where the FDI is planned or has been completed.[138]

In sum, the EU FDI Regulation doesn't equate with the FIRRMA of the CFIUS in that it doesn't impose an obligation on parties to a transaction but onto EU member states. Depending on member states' reaction to the regulation, CFIUS-like review boards, and screening and blocking mechanisms may be established at a national level in the EU jurisdiction. Since the cooperation provisions insist, member states likely will introduce national screening systems (the recent Hungary and Netherlands national screening systems can be mentioned); or those fourteen member states who have already introduced FDI screening system shall maintain, amend and adopt measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions;[139] and are required to notify the Commission.[140] At the end of the day, though it adds a layer of procedural complexity for foreign investments in the EU, the Regulation is expected to result in increasing convergence between the different systems of the EU member states with predictable and transparent FDI screening systems on security and public order grounds.

5.1.4. A Cursory Look on the African Investment Regime from (Evolving) National Security and Security Related Concerns

[134] *Id.,* REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 6 (9).
[135] *Id.,* REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 7.
[136] *Id*., REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 7 (1).
[137] *Id*., REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 8.
[138] *Id*., REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 8 (1).
[139] REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 3 (6).
[140] REGULATION (EU) 2019/452, A Framework for the Screening of FDI, Art. 3 (7).

The international investment law regime in Africa is characterized as a complex, fragmented, and heterogeneous web of bilateral, regional, and international legal instruments. Just so, the regime consists of customary international law rules, bilateral, regional, and plurilateral investment treaties, and free trade agreements with investment provisions.[141] Most of the international investment agreements (IIAs), which are commonly called North-South BITs, were concluded since the 1960s with developed economies made for investment promotion and standardization. These IIAs were motivated by social, economic, and political reasons: to strengthen economic integration, and nurture diplomatic and economic relations. However, though voluminous FDI has been attracted, still under development, abject poverty, and high unemployment remain bottlenecks to the content. This triggers to question the role of FDI for Africa's economic growth and development.[142]

It is witnessed Africa has signed IIAs as an incentive to attract FDI from the developed economies. The developed economies, on their part, have signed IIAs to protect their investors and investments from expropriation and nationalization.[143] This kind of non-aligned relation can be expressed result of developed countries being investment treaties designers and pro-investor by denying host countries substantive right to regulate.[144] Host African countries, hoping for future FDI inflow, remain investment-rule consumers losing consideration of the nature and content of the agreements they signed.[145] As a reason for this, Africa doesn't have a legally binding and continent-wide tool to regulate investment. In 2016, the African Union adopted a continent-wide investment code, The Pan-African Investment Code (PAIC). Still, it is a nonbinding instrument. PAIC is designed to create a balanced investment regime: providing investment protection while maintaining host states' policy space for regulation.[146]

PAIC is expected to have a multiplier effect in shaping agreements coming in the future and those under negotiation so that it aids to meet the continent's transformation objectives.[147] Unlike the U.S., China, and EU rules discussed above, PAIC doesn't clearly show evolving national security concerns. This may be due to the wider objectives it aimed to achieve. It states national security interests as one of the general exception clauses left for states to decide over it.[148] PAIC can also be used as yeast to develop FDI screening framework rule in the future as in the case of the EU

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[141] Talkmore Chidede, The Right to Regulate in Africa's International Investment Law Regime, *Or. Rev. Int'l L.*, *20*, (2018), pp. 437-438, [hereinafter Talkmore, The Right to Regulate in Africa's International Investment Law Regime]
[142] *Id.,* Talkmore, The Right to Regulate in Africa's International Investment Law Regime, p. 438.
[143] Africa and bilateral investment treaties: To "BIT" or not?, POLITY.ORG.ZA , https://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23 (last visited Apr 20, 2020).
[144] Emmanuel Layrea and Franziska Sucker, Introduction: The Importance of an African Voice in, and Understanding and Use of, International Economic Law, In *International Economic Law: Voices of Africa, Siber Ink Cape Town, chapter*, *4*, (2012), p.10.
[145] Talkmore, The Right to Regulate in Africa's International Investment Law Regime, p. 467.
[146] Talkmore, The Right to Regulate in Africa's International Investment Law Regime, p. 443.
[147] Mouhamadou Kane, The Pan-African Investment Code: a good first step, but more is needed, Columbia FDI Perspectives, Columbia Center on Sustainable Investment, 217, (2018), pp. 1-3.
[148] The African Union, Economic Affairs, The Draft Pan-African Investment Code, (2016), Art. 14.

and to reform domestic investment policies in general and concerning evolving national security interests in particular.

Beyond responding to evolving national security threats in the world of FDI, African countries should also reassure their sovereignty over its abundant natural resources by overcoming the internationalization of investment contracts and stabilization clauses that paralyzed the use of their domestic legislative jurisdiction. African countries should also preserve their judicial jurisdiction and limit the almost uniform adoption of international arbitration as a means of settling investment disputes. These can be carried out through developing continental and regional common positions; by reviewing BITs and other investment agreements, contracts, and national legislations; and by terminating or renegotiating those which compromised national interests using harmonized policy frameworks.[149]

Concluding Remarks and Ways Forward

Though investment liberalization and opening of an economy for FDI is still a working fashion of the day, in recent years, evolving national security and security-related concerns have gained more attention in investment policies of several countries. The cause of the problem is not only on the subjective and political nature of national security and its evolving feature at different times but also hidden protectionist agendas and economic or strategic goals that make FDI regulation fall short of having a common legal framework.

To restrict FDI based upon national security and security-related grounds, different review mechanisms are evident across various countries, ranging from formal investment restrictions to complex review mechanisms. And, broad definitions and scope of application of national security are giving rise to a wider discretion for the host state through screening FDI in general and based upon national security grounds, in particular, is emanated from the inherent sovereignty of states.

The critical point is on how to balance the legitimate demands of national security and FDI. Unless a balance is made, invoking the ambiguous and blurred evolving concerns of national security, it affects FDI and free trade as well. This problem is getting worse since FDI screening on national security grounds is undertaken without clearly defined national security interests in a dedicated policy legal rules, and institutional structure. In this regard, despite their respective drawbacks, the U.S.'s CFIUS review system, China national security review regimes, the recent EU FDI Screening Regulation on security and public order grounds, and other individual countries' screening frameworks can give other countries and economic blocs a lesson on how to regulate FDI based on evolving national security grounds. Someday, all these practices would give rise to developing a common legal framework that can be used as a guide for FDI screening on (evolving) national security grounds in different states. In doing so, pretextual protectionist measures or

[149] Melaku Geboye, Competition for Natural Resources and International Investment Law: Analysis from the Perspective of Africa, In *Ethiopian Yearbook of International Law*, Springer, (2016), pp. 117-149.

sought of hidden goals taken under the guise of national security interests will be lessened and the essence of FDI will be maintained worldwide.

Throughout this article, (evolving) national security interests have been identified as a legitimate public policy concern. Hence, regulating FDI on this legitimate policy concern is lawful and directly attached to the sovereignty of states. So, hereby, the recommendations will revolve around how to identify real national security interests; define the concept and scope of national security; design a sound standalone policy and legal framework; institutional structure, and develop a clear and justified screening practice at a national level. At the international level, how to establish a framework policy and law on a multilateral basis to the matter have also been indicated.

Firstly, in dealing with their respective national security interests without affecting the inward FDI they receive, countries need to ostensibly identify their real national security interests and set a clear and predictable mechanism on how to entertain evolving national security interests. This measure of providing more clarity to the concept and scope of national security can be encapsulated in their investment and investment-related policies and legislations.

Secondly, after identifying their real national security interests, countries need to discern and utilize alternative policy approaches that would help solve national security-related issues in their FDI regulation. In this way, national security measures will not be abused for security-related and protectionist measures so that a host country can rip benefits of FDI, and freedom of investment can be guaranteed to a foreign investor.

To overcome retaliation measures among countries concerning FDI screening on national security concerns, and set a predictable, transparent, and responsible investment environment, countries are advised to enact standalone national security review policies and rules at the national level. Besides, formulating a framework policy and law helps them to guide their national policies, legal rules, and actions, (potential) trading partner countries exchanging foreign trade and investment should conclude bilateral or multilateral framework agreements.

Thirdly, to respond to evolving national security issues, beyond enacting a dedicated policy and law, compatibility of existing national investment, competition, and other related policies and laws need to be revised and tailored as to the spirit and notions of the current national security interests. For this, policy dichotomy, rule or institutional overlapping, inconsistencies, and lack of predictability and transparency of FDI screening on national security grounds can be lessened.

Fourthly, if (evolving) national security concerns are linked to free trade while designing a legal framework for FDI screening on national security grounds should also be connected to WTO free trade rules. It is believed that WTO free trade rules can give a yeast and catalyze the development of the legal frameworks required for governing FDI worldwide in general and essentially concerning evolving national security grounds. Besides, as a step forward, for letting free trade and investment unencumbered by national security policies, international investment law and policy regime need to have declaratory rules setting framework on how to regulate FDI screening on evolving national security grounds.

Fifthly, any stakeholder's multilevel initiatives on FDI regulation are also commendable to mitigate FDI hurdles on evolving national security concerns. This can be done through facilitating intergovernmental dialogue, harmonization, norm-setting, and development of soft laws, in the long run, nudging to reform fragmented and hostile national screening systems worldwide.

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LEGAL DIAGNOSIS OF THE NATIONAL INDUSTRIAL COURT OF NIGERIA RULES, 2017 AS A CATALYST OF EGALITARIAN LABOUR ADJUDICATION

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Abstract

The National Industrial Court of Nigeria (NICN) is a specialized court dealing with labor and employment matters; its functionality is contingent on its procedural Rules. To ensure optimal functioning of the Court, its President, according to the powers conferred on him, made the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017. The question are: in comparison to the erstwhile 2007 Rules what improvement (s) has these Rules introduced into the functionality of the Court and its shortcomings? This article adopts doctrinal methodology in addressing these issues. The paper through desk-based analytical methodology examines the powers, status, and functionality of the National Industrial Court of Nigeria under the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010. The paper found that the NICN Rules, 2017, is a catalyst for expeditious, judicious, and egalitarian labor adjudication towards unearthing the benefits of the enhanced status of the Court under the Third 1999 Constitution (Third Alteration) Act 2010. It highlights the innovative provisions of the Rules. It identifies areas for improvement and recommends how to achieve the improvements.

Keywords: *Adjudication/Court/ Employer/ Employee/ National Industrial Court*

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1. INTRODUCTION

At present, the NICN has evolved as a Superior Court of Record (SCR) through a tumultuous sojourn since its creation under the Trade Disputes Act.[1] The Court was created to have exclusive original jurisdiction over labor and ancillary matters.[2] However, due to constitutional constraints, the NICN's status and powers were continuously undermined.[3] In fact, it was held that the purported exclusive jurisdiction of the Court over labor disputes was a flagrant infraction of the jurisdictions of the Federal High Court, State High Court and High Court of the Federal Capital Territory High Court contained in Sections 251, 257, and 272 of the 1999 Constitution of the Federal Republic of Nigeria.[4] The scope of remedies and orders that the court could legitimately grant as well as the kinds of labor disputes it could adjudicate upon, were grossly restricted which all hampered the efficiency and effectiveness of the Court.[5] The exclusion of the Court under the 1979 and 1999 Constitutions further worsened the quagmire that had shrouded the NICN as it was argued to be a non-constitutional Court.[6] As a result, the NIC was regarded as an inferior tribunal, subject to the supervisory jurisdiction of the High Court.[7] Several legislative attempts were made as an aftermath of assiduous brainstorming to address the challenges that had confronted the Court.[8] In 2003, the then President of the Court, Mr. Babatunde Adejumo OFR, organized a conference with the theme "Nigerian Industrial Dispute Settlement System: Challenges and Prospects of the National Industrial Court" under the Chairmanship of Chief Justice of Nigeria, Justice Mohammed Uwais (GCON).[9] At the end of the brainstorming, a Bill was

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[1] Section 9 Trade Dispute Decree No. 7 of 1976; CK Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Lagos: Concept Publications Ltd., 2011) 318.

[2] Alero E Akeredolu, and David Tarh-Akong Eyongndi, "Jurisdiction of the National Industrial Court under the Nigeria Constitution Third Alteration Act and Selected Statutes: Any Usurpation?" 10 (1) *The Gravitas Review of Business & Property Law* (2019) 1.

[3] *Western Steel Works Ltd. v Iron & Steel Workers Union of Nigeria (No. 2)* [1987] 1 NWLR (Pt. 49) 284; *Adisa v Olayiwola* [2000] 10 NWLR (Pt. 674) 116.

[4] *Attorney General of Oyo State v Nigerian Labour Congress* [2003] 8 NWLR (Pt. 821) 1.

[5] Oji D Amucheazi, and Paul U Abba, *The National Industrial Court of Nigeria; Law, Practice and Procedure,* 1st ed., (Dubai, Top Design Printing 2013) 3.

[6] Akeredolu and Eyongndi, (n 2) 6-7.

[7] Akintayo OA John, and David T. Eyongndi, "The Supreme Court of Nigeria Decision in Skye Bank Ltd. v. Victor Iwu: Matters Arising" (2018) 9(3) *The Gravitas Review of Business & Property Law* 109-110.

[8] David T. Eyongndi, & Kingsley O.N Onu, "The National Industrial Court Jurisdiction over Tortious Liability under Section 254C (1) (A) of the 1999 Constitution: Sieving Blood from Water" 10 *Babcock University Socio-Legal Journal* (2019) 243-270.

[9] Akintayo, and Eyongndi, (n 7) 111.

presented at the National Assembly and was passed into law as the National Industrial Court Act, 2006 (NIC Act).[10] This laudable effort only had a short time palliative effect as the constitutionality of the Act soon became a front-burner issue.[11] The question that arose was whether an ordinary Act of the National Assembly could be used to amend the provision of the Constitution with the answer being in the negative.[12]

These challenges that had plagued the NICN led stakeholders in the labor sector to seek a permanent solution. Thus, in 2010, the National Assembly enacted the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.[13] The long title of the Act reads thus: "an Act to provide for the establishment of the National Industrial Court as a Superior Court of Record; and related matters."[14] Section 254A establishes the NIC as a superior court of record just like the various High Courts.[15] Section 254C provides the exclusive original civil jurisdiction of the NIC which is more expansive than that hitherto provided for under the NIC Act, 2006 to the extent that the NIC has the vires to adjudicate over the interpretation of international labor standards and international labor conventions, treaty, protocol which Nigeria has ratified.[16] Section 254D clothes the NIC, to exercise any jurisdiction conferred on it, with all the powers of the High Court.[17]

From the above, it is crystal clear that the expansive original civil jurisdiction of the NIC vests enormous responsibility on the Court to ensure expeditious settlement of labor and employment disputes in Nigeria. While it could be said that the substantive legal framework of the NIC is settled, the aspiration of the legislature is in creating the NIC that can only be achieved through a robust procedural legal framework that will regulate its practice and procedure. Thus, section 254F (1) of the 1999 CFRN (Third Alteration) Act, empowers the President of the NIC to make Rules for regulating the practice and procedure of the Court.

[10] Amucheazi and Abba (n 5) 50-51.

[11] *National Union of Road Transport Workers v. Road Transport Employers Association of Nigeria* (2012) NWLR (Pt. 1307) 170.

[12] Polycarp E Amechi, and David T. Eyongndi, "Casualisation of Labour Practice in Nigeria and Ghana: What Lessons are there for Nigeria?" 2017-2018, *Nigerian Current Law Review, Institute of Advanced Legal Studies* 121-162.

[13] The President of the Federal Republic of Nigeria, H.E. Goodluck Ebele Jonathan Grand Commander of the Federal Republic of Nigeria (GCFRN) assented to the Act on the 4th day of March, 2011.

[14] Akintayo and Eyongndi, (n 7) 113.

[15] *Maduka v Microsoft Nig. Ltd.* [2014] 41 NLLR (Pt. 125) 67.

[16] Elizabeth A Oji, and Offornze D Amucheazi, *Employment and Labour Law in Nigeria* (Lagos: Mbeyi & Associates Nig. Ltd. 2015) 255.

[17] Ifeoluwa O Olubiyi, "Jurisdiction and Appellate Powers of the National Industrial Court: Need for Further Reforms"7 3 *The Gravitas Review of Business & Property Law* (2017) 46.

Thus, in 2017, the erstwhile President of the NIC, Mr. Babatunde Adejumo, made the National Industrial Court (Civil Procedure) Rules 2017 which revoked the 2007 Rules and the 2012 Practice Direction.[18]

The objective and intention of the Rules are to establish an enduring, equitable, just, fair, speedy, and efficient fast-track case management system for all civil matters within the jurisdiction of the Court; promote in the light of the specialized jurisdiction of the Court; the socio-economic importance of the jurisdiction of the Court, diverse composition of parties, easy and speedy resolution of civil matters, as well as, effective and prudent management of the resources of the Court.[19] The Rules aim at enabling a Judge sitting as a single Judge or a panel of Judges to fast track hearing and determination of all processes, motions, and or applications in respect of civil cases within the jurisdiction of the Court. It also seeks to achieve a system for speedy dispensation of justice and fast-tracking of proceedings in the Court and in particular the hearing and determination of interlocutory applications, motions, and notices.[20] Egalitarian adjudication requires that all persons who seek justice from the court are treated fairly and equally through the elimination of technicalities and other adjudicatory roadblocks. Courts are established to ensure that legal grievances are adjudicated and resolved speedily however, it has become customary for cases to remain in court longer than necessary thereby causing a delay in justice delivery despite the fact that justice delay is justice denied. Labor disputes by their nature deserve quick and responsive adjudication free from the shackles of technicalities which the NICN as a specialized Court under the previous procedural regimes, is not free thereby making egalitarian adjudication of labor disputes difficult. Thus, fast-tracking justice delivery has become necessary.

When compared with the previous Rules and Practice Direction, does the 2017 NIC (Civil Procedure) Rule contain provisions that are capable of promoting the jurisprudence of the Court encapsulated in its expansive jurisdiction under its enabling law? The article critically examines the provisions of this 2017 NIC Rule to ascertain the innovative provisions. This article is divided into four parts. Part one is the general introduction. Part two discusses the anatomy of the NIC as a superior court of record. Part three examines the provisions of the NIC Rules which are innovative and adjudges if they are capable of attaining the jurisprudence of the NIC. Part four contains the conclusion.

[18] Order 1 Rule 1 of the National Industrial Court (Civil Procedure) Rules 2017.
[19] Order 1 Rule 4 (1) of the National Industrial Court (Civil Procedure) Rules 2017.
[20] Order 1 Rule 5 (a), (b), (c), (d), (e) and (f) of the National Industrial Court (Civil Procedure) Rules 2017.

2. ANATOMY OF THE EVOLUTION OF THE NATIONAL INDUSTRIAL COURT

This section of the article examines some salient aspects of the NIC from its evolution till its crystallization as a superior court of record under the 1999 CFRN (Third Alteration) Act, 2010. Prior to the advent of the British in Nigeria, labor relations had been on the basis of family and communal labor.[21] Paid employment as it is today, was unknown.[22] The British, through colonialism and business expansion, introduced wage employment in Africa and Nigeria in particular as they established and extended their British businesses in Nigeria such as John Holt Group, Royal Niger Trading Company, Chanria Group, etc. With these kinds of business concerns requiring a lot of manpower, there were bound to be conflict and their expeditious settlement would prevent truncation of business activities. Thus, in 1941, the colonial government promulgated the Trade Disputes (Arbitration and Inquiry) Ordinance to settle disputes within Lagos Colony without making the same provisions for the protectorates. In 1957, another Ordinance was promulgated known as the Trade Disputes (Arbitration and Inquiry) (Federal) which had a nationwide application, unlike its predecessor.[23] Upon gaining political independence in 1960, the indigenous government, in its bid to improve the trade dispute settlement mechanism of Nigeria, the Federal Military Government, promulgated two Decrees in 1968 and 1969; Trade Disputes (Emergency Provisions) Decree[24] and Trade Dispute (Emergency Provisions) (Amendment)Decree.[25] These legislations prohibited strike and lock-out in an effort to engender industrial tranquillity. The later Decree established a permanent tribunal known as Industrial Arbitration Tribunal for settling trade disputes.

Six years after the unrest caused by the Nigerian Civil War, in 1976, the Trade disputes, Decree[26] was promulgated and it set up a Court known as the National Industrial Court to adjudicate over trade disputes.[27] Unfortunately, when the 1979 Constitution was enacted, section 6 (5) thereof that contained all the Superior Courts of Record in Nigeria, omitted the NICN. This led to the NICN being considered as a court not recognized by the Constitution leading to a challenge of its constitutionality.[28] In 1992, in a bid to rectify this defect, the

[21] Joe I Roper, *Labour Problems in West Africa* (London, Penguin, 1958) 12.
[22] Akintunde Emiola, *Nigerian Labour Law* 4th Ed. (Ogbomoso, Emiola Publishers Ltd., 2008) 1.
[23] Oji, and Amucheazi, (n 15) 254.
[24] Trade Disputes (Emergency Provisions) Decree No. 21 of 1968.
[25] Trade Dispute (Emergency Provisions) (Amendment Decree) Amendment No. 2 of Decree No. 53 of 1969.
[26] Decree No. 7 of 1976.
[27] Section 9 Trade Dispute Decree No. 7 of 1976; Oji, E. A., and Amucheazi, O. D. (n 15) 253.
[28] *Kalango v Dokubo* [2003] 15 WRN 32.

Trade Disputes (Amendment) Decree was promulgated and it elevated the NICN to the status of a superior court of record.[29] Being a military Decree during a military regime, the NICN status could no longer be challenged. When the 1999 Constitution was enacted, the NICN was again, omitted amongst the listed Superior Courts of Record. This opened up the floodgate of contention against its constitutionality and purported exclusive jurisdiction over labor and employment matters.[30] It was the argument that the provisions of the 1992 Decree that vested exclusive original civil jurisdiction on the NICN over trade disputes infringed the jurisdiction of the High Courts under the 1999 CFRN.[31] To resolve this jurisdictional cum constitutional impasse, the National Industrial Court Act, 2006 was enacted.[32] This attempt soon turned out to be an exercise in futility as it could not remedy the perforated and defective constitutional status cum jurisdiction of the NICN. To prescribe a permanent solution to this issue, the 1999 CFRN was amended via the 1999 Constitution of the Federal Republic (Third Alteration) Act, 2010. This Act included the NICN in the list of Superior Courts of Record in Nigeria and gave it expanded exclusive original civil jurisdiction overall labor and employment matters.

The exclusive original jurisdiction of the NICN and right of appeal from its decisions to the Court of Appeal generated controversies under section 243 (3) 1999 CFRN (Third Alteration) Act. Two schools of thought cropped up as a result of this controversy. One posited that only decisions of the NICN arising from fundamental human right cases as contained in Chapter IV of the Constitution can be appealed to the Court of Appeal while the other argued that every decision of the NICN, is appealable to the Court of Appeal either as of right or with leave as a court of the first instance cannot exercise final jurisdiction over a dispute. The Supreme Court settled this controversy in *Skye Bank Ltd. v Victor Iwu*[33] where it held that the Court of Appeal exercises appellate jurisdiction over all decisions of the NIC under two options, either as of right (decisions on fundamental human rights cases) or with the leave of the Court (all other decisions of the court not arising from Chapter IV of 1999).

[29] Trade Disputes (Amendment) Decree No. 47 of 1992.
[30] *AG Oyo State v. NLG, Oyo State* [2003] 8 NWLR (Pt. 821) 1 at 33-34; *Ekong v. Oside* [2005] 9 NWLR (Pt. 929) 102.
[31] *Inspection Service Nig. Ltd. v Petroleum and Natural Gas Senior Staff Association of Nigeria.* Digest of the Judgment of the NICN 1978-2006 at 428-430.
[32] Amucheazi and Abba (n 5) 3.
[33] [2017] 13 NWLR (Pt. 1590) 24.

Worthy of note is the fact that while section 254C (1) (d) of the 1999 CFRN (Third Alteration) Act gives the NIC exclusive jurisdiction over fundamental human right suits, the section, or any other, did not make provision for the abatement of such matters pending before other Courts prior to the enactment of the Act. The consequence of this omission is that while appeals from the decisions of the NIC goes to the Court of Appeal and terminates there, such labor disputes, commenced before courts other than the NIC, would be appealed to the Court of Appeal and to the Supreme Court having not emanated from the NIC. This is contrary to the intendment of the legislature when it inserted section 243 (3) of the 1999 CFRN (Third Alteration) Act. This notwithstanding, these labor cases pending before other Courts would be spent but their effect in disrupting the prevailing jurisprudence of the Court cannot be wished away.

Since 2010, pursuant to its enhanced status and stature, the NICN has introduced very radical developmental strides in Nigeria's labor jurisdiction to the admiration of several labor stakeholders. In *Mix and Bake Flour Mills Industries Ltd. v FBTSSA* [34] the NICN contrary to the prevailing common law position that reinstatement cannot be ordered in master-servant employment, order it. While it is the position that an employer, in master-servant employment, can terminate the employment of the employee for any or no reason as was held in *Olanrewaju v Afribank Nigeria Plc.*[35] In *Petroleum and Natural Gas Staff Association of Nigeria v Schumberger Anadrill Nigeria Ltd.*[36] the NICN held that it is no longer fashionable in accordance with global best practice for an employer to terminate the employment of an employee for any reason (good or bad) or no reason at all. This decision was reached placing reliance on ILO Termination of Employment Convention, 1982 (No. 158) and Recommendation No. 166. The Court in *Aloysius v. Diamond Bank Plc.*[37] held that where the employer gives a reason for termination (as it is expected), the employee reserves the right to contest the reason. At present, the NIC is trailblazing a labor jurisprudence that is worker-friendly in accordance with ILO standards. The employee, in a contract of employment, particularly in the master-servant employment, is perpetually at the disadvantaged position requiring protection. Unfortunately, the common law and our

[34] [2004] 1 NLLR (Pt. 2) 247.
[35] [2001] 13 NWLR (Pt. 731) 691.
[36] [2008] 11 NLLR (Pt. 29) 164.
[37] [2015] 58 NLLR (Pt. 199) 92.

obsolete labor legislation protected the employer to the chagrin of the employee. The NIC Act seems to have heeded to the Biblical Macedonia call to help labor.

Since 2010 pursuant to its enhanced status and stature, the NICN has delivered some landmark decisions that have positively impacted Nigeria's labor jurisprudence. For instance, under the common law, the employer has absolute right of termination of the contract of employment for any reason (good or bad) or no reason at all as was held in *Shell Petroleum Development Company Nig. Ltd. v Ifeta*[38] in fact, where the employer in terminating the employment, does so arbitrary in breach of the contract of employment, the contract is nevertheless determined the only remedy available to an aggrieved employee, is to seek damages for breach of contract.[39] However, the NICN has held that it is no longer fashionable to terminate the employment of an employee for any reason or no reason in accordance with international best practices. This position was established by the NICN per Kola-Olalere J in *Mr. Ebere Onyekachi Aloysius v Diamond Bank Plc.*[40] Defendant, in this case, had terminated the claimant's employment contrary to the terms and conditions spelt out in the letter of employment. Upon being challenged, it contended that it has the right to terminate the employment for any reason or no reason at all. On this contention, the NICN held as follows:

> The Termination of Employment Convention, 1982 (No. 158) and Recommendation No. 166 regulate termination of employment at the initiative of the employer. Article 4 of this Convention requires that the employment of an employee shall not be terminated unless there is a valid reason for such termination connected with his capacity or conduct or based on the operational requirements of the undertaking, establishment, or service. The Committee of Experts has frequently recalled in its comments that; the need to base termination of employment on a valid reason is the cornerstone of the Convention's provisions. This is the global position on employment relationships now. It is the current International Labour Standard and International Best Practice. Although this Convention is not yet ratified by Nigeria, since March 4, 2011, when the Constitution of the Federal Republic of Nigeria, 1999 (Third Alteration) Act, 2010 came into effect, the National Industrial Court has power under the Constitution to apply International Best Practice and International Labour Standard to matters like this by virtue of Section 254C (1) (f) and (h) of the Constitution as amended. In other words, by the Constitution, as amended, National Industrial Court can now move away from the harsh and rigid Common Law posture of allowing an employer to terminate its employee for bad or no reason at all. It is now contrary

[38] [2001] 11 NWLR (Pt. 724) 473.
[39] *Mobil Prod. (Nig.) Unltd. v Udo* [2008] 36 WRN 62.
[40] [2015] 58 NLLR (Pt. 199) 92.

> to international labor standards and international best practices and, therefore, unfair for an employer to terminate without a reason or justifiable reason that is connected with the performance of the employee's work. I further hold that the reason given by the defendant for the determination of the claimant's employment in the instant case, which is that his service was no longer required is not a valid one connected with the capacity or conduct of the claimant's duties in the defendant's bank. In addition, I hold that it is no longer conventional in this twenty 1st century labor law practice and in industrial relations for an employer to terminate the employment of its employee without any reason even in private employment.[41]

The above position of the Court was reiterated in its subsequent decision in *Petroleum and Natural Gas Staff Association of Nigeria v Schumberger Anadrill Nigeria Ltd.*[42] Thus, the employer in Nigeria, no longer has unfettered power of termination of a contract for employment. It must be for a credible reason which must be in accordance with Article 4 of the ILO Termination of Employment Convention, 1982 (No. 158).

Also, the measurement of damages for an employee whose employment has been wrongfully terminated under common law has always been what he/she would have been entitled to if the period of notice required had been complied with and nothing more.[43] This is irrespective of any injury that the employee would have suffered to his reputation or prospect of securing another employment arising from the process of termination.[44] However, the NICN has held that computation of damages for cases of wrongful termination of a contract on this basis, is not realistic with current realities hence, damages can be awarded over and above the common law anachronistic prescription. Thus, wherein terminating the employment of an employee, the employer inflict an injury either on the character of future employment prospect of the employee, this fact will be countenanced in the measurement of damages and the employee can be awarded damages over and above what he/she is ordinarily entitled if the period of notice to be given had been complied with by the employer. This was the position taken by the NICN in *Sahara Energy Resources Ltd. v Mrs. Olawunmi Oyebola.*[45]

3. INNOVATIVE PROVISIONS OF THE 2017 NATIONAL INDUSTRIAL COURT RULES

[41] [2015] 58 NLLR (Pt. 199) 92 at P. 134, Paras. A-F, G-B.
[42] [2008] 11 NLLR (Pt. 29) 164.
[43] *Nigeria Telecommunications Plc. v I. A. Ocholi* [2001] 10 NWLR (Pt. 720) 188.
[44] *Osisanya v Afribank Plc.* (2012) 2 NILR 214.
[45] (2020) LPELR-51806 (CA).

The 2017 NIC Rules contain some innovative provisions which are geared towards the realization of the speedy and effective dispute resolution mandate of the NIC. This part of the article examines these innovative provisions of the Rules. At this juncture, the various innovative provisions of the Rules are hereunder examined under various heads:

a. Electronic Filing of Processes and Documents

Technological advancement has infiltrated every area of human relations with its disruptive effect.[46] There is hardly any sphere of human endeavor that technology has not been deployed.[47] Technology has been deployed to improve the ease of doing business and advance the course of human life.[48] The 2017 NIC Rule, in recognition of the usefulness of technology in enhancement of the functionality of the Court, made provisions for electronic filing of court processes. Order 6A of the Rules contains copious provisions on the e-filing of processes. It provides that "there shall be an E-filing Centre for electronic filing and payment of filing fees for processes and documents relating to or connected with a matter before the court."[49] A party or counsel to a party may e-file any process or document that may be filed with the Court in paper form except, documents to be presented to the Court in Chambers or in-camera solely for the purpose of obtaining a ruling and documents to which access is otherwise restricted by law or Court order.[50] In order to ensure the efficient and effective function of the e-filing system of the NIC, there shall be an officer of the Court, known as the Electronic File Manager (EFM), who shall be in charge of the E-filing center. The Rule empowers the President of the NIC to issue direction to establish a communication and service center which may include designated electronic filing workstations for online filing of processes and documents.[51]

The EFM shall be responsible for the management of processes and documents transmitted to the electronic filing portal of the Court. A party or a counsel, who is desirous of utilizing the e-filing option of the Court, shall register with the EFM as an e-filer. Upon registration as an e-filer, the EFM shall issue an Authentication Registration Number (ARN) which shall be used by the e-filer for subsequent e-filing of any process or e-communication or

[46] George N Ikpeze, "Issues in Admissibility of Computer Generated and Electronic Evidence in Nigeria" (2015) 3(1) *Nnamdi Azikiwe University Journal of Commercial and Property Law* 119.
[47] Rauf F Mahmoud, "The Potential of WhatsApp as a Medium of Substituted Service in the Nigerian Judicial System" (2019) 5 *Section on Law Practice Law Journal* 66-86.
[48] Femi Daniel, *Introduction to Computer Law in Nigeria* (Lagos, Ins-Pire Ventures Ltd., 2015) 1-2.
[49] Order 6A Rule 1(2) NIC Rules, 2017.
[50] Order 6A Rule 2 (1) and (2) NIC Rules, 2017.
[51] Order 66 Rule 1 and 2 NIC Rules, 2017.

correspondence with the Court on the matter before the Court. No process or document e-filed without an ARN will be accepted by the portal of the Court and the EFM will forward the document to the Registry of the Court. Once a process is properly e-filed and accepted by the portal, the portal will automatically generate an email acknowledging receipt of the e-filing, send the automatically generated email to the designated email address of the e-filer. Upon this, the e-filer will thereafter receive a confirmation of the Registrar's acceptance of the filing, and a file-stamped copy of the document. The Rules also make provisions for electronic signature on all processes to be filed in the Court in compliance with the requirement of Rule 10 of the Rule of Professional Conduct for Legal Practitioners (RPCLP).[52]

This provision of the Rules is novel as far as the NIC is concerned and it is meant to facilitate the filing of cases with ease at the Court. It supplements the onsite filing of processes at the Court Registry at its various judicial division and administrative registries established for that purpose.

b. Trial on Records

Another innovation introduced by the Rules in the practice and procedure of the NIC is the effective case management system of trial on records (ToRs). Trial on Records is a system of litigating a case filed before the NIC based on the state of the pleadings only whereby the claimant and defendant consent to the Court, in lieu of an oral hearing, after the close of pleadings, to adopt the processes filed, examine them, ascribe evidential value and deliver judgment. By this method of trial, the parties consent to and forego the rigors and delay associated with the process of oral trials (characterized by evidence-in-chief, cross-examination, and re-examination where it is considered necessary), filed and exchange final written addresses as arguments in support of their cases as disclosed in their pleadings. Order 38 Rule 33 of the NIC rules[53] provides as follows:

> In any proceeding before the Court, parties may by consent at the close of pleadings agree to a trial on records where they rely only on the documents and exhibits frontloaded and thereby dispense with the need for oral testimony and/or cross-examination. Where parties agree to a trial on records, Written Addresses shall be filed starting with the Claimant on the basis of the document on record. The Written Address which shall be in the format provided in rule of Order 45 of these Rules

[52] Order 6A Rule 8 (1) NIC Rules, 2017.

[53] Order 38 Rule 33 (1) (2) and (3) of the National Industrial Court of Nigeria (Civil Procedure) Rules 2017.

shall be served first on the defendant in compliance with the provisions of rules 20 of this order.

This mode of case management is novel in Nigeria's procedural *corpus juris.* It totally eliminates the pitfalls engendered by oral advocacy, it eliminates the delays occasioned by objections taken in the course of tendering pieces of evidence owing to their admissibility or otherwise and interlocutory appeals that usually ensue from such disagreement. These interlocutory appeals, sometimes, move up to the Supreme Court while the substantive suit has stayed and judicious and judicial time, as well as resources, are wasted. From the provision of the Rules, all that is required to set in motion, the machinery of trial on records, is for the parties to consent to it at the close of pleadings. Once this is done, the Court, is duty-bound, to accede to this and deliver judgment based on the record.[54]

This process is capable of achieving the speedy, cost-effective, and efficient dispute settlement mandate of the NIC if deployed by litigants particularly in non-contentious matters for which it is most suitable.[55] Although, this procedure, robs the court of the opportunity and the benefits of observing the demeanor of the witnesses to ascertain the truthfulness or otherwise of their written depositions before the Court this is not comparable to the benefit of the quick dispensation of justice. Besides, the demeanor of witnesses is adjudged, more important in criminal trials than civil. For the effective deployment of this procedure, counsel in their address and the various witness depositions must tie each document frontloaded as an exhibit to be used in court to the relevant averment. Each of the exhibits must be adequately linked to the relevant portion of the claim and supporting deposition so that the judge is not made to engage in the strenuous duty of attaching documents to relevant portions of the claim. Failure to diligently do so can negatively impact the use of the procedure.

c. Fast-Track Procedure

When cases are filed in Court, they go through the normal adjudicatory channel. However, there are certain matters that due to their nature, require expeditious resolution one way or the other. The 2017 NIC Rules recognize the need for quick adjudication of a certain case

[54] Bimbo Atilola, *Recent Developments in Nigerian Labour and Employment* (Lagos, Hybrid Consult, 2017) 76.
[55] David T Eyongndi, "Attainment of Speedy Justice Delivery through the National Industrial Court Trial on Records Procedure: Prospects and Challenges" 6 *Nigerian Bar Association Section on Legal Practice Law Journal* (2020) 163-176.

and respond by making provisions for the placing of certain matters on the fast-track lane of the Court. Order 25 of the Rules make provision for the placement of certain cases on the fast-track lane of adjudication at the NICN. Thus, cases concerning a strike or lockout or any other form of industrial action that threatens the peace, security, stability, and economy of the country or any part thereof; a declaration of trade dispute by essential service providers; a trade dispute directly referred to the Court by the Minister of Labour, Employment and Productivity pursuant to the powers conferred on him/her by the relevant Trade Disputes Act (TDA). Also, any matter relating to the outstanding salary, pension, gratuity, claims, allowances, benefits or any other entitlement of a deceased employee; or any other matter which the President of the NICN may *suo motu* or, on the application of either of the parties to a suit direct to be placed on fast-track in the overall interest of the peace, stability, and economy of the nation or any part thereof.

Once a matter is ordered to be placed on a fast-track lane, it enjoys priority over every other matter in terms of hearing as it is given a speedy hearing. Matters on fast-track shall be marked "qualified for the fast track" by the Registrar after filing. This is to ensure that everything pertaining to the case, is given the urgent attention it deserves. The parties (claimant and Defendant) shall be put on notice to the effect that the matter has been placed on fast-track lane for adjudication. Defendant has not later than fourteen days from the date of being served with the originating processes to file defense and the Claimant has seven days from the date of service of the defense, to file a reply to the defense.[56] Any matter on the fast-track procedure shall be brought to the attention of the President by the Registrar for onward assignment to a judge or a panel of judges for expeditious adjudication.

The judge or panel to whom a fast-track case with an urgent interlocutory application is assigned shall within five (5) days or so soon thereafter but not later than ten (10) days, set down any such urgent pending application to be disposed of timeously, and direct hearing notices to be issued and served on all the parties.[57] The parties are to litigate such a case in good faith by cooperating with the Court in formulating a suitable case management timetable which once approved by the Court, they are bound to strictly comply with for the expeditious adjudication of the matter. Where either party fails to comply with any trial direction given by the Court, the other party may apply to the Court for an order directing

[56] Order 25 Rule 6 NIC Rules, 2017.
[57] Order 25 Rule 8 NIC Rules, 2017.

compliance or for a sanction to be imposed or both.[58] Unless the Court otherwise directs, the trial shall be conducted from day to day and in accordance with any order previously made by the Court. Adjournment shall only be countenanced as a last resort and adjournment where inevitable, and deemed fair and just, shall be for the shortest possible time. In all fast-track cases, the Judge or the panel of Judges shall endeavor to deliver judgment as quickly as practicable after completion of the trial or adoption of written addresses.[59]

d. Jettisoning of Technicalities

Litigation as a means of dispute settlement is not free of technicalities, which is strict adherence to form as against substance, even to the extent that injustice or avoidable hardship may be perpetuated. The Rules of Court are to midwife the attainment of justice in their application but slavish adherence to them can work untold hardship. Some litigants and legal practitioners have tenaciously held unto procedural irregularity, which has not occasioned any injustice to them, all in a bid to deny the meritorious determination of the suit between them. Attitudes like this, fan to flame, the embers of technicality as opposed to substantial justice.

To ensure that the Rules are not abused to attain technical justice, Order 5 thereof, makes provisions for the effect of failure to comply with any provision of the Rules: such non-compliance may be treated as an irregularity.[60] Thus, the Court may direct a departure from the provision of the Rules where the interest of justice so requires.[61] By this, the Rules place the interest of attaining justice over and above every other interest even to the extent of departing from any provision of the Rule that may serve as an obstacle to the course of justice.[62] In fact, the Rules enjoins the Court to apply both the Rules of common law and equity concurrently in any proceeding before it. Where there is any conflict between the rules of common law and equity, the latter shall prevail.[63] In any proceeding before it, the Court shall apply the fair and flexible procedure and shall not allow mere technicalities to becloud

[58] Order 25 Rule 6 (1) and (2) NIC Rules, 2017.
[59] Order 25 Rule 19 NIC Rules, 2017.
[60] Order 5 Rule 1 NIC Rules, 2017.
[61] *Ibid.* 3.
[62] Order 5 Rule 4 (1) provides that "at any time before or during the hearing of a matter the Court may-direct, authorize or condone a departure from the Rules, where the Court is satisfied that the departure from the Rules, where the Court is satisfied that the departure is required in the overall interest of justice, fairness and equity. Give such directions as to procedure in respect of any matter not expressly provided for in these Rules as may appear to the Court to be just, expedient and equitable. The Court may, on good cause shown, condone non-compliance with any period prescribed by these Rules."
[63] Order 5 Rule 1 NIC Rules, 2017.

doing justice to the parties based on the law, equity, and fairness while also considering the facts of any matter before it. In the interest of justice and fairness, the Court can regulate its proceedings, in appropriate circumstances. It can depart from the provisions of the Evidence Act that deals with the admissibility of evidence sought to be tendered in Court in the interest of justice, fairness, equity, and fair play.

e. Institutionalization of Alternative Dispute Resolution

There are certain matters that can be suitably resolved through means other than litigation but which have been filed in Court. While the NICN fast-track procedure ensures speedy adjudication of matters placed on it, it may not foster relationships after the adjudication of the dispute which is necessary for industrial harmony. This makes the need for amicable settlement imperative. The 2017 NIC Rules, have institutionalized the adoption of Alternative Dispute Resolution mechanisms in the settlement of matters filed at the NICN. Thus, the President of the Court (or the Presiding Judge in a particular judicial division) may refer amicable settlement through conciliation or mediation any matter filed in any of the Registries of the Court to the Alternative Dispute Resolution Centre maintained by the Court within its premises.

Any matter referred for settlement through mediation or conciliation, shall be settled within twenty-one working days. Where this is not possible, the President or Presiding Judge of the concerned division shall extend the time for not more than ten days. Where the dispute is successfully mediated, a certified copy of the Mediation Agreement shall be submitted to the Judge. Once this is done, the Court shall cause to be issued and served on the parties, hearing notice of the date of adoption of the agreement which shall become the judgment of the Court and have the same force as a judgment delivered by the Court which is binding between the parties.[64] It is unclear if, at present, every judicial division of the NIC has a functional ADR Centre.

f. The arrest of Absconding Party

The possibility of a party to a matter before the Court absconding or removing assets from the jurisdiction of the Court, that may be used to satisfy a judgment that may be given against him/her at the conclusion of the matter, to render the judgment unenforceable or nugatory is not improbable. Where this happens, the successful party is a constraint to incur extra expenses to have the judgment enforced in the jurisdiction where the unsuccessful party has

[64] Order 24 Rule 5 (1) (2) NIC Rules, 2017.

assets or has absconded to. This is one of the gimmicks employed by unscrupulous litigants to bewitch the process of litigation making it unattractive.

The 2017 NIC Rules have made adequate provisions to curtail this menace by providing that "wherein any suit a party (Respondent/defendant) is about to leave the jurisdiction of the Court, or has disposed of or removed from the jurisdiction, the party's property, or any part thereof, or is about to do so, the other party may, either at the institution of the suit or at any time thereafter until final judgment, make an application to the Court that security be given for the appearance of the absconding party to answer and satisfy any judgment that may be passed against the party in the suit."[65] This is to ensure that the judgment of the Court is not rendered in futility.[66] Where an absconding party, fails to show any such cause, the Court shall order the party to give bail for the party's appearance at any time when called upon while the suit is pending and until execution or satisfaction of any judgment that may be passed against the party in the suit or to give bail for the satisfaction of such judgment. The surety (ies) shall undertake in default of such appearance or satisfaction to pay any sum of money that may be adjudged against the party in the suit, with costs. Where the party fails to furnish security or offer sufficient deposit, the party may be committed to custody until the decision in the suit, or if the judgment is given against the party, until the execution of the decree if the Court so orders.

4. CONCLUSION AND RECOMMENDATIONS

It has been shown that the NIC is a specialized court having exclusive original jurisdiction over labor and employment disputes. Through its travails, the NIC has overcome all the challenges that had confronted its status and stature, and today, it is a Superior Court of Record having concurrent jurisdiction with other High Courts. The substantive legal framework of the NIC has placed her on a pedestal of revolutionary adjudication which can only be achieved through a robust framework on its practice and procedure. To achieve this aim, the President of the Court, made the NIC (Civil Procedure) Rules, 2017 which revoked the 2007 and 2017 Practice Direction. A perusal of the 2017 NIC Civil Procedure Rules, as seen above, makes one to come to the irresistible conclusion that the Rules contains a lot of

[65] Order 19 Rule 1 NIC Rules, 2017.

[66] Order 19 Rule 2 NIC Rules, 2017. It provides that "where after investigation, the Court is of the opinion that there is probable cause for believing that a party is about to leave the jurisdiction of the Court, or has disposed of or removed from jurisdiction, the party's property, or any part thereof, or is about to do so, it shall be lawful for the Court to issue a warrant to bring the party before the Court to show cause why that party should not give good and sufficient bail for the party's appearance."

innovative provisions which are capable of aiding the Court advanced its evolving jurisprudence of speedy, efficient, cost-effective adjudication and employee protection. It is hoped that the Court will avail itself of the justice-enhancing provisions of its Rules to unshackle itself from unnecessary technicalities that legal practitioners have used to slow down the effectiveness of other Courts.

To achieve this aim, the following recommendations are hereby made. To realize the objectives of these Rules, there is the need to continually organize capacity development symposia on the Rules amongst its Judges to ensure that there is an unwritten synergy among them in its application. A situation where there is a conflicting application by the Judges will easily defeat its laudable objectives as it will leave litigants with the opportunity of urging the Court to apply a decision that favors their cause while avoiding the unfavorable one; this scenario must be avoided at all cost.

Legal practitioners who litigate before the Court, are also expected to acquaint themselves with the rules so as to take advantage of its numerous innovative provisions towards achieving its aim of effective speedy resolution of labor and employment disputes so as to engendered industrial tranquillity. The Nigeria Bar Association, both at the national and branch level, should through its Continuing Legal Education Committee (CLEC), sensitize lawyers on the workings and functionality of the NICN as many still view the NICN with a pre-2010 eye or as a regular court where technical justice flourishes.

It is also necessary for the Court to ensure that in every judicial division, there is a functional Alternative Dispute Resolution Centre to enable amicable settlement of suitable labor and employment disputes which has the potential of fostering relationships and engendering industrial tranquillity which is direly needed. The capacity of the personnel to administer the various ADR Centres of the Court should be enhanced and necessary facilities for easy administration should be provided.

Also, to effectively realize the fast-track procedure of the NIC, it is important, like in other instances, where the procedure has been adopted, for a specific time frame for the settlement of such disputes to be specifically provided and not an ambiguous prescription of "timeous hearing of the case." A period of not more than three weeks, from the date of closing of pleadings, is recommended as the time frame for the completion of such matters. It is therefore needful for the Rules to be amended to specify a definite period within which to adjudicate such matters.

Furthermore, to ensure that the novel pronouncements of the Court as exemplified in some of its decisions discussed above where it has jettisoned anachronistic common law principles are sustained, the 1999 CFRN as well as the Court of Appeal Act, should be amended to ensure that the composition of the justices of the Court of Appeal in each judicial division includes at least a judge with specialist knowledge on labor and industrial relations matters from the NICN. This will ensure that the decisions of the court are not upturned due to a lack of understanding of their underlying philosophy by a division of the Court of Appeal that lacks is not abreast with current trends in labor and employment relations.

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BEHOLDING FEMALE GENITAL INCISION THROUGH THE LENS OF CULTURAL RELATIVISM: THE NEED TO STRIKE A BALANCE

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ABSTRACT

Female Genital Incision (FGI), the cutting and/or removal of female genitals, is a practice that is celebrated by pro-FGI groups, that is, the majority of Nigerian tribes (Indigenous Actors) as a cultural heritage, although, it is considered as a violation of human rights by anti-FGI groups like few (non-practicing Indigenous Actors) such as the Ijebus of South-West Nigeria, and several (International Actors) including WHO, UNICEF and the International Committee of the Red Cross (ICRC). Both actors antagonize each other on FGI and have reasons for this, hence, the battle against FGI cannot be won. Therefore, the aim of this research is to ascertain the rationale for FGI practice and persistence in Moniya, Ibadan, Nigeria while employing cultural relativism as a tool to strike a balance between pro-FGI and anti-FGI cultures, thus, reducing/eradicating FGI. The article conducts doctrinal and qualitative research. It carries out Interviews on 20 purposively selected Key Informants. The study finds that although FGI prevalence has reduced in Ibadan, it is still practiced in its interiors/rural communities majorly due to the cultural significance attached to it. It finds that 60% of respondents knew of the existence of FGI laws, however, the laws are not enforced. The article suggests that government should strike a balance between the dual cultures by taking a multifaceted approach.

Keywords: *Nigerians, Cultural Relativism, Female Genital Incision, International Human Rights, Westerners*

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1.0.INTRODUCTION

Female Genital Incision (FGI),[1] also known as, Female Genital Mutilation (FGM), Circumcision or Cutting (FGC) refers to all procedures which involve partial or total removal of the external female genitalia and/or injury to the female genital organs, whether for cultural or any other non-therapeutic reasons.[2] FGI is referred to as Female Genital Circumcision by pro-FGI groups, that is, the majority of Nigerian tribes practicing FGI (who are the Indigenous Actors) at large because, in the latter's view, it is comparable, but broader, to the male circumcision conventionally conducted on male newborns.[3]

It is of four (4) types/forms. Type 1 is 'Clitoridectomy,' a partial or total removal of the clitoris[4] and/or in very rare cases only, the prepuce.[5] Type 2 is 'Excision,' a partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora.[6] Type 3 is 'Infibulation,' the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris. Type 4 is 'Other,' comprising of all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping, and cauterizing the genital area.[7] Some communities introduce corrosive substances or herbs into the vagina to cause bleeding or to tighten

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[1] In this paper, the author has decided to use the term Female Genital Incision (FGI) to refer to the practice popularly known as Female Genital Mutilation (FGM) by the Non-practicing Indigenous and, International Actors, also known as anti-FGI; and Female Genital Circumcision by the practicing Indigenous Actors, also referred to as pro-FGI in this article. The term FGM denotes the damaging and horrific activities involved in the practice while FGC belittles/underplays the evils of the female practice. Therefore, the choice of the term FGI will aid this work, without advancing moral judgment, to take an objective position, in striking a balance, between the views of anti-FGI and pro-FGI groups, while analyzing the practice.

[2] World Health Organization (WHO) (1998), *Female Genital Mutilation: An overview,* Geneva: World Health Organization.

[3] Male circumcision is the surgical removal of the skin covering the head/tip of the penis (male reproductive organ).

[4] The clitoris is a small, sensitive and erectile part of the female genitals.

[5] The prepuce is the fold of skin surrounding the clitoris.

[6] WHO, and Pan American Health Organisation (2012), *Understanding and addressing violence against women,* 1-8, https://apps.who.int/iris/bitstream/handle/10665/77428/WHO_RHR_12.41_eng.pdf;jsessionid=5AAC8AC7EE2777DC1B8D9ADAD6043F68?sequence=1, accessed 26 June 2021. The labia are the 'lips' that surround the vagina.

[7] Ibid.

or narrow the vagina.[8] Type II is the commonest type of FGM practiced in Nigeria with 41% of women undergoing it.[9]

FGI practice is widely embraced culturally, hence, it is mostly prevalent among rural communities in Africa, however, some cultures do not practice it. Prevalent among such few cultures are the Ijebus of the South Western part of Nigeria.[10] The natives of the community are knowledgeable about FGI, especially its negative effects, hence, they do not mutilate their females or promote its practice.

Some literates among the indigenous cultures that practice FGI permit its performance or are compelled to allow it on their female children. This is because it is believed to be a rite of passage from 'girlhood' to 'womanhood.'[11] Deciding to perform, or not perform, FGI leaves a parent with only two options, neither of which are real choices.[12] On one hand, forcing her to undergo this surgery may violate international human rights instruments because of the deprivation of her bodily integrity.[13] On the other hand, the parents can allow their daughter to avoid the mutilation by protecting her personal autonomy, only to realize that she could encounter embarrassment, humiliation, and alienation for failing to undergo a culturally recognized tradition.[14] In both cases/options, culture is influencing people's personal decisions which are conflicting with international human rights provisions, including, the right to personal integrity, privacy, autonomy, life, health, etc, introduced by the Western Culture. However, it should be noted that in as much

[8] National Population Commission (NPC) [Nigeria] and ICF (2019), *Nigeria Demographic and Health Survey 2018,* Abuja, Nigeria, and Rockville, Maryland, USA: NPC and ICF, p. 465. See also M.U. Mandara, 'Female Genital Mutilation in Nigeria' *International Journal of Gynaecology and Obstetrics* 84 (2004), p. 291-298.
[9] Ibid. 466.
[10] See the study conducted on Iwasi village, located in Ijebu East Local Government of Ogun state; by H.O. Bodunrin, 'Female Genital Mutilation: Perceptions and Beliefs in a Nigerian Rural Community' *African Anthropology* 6:1 (1999), p. 75. file:///C:/Users/user/Downloads/23080-Article%20Text-30885-1-10-20040623.pdf, accessed 29 December 2021.
[11] P.D. Mitchum, 'Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework' *Wm. & Mary J. Women & L.* 19 (2013), p. 586, https://scholarship.law.wm.edu/wmjowl/vol19/iss3 /4, accessed 25 October 2021.
[12] Ibid. See also *Abbott Labs. v. Gardner* 387 U.S. 136, 152 (1967) ('Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution.') (citation omitted), superseded by statute, Pub. L. No. 94-574, 90 Stat. 2721, as recognized in *Califano v. Sanders* 430 U.S. 99 (1977). The Court determined this is not a real choice.
[13] T. Ballenger, 'Female Genital Mutilation: Legal and Non-Legal Approaches to Eradication' *J.L. & SOC. CHALLENGES* 9 (2008) p. 84, 98.
[14] Ibid, 90.

as these rights are inherent, traditional Africans of those times never widely recognized and affirmed such rights as much as the International community did.

The process of FGI highlights many complex universal human rights and cultural relativism arguments including, but not limited to, perspective, creation, and acceptance.[15] Perhaps the most complex dilemma is the notion of 'cultural relativism versus universality of human rights.'[16] This dichotomy of 'bad' versus 'good' has been hotly contested among human rights activists and scholars as either a violation of human rights or simply as not valuing cultural relativism.[17] With the practice of FGI, it is essential to recognize the role of universality in shaping human rights standards.[18] Recognizing the importance of cultural relativism, however, is also critical to have an accurate and honest discourse regarding why FGI has been viewed positively in various cultures.[19]

A fair solution is needed, not to impose the values of non-practicing Indigenous Actors, such as the Ijebus of South-West Nigeria, and several International Actors including WHO, UNICEF, and the International Committee of the Red Cross (anti-FGI group) on practicing Indigenous Actors (pro-FGI group), but rather to prevent health issues among practicing populations and to empower women who continue to be subordinated through this painful and injurious practice.[20] These solutions can only be achieved if anti-FGI groups have a true understanding of FGI -- why it began and why it continues. To convince the FGI followers and supporters that they are doing more harm than good requires an understanding of how 'good' is perceived. Without a tight grasp on their own rationale, anti-FGI groups trying to eradicate FGI will be unsuccessful in framing convincing arguments. If the focus is truly on a solution, and not on the imposition of anti-FGI beliefs on Indigenous Actors' cultures, then this solution must reconcile how on one hand FGI is a torturous, painful, barbaric practice, while on the other hand, it is a practice that lies at the heart of cherished

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[15] P. Goldberg, 'Women, Health and Human Rights, *PACE INT'L L. REV* 9 (1997) p. 271.
[16] Ibid.
[17] See B.E. Hernández-Truyol, 'Women's Rights as Human Rights— Rules, Realities and the Role of Culture: A Formula for Reform' BROOK. *J. INT'L L* 21 (1996) p. 605, 650–67.
[18] Ibid. 606.
[19] P. Goldberg, 'Women, Health and Human Rights, p. 271.
[20] R. Cassman, 'Fighting to Make the Cut: Female Genital Cutting Studied within the Context of Cultural Relativism' *Nw. J. Int'l Hum. Rts.* 6 (2008) p. 128. http://scholarlycommons.law.northwestern.edu/njihr/vol6/iss1/5, accessed 15 August 2021.

tradition, value, and honor.[21] Therefore, this work will analyze the arguments of both Actors: the anti-FGI and pro-FGI groups; and then try to strike a balance between them through the tool of cultural relativism, thus, leading to a gradual reduction of the practice, and probably its end in Nigeria.

2.0.CULTURAL RELATIVISM

Franz Boas first introduced cultural relativism to anthropological research at the beginning of the 20th century. Melville Herskovits helped popularize the principle through his book Man and His Works in the 40's. The principle was partly a response to Western ethnocentrism, in which one people believe that their culture is the most accurate and righteous, and as a result, spread their beliefs towards other different peoples.[22]

Herskovits developed his view on cultural relativism during his work with African studies and international affairs during which time he realized the principle as a highly significant contribution to society made by anthropologists.[23] Herskovits defined cultural relativism, in his book Man and His Works, as 'evaluations of cultures are relative to the cultural background out of which they arise, judgments are based on experience, and experience is interpreted by each individual in terms of his own enculturation.'[24] That is to say, one should not place any culture with higher or lower rankings, and doing so would be considered ethnocentrism. He reasoned that primitive people's cultures and philosophies are just as complex as any other culture with different ways of developing. The only real approach that any culture can use to bring their lives forward is the skill to survive. Survival is what every culture has in common and every person thinks their way of survival is the best way. However, he argues that every culture's approach to life is just as good as any other approach and all approaches to the quality of one's life should be respected.[25]

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[21] O. Bamgbose, 'Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl' U. *MIAMI INT'L & COM. L. REV* 10 (2002) p. 127, 128.
[22] J. El-Sissi et al, *Female Genital Mutilation: An Analysis through Capability Approach and Cultural Relativism.* Global Political Studies, Human Rights, Malmö University, (2013) p. 25, http://www.diva-portal.org/smash/get/diva2:1483276/FULLTEXT01.pdf, accessed 23 October 2021.
[23] J. Gershenhorm, *Melville J. Herskovits: And the Racial Politics of Knowledge* (2004) p.170.
[24] M. Herskovits, *Man and His Works: The Science of Cultural Anthropology,* New York: Aflred Knoff. (1949) p.65
[25] J. El-Sissi et al, *Female Genital Mutilation,* p. 26.

As a method, cultural relativism embraces the attitude of science that, in studying a certain culture, one should always seek to achieve the highest degree of objectivity conceivable. In doing so, one does not judge the behaviors of that culture and logic for that behavior, so as to not seek to change people's behavior. Instead, the researcher should simply aim to understand the logic of that behavior that arises from the culture, in order to fully capture the essence of that culture, free from preconceptions.[26] In other words, cultural relativism is an approach that clarifies how 'human values, far from being universal, vary a great deal according to different cultural perspectives.'[27] It represents the notion that 'one must not judge others using the standards of one's own culture,' but, should '...discern and study the parallelisms in human civilizations,'[28] that is, allow each culture to be analyzed on its own terms.[29]

As a modern-day example, cultural relativism can be applied to plastic surgeries (e.g., sex change operations and breast implants), tattoos, and body-piercing, which are viewed as normal, mainstream, and generally harmless by Americans.[30] African feminists analogize such elective cosmetic surgeries to FGI in that both create a hierarchical ordering of sexuality and gender,[31] and are likewise painful and extreme cultural avenues to make the woman's body more attractive and in line with male imposed cultural standards of beauty.[32]

Therefore, accurate, unbiased, and comprehensive information, along with open-mindedness, is essential to understanding cultural relativism.[33] In the long run, cultural relativism can be a key factor that can lead the pro-FGI groups into gaining a well-formed perceptive of FGI, thus, developing an objective outlook not significantly dictated by pro-FGI philosophy.

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[26] S. Satris, *Taking Sides: Clashing Views on Controversial Moral Issues* 9th ed. Guliford: McGraw- Hill/Dushkin. (2004) p. 2-25.
[27] D. Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity* New York: United Nations Background Note, (1995).
[28] M. Herskovits, *Cultural Relativism,* ed. Frances Herskovits, New York: Random House, (1972) p.35.
[29] S. Zeidan, 'Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in the Post-9/11 World' *HASTINGS INT'L & COMP. L. REV,* 29 (2006) p. 215, 216.
[30] B.A. Gillia, 'Female Genital Mutilation: A Form of Persecution' *N.M.L.REV,* 27 (1997) p. 579, 585.
[31] Ibid.
[32] See N. Ehrenreich and M. Barr, 'Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of Cultural Practices' *HARV. C.R.-C.L. L. REV,* 40 (2005) p. 71 to compare FGI to intersex surgery.
[33] R. Cassman, 'Fighting to Make the Cut' p. 128.

3.0.FGI AS A CULTURAL PRACTICE IN NIGERIA

Culturally, FGI is practiced for a multitude of reasons but most significantly, as 'an important rite of passage into adulthood and into the community.'[34] Traditionally, the initiation into adulthood is performed to remove the 'masculine' part of the girl's body, the clitoris.[35] Approximately forty (40) African and Middle Eastern countries engage in the practice of FGI.[36] However, prevalence rates significantly vary from country to country.[37] Although not formally recognized, estimates indicate that FGI is a custom that originated over 2,500 years ago.[38] Approximately, about 200 million girls and women in the world are estimated to have undergone FGI worldwide.[39] FGI can be performed at any time: at infancy, during childhood, at the time of marriage, during a woman's first pregnancy, or after the birth of her first child. Recent reports suggest that the age has been dropping in some areas, with most FGM carried out on girls between the ages of 0 and 15 years.[40] It is usually performed on many girls at one time.

FGI is frequently performed by elderly people in the community (regularly, but not restrictive to women) chosen to carry out this task or by Traditional Birth Attendants (TBA). In some communities, FGI may be performed by traditional health practitioners, (male) barbers, secret society members, herbalists, or a female relative.[41] In Ibadan, female circumcision is usually undertaken as a family profession and the family is referred to as *Oloola* (traditional circumcisers). FGI is usually carried out with special knives, scissors, herbs, sharpened stones, needles and thread, scalpels, pieces of glass, razor blades, or hot coals in various communities. The *Oloolas* in Ibadan uses a traditional instrument called *Abe.*

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[34] V.E. Beety, 'Reframing Asylum Standards for Mutilated Women' *J. GENDER, RACE & JUST* 11 (2008) p. 245.
[35] Ibid.
[36] P.D. Rudloff, In 'Re Oluloro: Risk of Female Genital Mutilation as 'Extreme Hardship' in Immigration Proceedings' *ST. MARY'S L.J,* 26 (1995) 877, 880.
[37] Population Reference Bureau, 'Female Genital Mutilation/Cutting: Data and Trends- Update *2017'* (2017) p. 1-11, https://www.prb.org/wp-content/uploads/2017/02/FGMC_Poster_2017-1-1.pdf , accessed 08 September 2021.
[38] L. Cipriani, 'Gender and Persecution: Protecting Women under International Refugee Law' *GEO. IMMIGR. L.J.* 7 (1993) p. 511, 525–26.
[39] UNICEF, 'Female Genital Mutilation/Cutting: A Global Concern' February 2016, https://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/, accessed 26 June 2021.
[40] United Nations Population Fund (UNFPA), *Female genital mutilation (FGM) frequently asked question,* (2020) https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions, accessed 26 June 2021.
[41] NPC and ICF, *Nigeria Demographic and Health Survey 2018,* p. 469.

Although FGI is widely perceived to be a vehicle for the subjugation of women, the ceremony that accompanies the practice may serve as an important rite of passage for women, making it highly desirable to them. In the cultures in which FGI is performed, it may be a strictly ritualized, woman-centered experience that occurs at special times and places, such as around the time of harvest.[42]

At the start of FGI initiation ceremony, girls are regularly accompanied by a family member, perhaps a woman from her father's family. They are forcibly held down and may be encouraged not to cry out or move during the procedure because that might bring shame to the family.[43] The participants may be sequestered and given special foods and clothes. A communal meal for women might be served, during which an oral history of domestic life, the expected role of the adult woman, and information about women's secret societies are shared.[44] After the FGI and initiation ceremonies are completed, girls usually return home. In some groups, they are expected to join the household of their future husband. Usually, anesthetic and antiseptics are not used unless the procedure is carried out by medical practitioners.[45] These communal aspects of FGI contribute to the difficulty in eradicating it because FGI and the ceremonies associated with it give women access to rituals and customs that they prize.[46]

Furthermore, FGI is important not only for the woman who receives it but also for the woman who performs it because she gains respect and reverence in her community for her role.[47] Increasingly, out of concern for morbidity, mortality, and public health, FGI is being performed in hospitals and clinics by physicians, nurses, and nurse-midwives.[48] The participation of trained health care providers in FGI is a subject of great ethical and cultural debate in North America and in African countries. Performing FGI in a hospital, without the ritualistic or socialization components, alters

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[42] O. Koso-Thomas, *The circumcision of women: A strategy for eradication,* (1992), London: Zed Books, Ltd.
[43] A.M. Gibeau, 'Female Genital Mutilation: When a Cultural Practice Generates Clinical and Ethical Dilemmas' *JOGNN,* (1998) p. 87.
[44] Ibid.
[45] UNFPA, *Female genital mutilation (FGM) frequently asked questions,* https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions, accessed 26 June 2021.
[46] A.M. Gibeau, 'Female Genital Mutilation: p. 87.
[47] Ibid.
[48] This is referred to as the Medicalization of FGC.

the cultural practice of FGI.[49] The reason behind the medicalization of FGI[50] is based on the claim that physicians should participate in order to limit injury, since if physicians refuse to perform such procedures, they may be performed more harmfully by unqualified persons. However, such claim/argument is rejected in much the same way that medical professional organizations prohibit medical participation in torture and execution of judicial sentences of flogging, amputation,[51] and abortion.

4.0.INTERNATIONAL HUMAN RIGHTS AND OTHER LEGAL PROVISIONS ON FGM

In attempting to eradicate FGI practice worldwide, the United Nations, as one of the International Actors, at the international level; African nations at the regional level; and the Nigerian government at the local level have published/enacted several treaties, policies, and laws prohibiting it. Some of them are examined below:

4.1. International Treaties

The Universal Declaration of Human Rights (UDHR)[52] is the foremost international legal document that recognizes human rights. Article 5 recognizes and protects an individual's right to health. It encompasses a general concern for the physical, mental, psychological, and social welfare of a person. Moreover, article 25, states that everyone has 'the right to a standard of living adequate for the health and well-being of himself [or herself] and of his [or her] family, including food, clothing, housing, and medical care...'[53] Also, '[m]otherhood and childhood are entitled to special care and assistance.'[54] In practice, women who undergo FGI receive no beneficial health care, however, thus continuing the violation of international laws. Moreover, FGI practicing communities refuse to: treat gender equally; provide women equal opportunities to work, in marriage, or in regard to their own body...[55] The examination of health in a broader perspective

[49] Ibid.
[50] NPC and ICF, *Nigeria Demographic and Health Survey 2018,* p. 469.
[51] R.J. Cook, B.M. Dickens, and M.F. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law,* 1st ed. Oxford: Clarendon Press, (2003) p. 268.
[52] UDHR was proclaimed by the United Nations General Assembly in Paris on 10 December 1948.
[53] Ibid.
[54] Ibid, Article 25(2).
[55] L.A. Trueblood, 'Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory, *DEN. J. INT'L L. & POL'Y* 28 (2000) p. 452.

makes it understandable that health cannot be protected without preserving fundamental human rights.

The International Covenant on Civil and Political Rights (ICCPR)[56] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[57] also recognize various international human rights, but fails to expressly prohibit FGI, however, inferences can be drawn from the human rights recognized that FGI is an act of torture[58] and discrimination against women.

It should be noted that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[59] is a treaty majorly devoted to the protection of women. It describes discrimination as a violation of women's rights,[60] and in interpreting this provision, FGI practice fits within it being a practice exclusively directed at women and girls. Hence, it instructs States Parties to '...take all appropriate measures to eliminate discrimination against women...' and to include 'legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women...'[61] Subsequently, FGI is explicitly recognized by the Committee on CEDAW[62] as a form of violence against women and recommends that state parties take measures to abolish it.

Furthermore, the Convention on the Rights of the Child (CRC) enjoins State Parties to ensure the protection of children's rights in 'the best interests of the child.'[63] Likewise, State Parties should

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[56] Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. Article 3 provides for right to equality as men and women. Article 6: right to life. Article 7: right to freedom from torture or to cruel, inhumane or degrading treatment or punishment. Article 17: right to privacy. Article 24: right to protection from discrimination as a child, and Article 26: right to equality before the law.
[57] Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January 1976. Article 3 recognises the equality of right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant. Article 12: right to physical and mental health.
[58] According to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); torture is defined as 'any physical or mental act that is intentionally inflicted for any discriminatory reason.'
[59] Adopted by UN General Assembly on 18 December 1979 and entered into force on 3 September 1981.
[60] Ibid. Article 1.
[61] Ibid.
[62] General recommendations made by the Committee on the Elimination of Discrimination against Women. See the General Recommendation Nos. 14, 19 and 24, https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm, accessed 28 June 2021.
[63] Adopted by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990, Article 3. Every child is also entitled to right to privacy- Article 16.

'take all appropriate…measures to protect the child from all forms of physical or mental violence…while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.'[64] This article renders parents who subject their girl children to the ordeal of FGI (at a very tender age, and without obtaining their consent) legally responsible under CRC; however, there is no Article expressly sanctioning or punishing such parents. Similarly, the UN in its Sustainable Development Goals 5 (SDG 5) seeks to end all forms of discrimination against all women and girls everywhere, and also to eliminate all harmful practices, such as child, early and forced marriage, and FGI.[65] From the foregoing, the question is that what success has been recorded by the International Actors and some Indigenous Nigerian cultures anti-FGI in abolishing cultural practices like FGI? Do practicing Indigenous Actors view FGI practice as an act of discrimination against women? It is until practicing communities share a similar ideology with anti-FGI groups that they can end such custom. But, is that possible? Will practicing communities in Nigeria permit anti-FGI customs to override theirs, thus, ending the aged-long custom of FGI? In response to these questions, this work suggests the finding of a middle ground between both customs through the lens of cultural relativism.

4.2.Regional Treaties

The African Charter on Human and People's Rights (the Banjul Charter)[66] is a leading regional treaty ratified by Nigeria. It protects women's human rights by ensuring the right to the physical and mental health of all.[67] Also, it demands the government to 'ensure the elimination of every

[64] Ibid, Article 19.
[65] United Nations, *Goal 5: Gender Equality,* https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=Cj0KCQjw_8mHBhClARIsABfFgpi5F5rWHyyjwyR10NU61nbJYH_6SarKwRqgv_RdSJQPqNG_ymgzqOkaAub1EALw_wcB#gender-equality, accessed 17 July 2021.
[66] Concluded at Nairobi on 27 June 1981, came into force on 21 October 1986 and registered by the Organization of African Unity on 28 December 1988.
[67] Ibid. Article 4 and 5: the respect for life, integrity of person, and the 'right to the respect of the dignity inherent in' every person

discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.'[68]

Correspondingly, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol),[69] and the African Charter on the Rights and Welfare of the Child[70] both have similar provisions to their international counterparts of CEDAW and CRC respectively. They protect women and girls (children) from discrimination, inequality, and FGI.

4.3.National/Local (Nigerian) Laws

The Constitution of the Federal Republic of Nigeria 1999 (as amended)[71] does not expressly recognize/prohibit it. However, sections 34 and 42 protect Nigerians' human rights and reference can be made to FGI from them. Section 34 (1)(a) states that 'no person shall be subjected to any form of torture, inhuman or degrading treatment or punishment.'[72] Further, section 42 prohibits discrimination and sets out equality of rights.

The Child's Right Act 2003 does not recognize FGI, but, relies on some human rights provisions in protecting girls from FGI harmful practice.[73] Section 11 provides that no child shall be '(a) subjected to physical, mental or emotional injury, abuse, neglect or maltreatment...(b) subjected to torture, inhuman or degrading treatment or punishment'.[74] Section 13 entitles every child to the enjoyment of the best attainable state of physical, mental, and spiritual health.[75] Hence, girls are entitled to enjoy their reproductive and sexual health rights as it falls under the right to health. Nevertheless, practically, the majority of Nigerian girls and women are circumcised without

[68] Ibid. Article 18(3).
[69] Signed on 11 July 2003 and entered into force 25 November 2005.
[70] Adopted on 11 July 1990 and entered into force in 1999.
[71] The Constitution of the Federal Republic of Nigeria 1999 (as amended) Laws of the Federal Republic of Nigeria 2004.
[72] Ibid.
[73] The Child's Right Act 2003, Act No. 26 of 2003. See also section 10: the right to freedom from discrimination.
[74] Ibid. Section 11 recognizes the right to dignity of a child
[75] Ibid.

obtaining their consent (mostly infants whose parents forcefully put through the practice), which also amounts to physical/body abuse and inhuman or degrading treatment.[76]

The Violence Against Persons (Prohibition) Act [VAPP Act], 2015 is the only law that expressly bans FGI in Nigeria.[77] It punishes all persons engaged in the act.[78] However, despite the laudable provisions of the Act, it has some lacunae. First, it fails to overtly prohibit failure to report the occurrence of FGI. Besides, it does not punish health professionals involved in FGI. Further, VAPP was initially applicable in the Federal Capital Territory, but, not entire Nigeria; presently, its application is restricted only to the 23 out of the 36 States of Nigeria that domesticated it. In 2016, Oyo state domesticated it and enacted the Violence Against Women Law (VAWL) of 2016 which also prohibits FGI. Similarly, the Oyo State Child Rights Law of 2006 bars the mutilation of a girl-child.[79] It should be noted that the enactment of the laws discussed above has been ineffective in ending FGI as no Nigerian has ever been convicted of FGI. Also, many local women feel hesitant about speaking up against FGI or reporting the practice because the cultural norms and taboos have silenced them. The effect is that the laws have made the practice a clandestine one.

5.0. THE DICHOTOMIES BETWEEN PRO-FGI AND ANTI-FGI GROUPS ON FGI THROUGH FGI PRACTICE

This section will examine the controversies between the majority of Indigenous Actors who are proponents of FGI and opponents of FGI who are few non-practicing Indigenous Actors and International Actors like HO, UNICEF, and ICRC. Notwithstanding, a balance cannot be struck, nor can a solution be reached on FGI reduction/eradication unless the anti-FGI groups objectively study and understand the historical rationale behind the cultural practice of pro-FGI groups, and the honor, tradition, and purpose attached to it.

[76] But, does parental or a guardian's consent not amount to a minor's consent under the law? It sure does, but, practically, it is controversial. This is another future area of research.
[77] The Violence Against Persons (Prohibition) Act [VAPP Act], 2015; section 6 (1).
[78] See section 6(2) (3) and (4) of VAPP Act.
[79] Section 26 of Oyo State Child Rights Law.

Cultural relativists justify FGI practice on four major grounds: religious, psychosexual, sociologic, and hygienic.[80] Firstly, religious rationales are attributed to Islam. FGI is not an entirely Muslim practice; it is also practiced by secular and other religious groups.[81] Generally, Muslim communities practice FGI because of the belief that they are required to do so by their faith.[82] Religious scholars, however, have confirmed that the Koran does not mention FGI at all.[83] However, it is mentioned in one of the Fatwas[84] contained in the Sunna[85] that abandoning 'excision' was not a sin.[86] However, some more recent Fatwas oppose ending the practice of excision on the basis that the teachings of physicians should not outweigh the teachings of the Prophet Mohammed.[87] This still does not prevent religious leaders from asserting that it has a place in Islam.[88] In 1994, the Sheikh of Al-Azhar, Sunni Islam's highest leader, persuaded the Egyptian Ministry of Health to issue a proclamation allowing hospitals in Egypt to perform FGI.[89] In 1997, however, the Sheikh changed his support in favor of the Egyptian Ministry of Health's prohibition on FGI.[90] Today, many religious leaders continue to defend the practice, and religion continues to be a primary justification for FGI among some religious groups.[91]

Further, many supporters argue that sociological reasons for FGI are the strongest because they are entrenched in the lives of women in Africa and Middle Eastern countries.[92] In many countries, FGI is performed as a rite of passage from 'girlhood' to 'womanhood.'[93] As such, many ceremonies are accompanied by men and women from villages performing traditional songs and dances.[94] Furthermore, the young girl undergoing the procedure will receive gifts, clothing, and

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[80] E. Dorkenoo, *Cutting the rose: Female genital mutilation: the practice and its prevention.* London: Minority Rights Publishers, (1994) p. 1-192.
[81] L.A. Trueblood, Female Genital Mutilation, p. 445.
[82] Ibid, p. 445-446.
[83] Ibid, p. 446.
[84] Fatwas are the religious teachings of the Muslim scholars.
[85] Sunna represents words and actions attributed to the Prophet Mohammed.
[86] Dorkenoo. *Cutting the rose: Female genital mutilation.*
[87] A.M. Gibeau, Female Genital Mutilation, p. 88.
[88] L.A. Trueblood, Female Genital Mutilation, p. 446.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] L.A. Trueblood, Female Genital Mutilation, p. 446–447.
[93] Ibid. p. 447.
[94] Ibid.

food.[95] A young girl who does not undergo FGI may suffer long-term cultural consequences.[96] For example, the girl may be ostracized by her family and, in some instances, may not be able to marry.[97] Failure to suffer through the procedure can lead to various social pressures.[98] The most common illustration is in Uganda, where a woman 'cannot speak in front of elders, hold any position of responsibility, or even marry' if she does not undergo the procedure.[99] Although there are social pressures, some women have decided not to compel their daughters to be mutilated.[100] Unfortunately, however, most women who have been subjected to FGI strongly support it for their daughters.[101] A woman perpetuating the subordination of her own daughters is a difficult notion for the anti-FGI groups to accept.[102] Women in the community have a large role, as they arrange for and perform the operation.[103] Typically, the mother or grandmother arranges the procedure, which only helps promote a system of patriarchy.[104]

Various cultures actively promote and perform FGI based on aesthetics and hygiene.[105] FGI-practicing societies believe that external female genitalia is 'dirty' and not aesthetically pleasing.[106] Members of these cultures admire women who have their genitalia removed, and those who retain their genitalia are detested.[107] Moreover, proponents believe that excision is essential to prevent infection and maintain cleanliness.[108] Excision is considered a more 'hygienic sound form of health care than remaining unexcised'[109] and is believed to improve the aesthetics of female genitalia and

[95] Ibid.
[96] L.A. Trueblood, Female Genital Mutilation, p. 447.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] See D. Shepherd-Johnson, *Somali Communities Say 'No' to Female Genital Cutting,* UNICEF (14 December, 2009)
[101] L.A. Trueblood, Female Genital Mutilation, p. 447–448.
[102] Irin, Razor's Edge—the Controversy of Female Genital Mutilation, 3 (01 March 2005) https://www.yumpu.com/en/document/read/23510335/razors-edge-the-controversy-of-female-genital-mutilation-irin, accessed 29 June 2021.
[103] Ibid.
[104] Ibid.
[105] L.A. Trueblood, Female Genital Mutilation, p. 448.
[106] Ibid.
[107] Ibid.
[108] B. M. Guy, 'Female Genital Excision and the Implications of Federal Prohibition' *WM. & MARY. J. WOMEN & L.* 2 (1995) p. 149.
[109] Ibid.

prevent venereal diseases.[110] Despite evidence to the contrary, excision is also believed necessary for the safe delivery of a baby and thought to increase fertility as well as improve a woman's production of healthy children.[111] FGI practicing communities believe the clitoris is a 'dangerous organ' that will cause symbolic or spiritual injuries to newborns and as a result, decrease the number of live births.[112] In the 'bisexuality of the god's myth,'[113] the clitoris will grow to the size of a penis if left as is. Additionally, a girl's clitoris must be removed so that she is free from male characteristics before she is allowed to enter the world of adults.[114] To pro-FGI supporters, this is yet another example of the system of patriarchy that will only serve as a tool of female subordination and male dominance. As such, aesthetic reasons for beauty should not be justifications for why women are compelled to undergo FGI.[115]

The most blatant justification for the subordination of women is psychosexual reasons.[116] According to some FGI-practicing societies, 'women are fundamentally sexual creatures and naturally promiscuous; thus the purpose of FGI is to prevent women from succumbing to these impulses and to protect them from the aggression of others.'[117] Supporters of FGI argue that cutting the clitoris can reduce a woman's sex drive so the husband can match his wife's when they get older.[118] This is the clearest form of the non-subordination theory encompassing FGI because instead of protecting women, men are concerned with being emasculated.[119] Supporters of FGI contend that the practice is a cultural and social right that they choose to practice.'[120] As many women do, in fact, support FGI, this argument can appear rational.[121] However, FGI deprives women of equal status in society and ensures that they will remain submissive to men.[122]

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[110] Ibid.
[111] Ibid. p. 149-150.
[112] B.M. Guy, Female Genital Excision and the Implications of Federal Prohibition, p. 150.
[113] Ibid.
[114] Ibid.
[115] P.D. Mitchum, 'Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework' *Wm. & Mary J. Women & L.* 19 (2013) 595.
[116] L.A. Trueblood, Female Genital Mutilation, p. 448.
[117] Ibid.
[118] Ibid, p. 448-449.
[119] Ibid, p. 449.
[120] L.A. Trueblood, Female Genital Mutilation, p. 453.
[121] Ibid.
[122] Ibid.

Additionally, marriage and economics are two other major factors that influence FGI practice in Nigeria. A woman's marital status is often associated with her status in the African community.[123] With a common prerequisite to marriage being mutilation of the potential wife,[124] FGI is encouraged by mothers to ward against unmarriageability.[125] Consequently, the very gender that is physically pained and affected by its harmful consequences is the same gender supporting and perpetuating the practice,[126] oftentimes under the basis (and assumedly, fear) that unexcised daughters will be unmarriageable and severely ostracized from the community.[127] This has been evidenced by women who refuse the procedure and are subsequently rejected from their communities and unaccepted in social circles.[128] The unmutilated woman is left to live her life enduring ridicule and without a husband.[129] Furthermore, economics continues to play a role for parties on both sides of the procedure. Excisors, many of whom are women, make 'more money than they could make any other way.'[130] And, because the dowry price[131] increases if the woman's virginity has been preserved,[132] there is a financial incentive for the families of eligible girls to perform FGI on their daughters.[133]

Mothers and grandmothers, cut as little girls themselves, carry the weight in upholding these rituals, with younger females embracing the legitimacy of female authority.[134] Understandably, it is challenging to eradicate a procedure that is actively supported and legitimated by the very individuals suffering from its effects. Women are the 'caretakers of the very culture that often

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[123] S. McGee, 'Female Circumcision in Africa: Procedures, Rationales, Solutions, and The Road To Recovery' *WASH. & LEE RACE & ETHNIC ANC. L.J,* 11 (2005) p. 142.
[124] R. Cassman, Fighting to Make the Cut, p. 135.
[125] F.A. Althaus, 'Female Circumcision: Rite of Passage or Violation of Rights. International Family Planning Perspectives' 23 (3) (1997).
[126] R. Cassman, Fighting to Make the Cut, p. 135.
[127] See R. Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' *GEO. WASH. INT'L L. REV,* 34 (2002) p. 493. K. Trangsrud. *Female Genital Female Genital Mutilation: Recommendations for Education and Policy.*
[128] B.M. Guy, Female Genital Excision and the Implications of Federal Prohibition, p. 146.
[129] K. Trangsrud, *Female Genital Female Genital Mutilation: Recommendations for Education and Policy.*
[130] Ibid. See also H. Lewis, 'Between Irua and 'Female Genital Mutilation': Feminist Human Rights Discourse and the Cultural Divide' *HARV. HUM. RTS. J,* 8 (1995) p. 1.
[131] Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children [hereinafter Fact Sheet No. 23], Office of the High Commissioner for Human Rights.
[132] Ibid.
[133] Ibid.
[134] R. Coomaraswamy, *Identity Within,* p. 490.

discriminates against them[135] and have been 'socialized to believe that they are the custodians of the very laws, rituals, and practices that discriminate against them.'[136]

On the other side of the divide, anti-FGI groups have a rationale for blatantly opposing FGI worldwide through the introduction of human rights treaties. The reasons are not far-fetched. They are majorly centered on the protection of women's rights, especially, rights to health, privacy, dignity, and life.

According to Herskovits' ethnocentric ideas of the history of the West and Africa, the United Nations (UN) has a major influence on how Sub-Saharan African human rights function. In support of Herskovits's ethnocentric perspectives, it may be noted that the UN's Declaration of Human Rights was written to mimic the United States Constitution, therefore, causing the spread of Western ideas of human rights.[137] Also, the Maputo Protocol denotes strong senses of liberties of value and freedom that are of western origins. When taking into account the timeline of events, a deduction can be made by looking at where the African Union's inspiration of strengthening women's rights may have originated from; there are strong western influences throughout African human rights policies.[138] No wonder the human rights treaties and national laws prohibiting FGI have been unsuccessful in eradicating the practice, but, have pushed it underground, while little or no prosecution of offenders have been made.

Pro-FGI groups believe that FGI poses serious mental and physical health risks for women and young girls, especially for those who have undergone the more extreme forms of genital mutilation.[139] Generally, complications from FGI can 'include severe pain, hemorrhage, tetanus, infection, infertility, cysts and abscesses, urinary incontinence, and psychological and sexual

[135] Ibid, p. 487.
[136] Ibid, p. 487-488.
[137] J. El-Sissi et al, *Female Genital Mutilation,* p. 27.
[138] Ibid.
[139] Population Reference Bureau, *Female Genital Mutilation/Cutting.*

problems.'[140] Whereas, the belief in practicing cultures is that FGI cures the female genitalia of its uncleanliness, danger, and poison,[141] but, in reality, FGI results in serious complications.

The complications of FGI on women's health are extensive and can include urinary tract infections and, in some instances, death.[142] Although the numbers of girls who die from FGI are not known, the highest infant mortality rates are in countries that traditionally practice FGI.[143] Death may result from FGI because of the unsanitary method used by local practitioners and community leaders.[144] Often, practitioners use instruments such as razor blades or broken glass to perform the procedure.[145] Many of these instruments have not been disinfected but are still used to excise the woman's clitoris.[146] After the procedure is performed, the practitioners are not equipped with antibiotics, thus potentially leaving the victim around a pool of blood.[147] In some regions in West Africa, dirt, ashes, or animal faeces are placed into a wound to stop bleeding, which increases the risk of infections and uncontrolled hemorrhaging.[148] The consequences of undergoing FGI have short-term and long-term effects.[149] For example, some short-term effects are immediate physical problems, wound infection, tetanus, and urinal blockage.[150] On the other hand, long-term effects include blocked menses, hardened scars, child morbidity, sexual dysfunction, and less reproductive rights.[151] Specifically, research in Sudan exposed that '50% of women who had undergone FGI say that they do not enjoy sexual intercourse, but rather they accept it as their duty.'[152] Regrettably, this duty highlights subordination to men. FGI may be encompassed with this subordination.[153]

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[140] Ibid.
[141] A.N. Wood, 'A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation From An International Law Perspective' *HASTINGS WOMEN'S L.J,* 12 (1995) p. 358.
[142] L.A. Trueblood, Female Genital Mutilation, p. 442.
[143] Ibid.
[144] Ibid, p. 443.
[145] Ibid.
[146] L.A. Trueblood, Female Genital Mutilation, p. 443.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] L.A. Trueblood, Female Genital Mutilation, p. 443.
[151] Ibid. p. 443-444.
[152] Ibid, p. 445.
[153] P.D. Mitchum, 'Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework' p. 593.

Cultural relativists argue that pro-FGI proponents 'establish norms based on their own idea of right and wrong.'[154] This causes pro-FGI supporters to 'inadequately recognize how different cultures possess different concepts of moral rules as well as different concepts of right and wrong.'[155] Consequently, pro-FGI feminists and human rights activists are perceived as arrogant and condescending, and only interested in imposing their ideas onto African cultures.[156] However, pro-FGI feminists are not trying to replace patriarchal oppression with pro-FGI cultural oppression,[157] but are rather attempting to eradicate the procedure through education and empowerment.[158] Also, pro-FGI feminists have fashioned alternatives to FGI that focus on maintaining the celebration of womanhood while eliminating the painful cutting. Proponents react to these solutions with the fear that the 'abolition of the surgical element [of FGI] means the abolition of the whole institution.'[159]

While pro-FGI feminists tend to view FGI as a form of male societal control, female oppression, and subordination of women,[160] African or anti-FGI feminists, particularly those who do not wish to eliminate FGI,[161] take the focus off subordination and place it on the cultural importance of FGI.[162] Anti-FGI feminists tend to view pro-FGI feminists' 'articulations of concern...as thinly disguised expressions of racial and cultural superiority and imperialism.'[163] Anti-FGI feminists contend that pro-FGI feminist discourse is ineffective at least partly because of the pro-FGI group's failure to ask appropriate questions such as: what socioeconomic purposes does FGI serve, whether there are alternative ways of fulfilling the purposes of FGI and whether domestic and international actors contribute to the continuation of FGI.[164] FGI proponents feel that anti-FGI feminists, in their focus on health complications, fail to take into consideration other social,

[154] K. Bowman, 'Comment: Bridging the Gap in the Hopes of Ending Female Genital Cutting' *SANTA CLARA L. REV.* 3 (2005) p. 4.
[155] Ibid, p. 4.
[156] D.S. Davis, 'Male and Female Genital Alteration: A Collision Course with the Law?' *HEALTH MATRIX* 11 (2001) p. 495.
[157] H. Lewis, *Between Irua and 'Female Genital Mutilation'.*
[158] Ibid.
[159] Ibid.
[160] A. Stern, 'Female Genital Mutilation: United States Asylum Laws Are In Need Of Reform' *AM. U.J. GENDER & L,* 6 (1997) p. 103.
[161] B.A. Gillia, 'Female Genital Mutilation: A Form of Persecution' *N.M.L.REV,* 27 (1997) p. 583.
[162] A. Stern, Female Genital Mutilation, p. 103.
[163] B.A. Gillia, Female Genital Mutilation, p. 585.
[164] H. Lewis, *Between Irua and 'Female Genital Mutilation'.* See also Ibid.

political, and economic issues linked to the health of African women.[165] Unlike their pro-FGI counterparts, anti-FGI feminists lack physical, political, cultural, and emotional relatedness to African women and children.[166] Although anti-FGI feminists continue to fight FGI using public education that focuses on health risks, religious myths, and legal repercussions of resisting the law,[167] there continues to be a demeaning, judgmental, and imperialistic spin in their message.[168] As a reaction to the recent legacy of Western imperialism, anti-FGI feminists have even advised pro-FGI feminists to modify their rhetoric to gain credibility within the populations their message is intended for.[169] If the antagonists of FGI persistently fail to observe and understand FGI practice through the eyes of cultural relativism, it will remain unsuccessful in its abolition efforts.

6.0.METHODOLOGY

Study Population and Location

The study was carried out in Akinyele Local Government, one of the 33 Local Government Areas (LGA) of Ibadan, the capital city of Oyo State, Nigeria. The LGA covers an area of 518 km², using a 3.2% growth rate from 2006 census figures, the 2010 estimated population is 239,745.[170] The LGA is bounded to the west by Ido LGA, to the east by Osun State and Lagelu LGA, to the south by Ibadan North LGA, and to the north, by Afijiyo LGA. 12 Wards make up the LGA, including Moniya, the selected area of the research. Moniya was selected because it is the largest ward in the LGA. Besides, in 2020, the state government conducted some advocacy programs in the area so as to sensitize the community residents, thus, eradicating FGI prevalence. The program is still ongoing, but, the practice persists. Therefore, this paper intends to ascertain the rationale for FGI practice and persistence in spite of previous efforts of the government. It intends to assess the level

[165] Ibid.
[166] Ibid.
[167] I. Ferguson and P. Ellis, 'Canada Department of Justice Female Genital Mutilation: A Review of Current Literature' (1995).

[168] E.L. Han, 'Legal and Non-Legal Responses to Concerns for Women's Rights in Countries Practicing Female Circumcision' *B.C. Third World L.J,* 22 (2002).
[169] J. Dimauro, 'Toward a More Effective Guarantee of Women's Human Rights: A Multicultural Dialogue in International Law' *WOMEN'S RTS. L. REP,* 17 (1996) p. 339.
[170] National Population Commission (NPC) and ICF Macro, Nigeria, Demographic and Health Survey 2008: Key Findings, (2010), Calverton, Maryland, USA: NPC and ICF Macro.

of knowledge of the provisions of the law among the surveyed people and whether the law can be used to balance culture and human rights while attempting to end FGI in the study area.

Ethical Approval

The Oyo State Research Ethics Review Committee under the Ministry of Health (AD 13/479/4247B) reviewed and gave ethical approval for this study.

Study Design and Size

The design of this study is a socio-legal one, comprising of both doctrinal research methods (legal methodology), and qualitative research via oral interviews (social/behavioral methodology). A qualitative methodology via oral interview was selected over quantitative/questionnaire because of its flexibility as 'the researcher is not constrained by predetermined categories of analysis while approaching fieldwork. Rather, themes of analysis ideally emerge from the data, thereby, enhancing the study's credibility.'[171] Qualitative research is also beneficial to this research because it 'offers a cogent template to study selected issues exhaustively'[172] and it epitomizes uprightness and sincerity towards inquiries, recognizing that every investigation is loaded with standards.[173] Thus, this qualitative research was conducted through the interview method by studying and interacting with about nine selected groups of people in order to discover their socio-cultural backgrounds and beliefs on FGI practice within practicing communities like Moniya.

Furthermore, the oral interview questions were semi-structured while the mode of selecting respondents was through Key Informant Interview. These set of individuals are specialists, who with their awareness, can enlighten on the nature of prevailing issues and offer suggestions for resolutions.[174] Its essence is to get information about prevailing issues in the society from a small number of well-versed participants; second, it assists in understanding the drive, values, and beliefs

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[171] M.Q. Patton, *Qualitative Research & Evaluation Methods,* 3rd ed, London, Thousand Oaks: Sage, (2002) p. 1-598.
[172] Ibid, p.14.
[173] D.M. Mertens, Mixed Methods and the politics of human research: The transformative-emancipatory perspective, *Handbook of Mixed Methods in Social & Behavioral Research.* A. Tashakkori and C. Teddlie, London, Thousand Oaks: SAGE Publications, (2003) p. 1-913.
[174] UCLA Centre for Health Policy Research, *Section 4: Key Informant Interviews,* Health DATA Program – Data, Advocacy and Technical Assistance, 1-10, https://healthpolicy.ucla.edu/programs/health-data/trainings/Documents/tw_cba23.pdf, accessed 28 December 2021.

of citizens of a particular society on a prevailing problem; and third, it aids in obtaining information from participants with varied backgrounds and beliefs through in-depth questioning.

The selected persons, although appear minute in number, were key stakeholders to the issue of FGI in Ibadan, particularly, in Moniya environs. The respondents were 20 in number, such as Religious Leaders (2 participants), Community Leaders (2 participants), Legal Practitioners (2 participants), State Ministry of Health officers focused on the eradication of FGM (2 participants), Gynaecologists (2 participants), Nurses (2 respondents), Traditional circumcisers (2 participants), NGOs focused on the eradication of FGM (2 participants), and Victims of FGM (4 participants). The research instruments were pretested and authenticated by a pilot study. Respondents participated voluntarily and gave written informed consents before participating in the research.

Data Collection

The researcher conducted each interview session. The interview was in English and Yoruba languages. The interview guide, advanced tape recorder, pen, and book were the main instruments used. The file number of the voice recorder for each session was written in the research book. After every session, the researcher listened to the tape recorder and transferred the information to a safer place. Also, the researcher ensured the anonymity of participants and the confidentiality of their data by excluding all personal information from which participants are identifiable, such as names, addresses, or phone numbers of participants. Similarly, each participant was given an identification number/code which ensured stronger privacy and made it impossible for a person to identify any respondent once the data has been collected.

Data Analysis

Analysis of data was carried out through Content Analysis using NVIVO version 12. Furthermore, related thoughts expressed by participants were identified, coded and grouped together as underlying Themes. Emerging similar themes were grouped together to make up major themes. The cassettes used for the recordings were kept in cassette cases and after transcribing into the computer, the original data were kept in a locked safe. The original data will be kept for two (2) years after the publication of this paper before they are destroyed.

Disclosure

The author reports no conflict of interest in this work.

7.0.RESULTS AND DISCUSSIONS

This section presents results and discussions from conducted semi-structured interviews with 20 participants. The age range of the respondents was 25–54 years, with a mean of 47 years. 13 of them had at least Senior Secondary School education while 7 had a little level of formal education or illiterates. 10 were professionals. 4 of them were victims of FGI. All the participants were from Yoruba ethnic groups and of different occupations/socioeconomic classes. The opinions of respondents on FGI, their knowledge of the law, and its impact on FGI prevalence, including multifaceted steps that can be taken by all stakeholders in the society in eradicating FGI in Nigeria were obtained.

Meaning of FGI and rationale for its practice

Two semi-illiterates/illiterates opine that FGI is the practice of cutting a female's vagina. One of them, a 25-year-old female native expressed in her local dialect about FGI: "*Idabe fun omo obinrin"*.[175] Moreover, the majority of them described FGI as a cultural practice handed down to them by their ancestors. A 43 years old male [Traditional Circumciser]- "*Oloola*" defined it as *"a cultural practice passed over to us over 50 years ago"*.

On the other hand, medical professionals and Ministry of Health officials describe FGI according to WHO's definition.[176] They had this knowledge and could also classify FGI into 4 types as a result of their training and profession. Other literate respondents were aware of only Type 1 - 'Clitoridectomy,' a partial or total removal of the clitoris. They were unaware of other types of FGI. This is mainly dictated by their levels of education and exposure; and also because it is the commonest type that is culturally recognized in Ibadan and its South West environs. This reflects that culture is a major determinant of people's ways of life.

[175] It means FGI is the circumcision of a female private part.
[176] WHO, '*Female Genital Mutilation: An overview'* (1998).

Several cultural rationales were recounted for the performance of FGI in the study area. Participants adduced to the fact that FGI is a culturally celebrated practice for many reasons. Some of them include initiation rights for a woman of marriageable age; greater sexual pleasure; family tradition; chastity in marriage; it gives a woman the ability to conceive; easy childbirth; prevention of promiscuity among women; sicknesses/diseases control; etc. A female nurse participant stated that; *"some cultures feel that girls not mutilated would bring shame or not have a stable home"*. Another participant, a 52 years old Ministry of Health Official and the State Coordinator of FGI, opined that if FGI is not done, *"...and the head of the newborn touched the clitoris, it will die"*. It may be quite surprising to realize that myth of this sort is being held by a Ministry of Health official who is supposed to educate others. This goes to show that one's profession may not necessarily divorce one of one's traditional background and mythical beliefs.

Nevertheless, a participant did not know about the cultural bases for FGI, but, he practices it by mutilating his female children. Thus, for the avoidance of numerous cultural myths, and the honor of one's culture, many women get cut/mutilated. Further, all the participants collectively opined that FGI is not backed up religiously because it is not explicitly stipulated for in the Bible and Quran, the two prominent religions in Nigeria.

Effects of FGI on women

The semi-illiterates/illiterates noted that FGI has no negative effects/consequences on women. This is probably because they are more culturally inclined to FGI. Hence, they are highly likely to continue FGI practice. For instance, a 46 years old Muslim religious leader stated emphatically that *"FGI has no consequences. It does not affect chastity"*.

However, the literates/professionals highlighted many consequences of FGI ranging from the ones having short-term effects, to intermediate and long-term. A participant: a female 35 years old NGO official classified the effects into physical and mental consequences.

> *"Physical consequences- pain, bleeding, infection, the pain of having sex, vagina fistula, reduced sexual libido, obstructed labor;*

Mental consequences- anxiety of having the procedure, depression, low self-esteem, lack of confidence for sexual activity, post-traumatic disorderliness".

The negative medical effects of FGI listed above are backed up by scientific research and proof, and they are the strong points of International Actors and a few non-practicing Indigenous Actors on their reasons for antagonizing FGI. However, as opined by semi-illiterate/illiterate participants, they see nothing wrong with it.

Perspectives about FGI

The different views held about the effects of FGI on women by literates/professionals and semi-illiterates/illiterates influence their attitude towards the practice, and its prevalence. While the literates/professionals perceive FGI as a violation of women's human rights, semi-illiterates/illiterates view it as a robust cultural practice that may have repercussions if not done. 25% of participants (the semi-illiterates/uneducated) were not aware of the meaning of reproductive and sexual health rights and/or what constitutes its violation. They opine that FGI does not in any way hinder the enjoyment of a woman's sexual activity. For instance, a 25 years old native female participant felt that not doing FGI does more harm than good to a female. According to her: *"I did not circumcise my daughter and because of that, she is having white discharge from her private part".* She regretted not giving consent for her daughter to undergo FGI. However, the above report has no scientific evidence, but, it is a reflection of a deeply-entrenched cultural myth/belief about FGI. The myth teaches that there are sanctions attached to willful refusal to mutilate a female child, such as the production of white discharge from her private part, which unknown to them is not a sanction, but, maybe a symptom of infection or normal discharge as a lady approaches puberty.

On the other hand, 13 literate participants and 2 semi-illiterates/uneducated participants believed that FGI violates women's RSH rights. Their perspectives developed from their previous sensitization about FGI and its evils, which have influenced their attitude towards it. A 44-year-old Nurse reported; *"FGM robs a woman of the ability to have a satisfactory and enjoyable sex life. It reduces her sexual libido".* Thus, the Oyo State Government's advocacy programs have started having a gradual, but, positive impact on the attitudes of natives, hence, the change in

narratives of the participants examined above. Furthermore, the 52 years old Ministry of Health Official who is also a medical expert recounted; *"FGM causes a scar which reduces the vagina's capacity to expand during sex and child delivery"*. Once again, the personal opinion of the Ministry of Health Official shows that one's traditional background and mythical beliefs may influence one's ideology in spite of one's profession.

Additionally, the different perspectives held about FGI are dictated by the angles from which the participants view it (either as pro-FGI or anti-FGI), hence, there is a need for both actors to shift grounds in order to strike a balance and end FGI.

Prevalence and persistence of FGI in Nigeria and Oyo State

Participants could not give a precise prevalence rate because of Nigeria's poor attitude of gathering data and the secrecy involved in FGI which prevents it from being reported or underreported, but, they unanimously believed that although it has been reduced, it is still in practice clandestinely. Reliance on NDHS reports of 2013 and 2018 show that in Nigeria, FGI decreased from 25% in 2013 to 20% in 2018,[177] while in Oyo State, it reduced from 65.6% in 2013[178] to 31.1% in 2018.[179] However, the Programme Coordinator of FGI in Oyo state, a participant, mentioned that her work experience reveals that practice within the rural communities, the prevalence rate is higher than the NDHS 2018 report of 31.1%. Also, she listed the prevalence rates in Oyo State Local governments: *"Kajola (Okeho) Local Government- 98% (the highest in Oyo State); Oyo West- 86.9%; Ibarapa North- 84.2%; Ogbomosho South- 75%; Akinyele- 66.3%; and Ibadan North- 48%. There is no local government in Oyo State where FGM is not practiced"*. All the figures above imply that in spite of advocacy programs embarked upon in the study area, and some reduction in the previous rates, the latter still requires attention.

Laws on FGI

[177] Op. cit. 9, p. 466. Unfortunately, the NDHS 2018 is the most recent report of NPC (Nigeria) and ICF International.
[178] National Population Commission (NPC) [Nigeria] and ICF International, 2014, *Nigeria Demographic and Health Survey 2013,* Abuja, Nigeria, and Rockville, Maryland, USA: NPC and ICF International, (1998) p. 350.
[179] NPC and ICF. *Nigeria Demographic and Health Survey 2018,* p. 474.

This paper enquired about participants' levels of knowledge on the laws on FGI, the impacts of the laws on FGI, and the amendments that can be made to the laws on FGI in Oyo state and in Nigeria. Perhaps through the legal mechanism, headway can be made towards FGI reduction/eradication.

On awareness of the law, 12 participants knew that some laws, such as VAPP Act, Child's Right Act, CEDAW, exist on FGI, however, only 7 out of the 12 participants knew the provisions/contents.

On the impact of the laws, opinions differed. 6 participants believed the laws had a positive impact; 11 viewed that they had a negative impact while 3 did not know whether they were a positive impact or not. On the positive impact, a male participant- 43 years old Christian religious leader II noted; *"it is impactful because no one wants to go to jail"*. On the other hand, a 43-year-old Ministry of Health Official II stated on the law's negative impact: *"The law is not functional because FGM is practiced in secrecy and due to family/communal bond, no one wants to report it so as not to be castigated or tagged as 'omo ale'.*[180] *Also, where it is reported, nobody has been prosecuted"*.

As a result of secrecy attached to the act, there is no prosecution yet, neither is there any other empirical evidence, such as court cases, that can be referenced in this article to buttress the claim that the law has a negative impact on FGI practice/persistence. Therefore, if the majority of participants opined that the law has a negative impact on FGI practice as it has drawn the practice underground. The majority of natives no longer mutilate their female children publicly anymore, unlike before when a small village or community would circumcise all females deemed to be culturally due for it. Presently, natives do it in the secret corners of their rooms, known only by the circumcisers and the parents of the girl. A participant submitted; *"it is possible that sometimes when a girl child is crying uncontrollably in her mother's room, she is being circumcised; but, unknown to you, if you knock on the door in order to assist in pacifying her, her parents will lie that she is only hungry, naughty or merely seeking for attention. So, it may be happening secretly*

[180] The translation of "omo ale" into English language means "a bastard".

in your household and you may not know." Then, perhaps, it can be submitted that the majority of participants, representing the Moniya Community, are of the opinion that there is a need for an amendment of the law and/or other possible solutions outside of the law. Consequently, 16 participants suggested that FGI laws in Oyo state and Nigeria should be amended. 11 of them asked for enforcement of the extant laws; 2 participants demanded the provision of stricter sanctions/laws, and 3 asked for the enactment of specific laws on FGI.

Cultural Relativism: Solutions on FGI reduction/eradication

Only about 6 of the participants had knowledge of the word 'cultural relativism. However, after the phrase and its significance to this research were described to all of the participants, they were able to suggest a multifaceted approach in striking a balance between the stance of pro-FGI and anti-FGI groups. Some key solutions mentioned by a participant, particularly by a 44 years old Nurse II, are: *"Increased awareness in rural areas via radio, jingles, media, online platforms, community awareness, National Orientation Agency, and women rights group or NGOs, targeted at women".*

Existing evidence of ongoing awareness/advocacy within the Moniya metropolis shows persistence, but, a reduction in FGI practice. Thus, the participants submitted that via increased awareness about the cultural rationale behind FGI (which favors pro-FGI), and the teachings about the negative health effects of FGI to women and girls (which favors anti-FGI), natives' perspectives about the practice would gradually change towards putting an end to it. Similarly, participants recommended that the government should reinforce her advocacy programs on health education. She should educate religious and community leaders, medical practitioners, and TBAs, being major stakeholders, who will, in turn, carry the message across to their religious centers and communities. Furthermore, the *Oloolas* (traditional circumcisers) clamored for economic empowerment by the government and the provision of alternative jobs or sources of income.

8.0.STRIKING A BALANCE BETWEEN PRO-FGI AND ANTI-FGI GROUPS THROUGH CULTURAL RELATIVISM

There is a proliferation of arguments on FGI particularly between the majority of indigenous actors, and international and some indigenous actors whose opinions are tainted with their ideologies on the practice. The constant struggle between both cultures in trying to impose one's cultural values on the other has made it difficult for the anti-FGI groups to eradicate FGI through their human rights arguments. The only way forward is for both cultures to strike a balance in their ideologies, that is, while the anti-FGI groups view FGI from the pro-FGI group's point of view (as a rich cultural practice); proponents of FGI should also understand FGI beyond it being a cultural practice, but as an act affecting women's rights and health. Therefore, findings from the doctrinal and qualitative studies conducted above recommend that efforts must be put in place to change broad social norms; the most effective approach to eradicating FGI seems to be multifaceted, intervening at many strategic points throughout society, and promoting a different norm publicly. Efforts to eradicate FGI must address a range of community stakeholders, health professionals, and policymakers.[181]

As a start, the anti-FGI group must find out and understand all the cultural rationale behind FGI practice. Then, they can sensitize the community about it via local (religious and community) leaders, together with providing locally appropriate alternative rites of passage for girls to substitute for mutilation.[182] This article believes, subject to personal opinion, that such alternative rites of passage for girls will be a subtle way of reducing or eliminating FGI from the community, without antagonizing it. Also, it will shift attention away from FGI and will have a positive effect on pro-FGI groups' attitudes and behaviors about women's bodies, sexuality, and role in society, as well as a reinterpretation of religion and traditions of initiation.[183] Support must come from religious leaders, scholars, activists, and health care providers who are dedicated to the development of human rights, women's rights, and child development.[184]

Also, a government may find an alternative to FGI practice as it occurred in Kenya by maintaining the ceremonial rite of passage through a modification (rather than abandonment) of the practice.

[181] L.M. Shaaban and S. Harbison, 'Reaching the tipping point against female genital mutilation' *The Lancet.* 366 (2005) p. 347-349, DOI:10.1016/S0140-6736(05)67003-1, accessed 17 October 2021.
[182] Ibid.
[183] K. Trangsrud, Female Genital Mutilation: Recommendations for Education and Policy.
[184] Ibid.

'Circumcision through words' was initiated by the Kenyan group Maedneleo Ya Wanawake Organization (WYWO) whose mission was to replace cutting with non-cutting rituals. Such 'initiation without cutting' programs in Kenya has been a huge success, integrating counseling and education of young women with attention to health issues like human sexuality, hygiene, self-esteem, and peer pressure. The initiation is marked with a celebration, rather than a cut, where the girls receive gifts and extra respect for the day.[185]

Another successful community-based intervention was implemented by Tostan in 90 villages in the Kolda region of Senegal. It included a basic education program for women that addressed hygiene, human rights, literacy, community problem-solving, and health. As women learned about health issues and their rights, they focused on FGI. A key feature was the 'public declaration' opposing FGI, which included men, women, religious leaders, and other stakeholders. The program had a significant effect on community attitudes towards FGI, leading to a dramatic decrease in the number of parents who intended to have their daughters cut.[186] Hopefully, a similar program would be replicated among practicing indigenous communities in Nigeria and other African countries.

Due to the economic dependency some cultures have on the continuation of FGI, a possible solution is to provide sources of additional income, new jobs, (such as community health care work), or government funding to those who financially benefit from FGI.[187] This would help to curtail opposition to change. However, providing practitioners with an alternative means of livelihood must be coupled with addressing community demand for if the demand remains, the need for practitioners will continue to exist.[188]

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[185] J. K. Wellerstein, 'In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation' *LOY. L.A. INT'L & COMP. L. REV,* 22 (1999) p. 136. See also N.J. Friedenthal, 'It's Not All Mutilation: Distinguishing Between Female Genital Mutilation and Female Circumcision' *N.Y. INT'L L. REV,* 19 (2006) p. 147-149.
[186] N.J. Diop, M.M. Faye, A. Moreau, et al, *The TOSTAN program: evaluation of a community based education program in Senegal: FRONTIERS final report,* Population Council 2004 Washington, DC, https://namati.org/resources/the-tostan-program-evaluation-of-a-community-based-education-program-in-senegal/, 05 November 2021.
[187] N.J. Friedenthal, It's Not All Mutilation, p. 147.
[188] L.M. Shaaban and S. Harbison, Reaching the tipping point against female genital mutilation.

Another alternative to an outright ban of FGI is medicalizing/canonicalizing the practice so that it is performed under sanitary and safe conditions.[189] This would likely entail training midwives and doctors to perform the procedures in hospitals, as well as using anesthesia and sterile instruments.[190] However, although clinicalizing may avoid medical risks by utilizing qualified medical personnel and guarding against the most serious side effects, it communicates a sense of acceptance, thus perpetuating FGI.[191] Consequently, medical professional organizations prohibit it.

A different approach is the promotion of activism by African women. Their legitimacy and credibility are linked with an inherent connection to those who have undergone FGI and they are able to identify with and connect to the same cultural influences.[192] This power of connectedness is reflected in the efforts of Alice Walker, an African American feminist who unequivocally opposes FGI,[193] and who is perceived as the 'ideal ambassador between the cultural divide of white Western feminists and African feminists.'[194] Similarly, the 'positive deviance' approach can be employed. This identifies women and men who oppose the practice despite prevailing norms and uses them to raise awareness of the issue and advocate for change.[195]

A final and very strong approach is the legal one, which must be combined with one or more of the approaches suggested above for it to be successful, as the prohibition of FGI through international legal provisions is not sufficient until individual countries enforce the law and implement their own laws that support such international prohibition.[196] Where local law overlaps international laws and codes, and where local state governments apply international law to their

[189] Somalia has medicalized FGI in order to protect girls from the unsafe conditions of the practice. See C. Fernandez-Romano, 'The Banning of Female Circumcision: Cultural Imperialism or a Triumph for Women's Rights?' *TEMP. INT'L & COMP. L.J,* 13 (1999) p. 159.
[190] K. Trangsrud, Female Genital Mutilation: Recommendations for Education and Policy.
[191] Unfortunately, medicalization increases parents' interest in FGI. See D.S. Davis, Male and Female Genital Alteration, p. 497.
[192] H. Lewis, Between Irua and 'Female Genital Mutilation.'
[193] Ibid.
[194] Ibid.
[195] *The positive deviance approach in female genital mutilation eradication.* Final end-of-project report for PROWID to the Center for Development and Population Activities, Cairo: CEDPA, (1999).
[196] J.K. Wellerstein, 'In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation' *LOY. L.A. INT'L & COMP. L. REV,* 22 (1999) p. 120-121.

own individual legislation, there is a much greater likelihood that FGC can be stopped.[197] Again, this process must be done with great sensitivity and respect, and absent excessive imposition of anti-FGI groups' cultural norms.[198] 'Change can only occur if the global community embraces the laws of individual nations, works with those laws, and coordinates them with international legislation.'[199]

9.0.CONCLUSION

This paper has attempted to behold FGI through the lens of cultural relativism. It finds that there is a constant struggle of supremacy between the pro-FGI and anti-FGI groups and it tried to strike a balance between them. Also, it examined the rationale for FGI practice and persistence in Moniya, Ibadan, Nigeria by asking semi-structured questions via the conduct of Key-informant interviews. It finds that not until the cultural background, rationale, values, and beauty of FGI are well understood by the few non-practicing Indigenous, and International Actors, while the practicing Indigenous Actors also see the impact the practice has on the human rights of women that FGI can be eradicated. It suggested sensitization of the people; provision of locally appropriate alternative rites of passage for girls; promotion of activism by African women; 'positive deviance' approach; 'circumcision through words'; enforcement and implementation of local laws supporting international prohibition of human rights; as solutions in finding a middle ground to end FGI in Nigeria.

[197] Ibid, p. 132.
[198] Ibid.
[199] Ibid.

Balancing and Completing Thoughts of Islamic Jurisprudence

Alyu Abate Yimam*

Abstract

This paper reflects on the jurisprudential issue of the duty to obey the law. Several theories can be found in the secular jurisprudence on the question of why an individual has to abide by the law. One of which is utilitarianism. The paper argues that the utilitarian conception about the duty to obey the law has a gap that would be revealed using the same justification which means, if an individual obeys the law on utilitarian grounds, the same may be invoked to break the law. But beyond weighing the pros and cons of obedience over violation, there are other factors that explain the rationale behind compliance with the law. These factors entail the metaphysical understanding of justice as underlined in the theory of natural law and Islamic jurisprudence. While the utilitarian legal obligation forms part of the theory of Sharia for legal compliance, the Islamic jurisprudence provides the ultimate reason why a person could subject himself to the law, which is a liability in the afterlife. This paper reflects on this theory of Sharia and its basis in the primary sources and the intellectual tradition of the Sharia schools of thought.

Keywords: *Universal Norms, Secular Jurisprudence, Islamic Jurisprudence, Utilitarianism, Natural Law Theory.*

1. Introduction

The contribution intended to be made by this paper is to indicate a theoretical gap in secular jurisprudence when addressing the fundamental question of why an individual has to obey the law and to show how this gap can be addressed by Islamic jurisprudence. By secular jurisprudence, I mean any system of jurisprudence that has no metaphysical considerations and liability in the afterlife to its underlying conceptions and assumptions. To this definition falls western systems of jurisprudence that are based on Roman civil law and English common law traditions. We find that most systems of jurisprudence have adhered to one of these legal

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traditions which have a secular basis and whose norms are enforced through secular government institutions.

The issue of the obligation to obey the law becomes important when the law that has to be obeyed has the objective of serving the cardinal values of justice and protection of individual rights and freedoms. It has to be noted that the question takes an individual perspective of why a person has to adhere to the rules that may be enacted by the government as positive laws, or ordained by society in the form of culture or religion. The gap articulated above is identified after examining the most important theory in secular jurisprudence which is utilitarianism. This theory holds that a person adheres to law because that would accrue him/her greatest benefit and happiness as compared to being not compliant, and it would be necessary for him/her to avoid harm and inconvenience by not complying with the law. The problem with the utilitarian approach to the understanding of legal obligation is the fact that the thesis can be deconstructed following the same lines of the utilitarian argument. If an individual obeys the law for reasons related to happiness, wellbeing, harmony, punishment, etc., the same reasons could be advanced to break the law or not to abide by it. As indicated earlier, the law may hold rules which aim at upholding fundamental universal norms or it may contain rules lower in purpose. A person may abandon killing another person for fear of punishment. The individual could reasonably advance the same instrumentalist approach of killing a person who accrues benefit to him/her after weighing the possible harm or loss that might befall him. This theoretical gap has not been addressed by any of the theories of jurisprudence as found out and concluded by M.B.E. Smith.[1]

This paper shows how this gap can be addressed in the theory of Islamic jurisprudence which is founded on the metaphysical and theological concepts of creation of the universe and universal human values by God and the accountability of human beings in the life after death.

2. Universal Norms as Foundations for the Regulation of Human Interactions

Before reflecting on the foundational nature of universal norms for the regulation of human relationships, it shall be noted that there are two opposite views on the universal natures of

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[1]M. B. E. Smith, Is There A Prima Facie Obligation To Obey The Law? *The Yale Law Journal*, Vol. 82, No. 5. pp. 975-976.

norms that are considered fundamental for the wellbeing of human society; these are moral universalism and moral relativism.

Moral universalism advocates for the universality of certain ethical and moral principles and standards, which do not change across cultures, religions, or time. These values are very generic in their nature and they prohibit harm to others, preserve and encourage good and virtue in the world. Such values are naturally endowed to human beings irrespective of time and place. In Islamic jurisprudence, the concept of moral universalism finds its support in the primary sources of Sharia law i.e. the Quran and the *Sunnah* (Prophetic tradition). The Sharia affirms moral values and calls for their respect and enforcement at all times. Among the cardinal universal values invoked and affirmed by the Quran are justice, fairness, respect and sanctity of human life, property rights, human freedom, and liberty.[2]

Theorists of ethical universalism argue that universal values are unchangeable and immutable. This is true to the extent these values remain generic and not specific that would require adaptability and flexibility of moral norms. In other words, specific norms and rules are deduced from general universal values and the immutability of these values remains only to the level where they are broad. That distinguishes specific circumstances in which case specific governing values can be adopted which have to be relative to the prevailing realities across various societies and cultures.

A different view is advanced by theorists of moral relativism who argue that moral norms are not universal; instead, they are relative to cultures and situations. This view of relativists can be considered valid to the extent that norms and rules of conduct are amenable to the changing circumstances of societies. The counter-argument against relativism is empirical in the same way in which universalism is asserted based on reality. This reality is that we see norms such as justice, fairness, fundamental rights, and liberty being upheld by all human civilizations. Relativism would only be valid at the rules level, not at the morals level, as a law is relative to dynamic situations.

[2] See: Qur'an 5:8, 5:42, 4:58, 14:48 and other many countless verses of the Quran and the prophetic narrations.

In the endeavor to develop specific rules to regulate human interaction, the role reason plays as a source of knowledge in general, and laws, in particular, have been the subject of debate among theological sects of the early Muslim communities. The sect that could be mentioned to have developed in the early community after the *Khilafah* period[3] is the Mu'tazilla sect. This school is identified for its emphasis on reason as a source of knowledge for factors related to the nature of reason itself and the place it has in the Quran and other factors related to the weakness of other sources such as prophetic traditions as the authentic source of knowledge in Islam.

According to the Mu'tazilites, based on the universal legal values recognized and protected in the Quran, the logical faculty of humans would serve as the source of knowledge and law that could empirically interpret and reach conclusions in a way adaptable to the changing realities of societies. They believe that divine revelation is necessary for rational thought to identify what is good and bad. The role of revelation, or the Quran specifically, would be to affirm the general values of humanity and be a reminder as the Quran itself refers to these ideas.

On the other side, the Asharite school of thought has later adopted a more traditionalist approach on the epistemic issue of the source of knowledge. As opposed to the earlier Mu'tazilites, the Asharites argue that human reasoning is open for error and it needs fundamental guidance from God's revelations. Hence, human reasoning cannot reach a certain knowledge about what is good or bad, or right and wrong.[4]

In between these polar positions about the epistemic status of reason as a discursive source of knowledge, contemporary Muslim thinkers and reformists lean towards the Mu'tazilla approach in light of the support their views have from the scriptures and the reality. On the one hand, The Quran states norms such as justice and mercy as natural human values in the neutral tone that they are inherent to the nature of man, not as divine prescriptions or guidance. On the other the Quran elevates human thought to be a pathway to divine and spiritual truths, let alone to deduce rules of law for human interactions as individuals and society both from the universal moral premises and empirical realities. Thus, reformists such as the Jamaluddin al Afaghani and Muhammad Abduh, and more recently Taha Jabir Alwani, Abdulhamid Abu Sulayman, and

[3] Succeeding periods of rule after the death of Prophet Muhammad.

[4] Juan E. Campo, encyclopedia of Islam, New York: Facts On File, Inc 2009, p. 144.

Muhammad Hashim Kamali have argued for rational thought and the flexible and adaptable nature of Sharia law by way of independent reasoning *(Ijtihad)*.[5] This means while the moral ideals remain in place eternally, *Ijtihad* (reasoning) is capable to be a source of knowledge and law.

3. Epistemic Thoughts in the Sharia and Their Implication

From the ontological point of view, Maturidi asserts that universal principles and fundamental laws exist separate from divine prescriptions or revelations.[6] From an epistemological angle, this means such values and principles can be asserted through human conscience without divine guidance. In other words, the independent ontological existence of universal human values has predicated for cognitivity of such values by virtue of being a human being. As opposed to this understanding of the Maturidi School, the Asharite School has held a position that strictly attaches human norms to the divine revelation and asserts that humans cannot reach certain knowledge of the fundamental values.[7] But this position of the Asharite is utterly unrealistic for a reason that human civilizations and societies have existed in the past and in the present who held a secular view and live with no or less importance to divine or prophetic guidance have upheld universal values as equal as or more so to religious societies. In short, an individual who does not accept the concept of divine revelation could affirm and believe in human ideals. This means universal values are eternally natural to the nature of the human being not so with what is held as faith. It is to be noted that this view of the Maturidis and contemporary Muslim reform thinkers is expressed as the religious position of Islam and the Sharia. Meaning that, though divine revelation is central to the theological beliefs in Islam, its relation with fundamental human values is not a source or foundation.

To put forward some reflections on the relationship between divine revelation and fundamental norms (first/axiomatic principles), it is one of confirmation. Meaning that divine revelation as set

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[5] See: Taha J. Alwani, The Crisis of Thought And *Ijtihad*, *The American Journal Of Islamic Social Sciences,* 10, No. (2) (1993), p, 234. For Amharic explanation on the nature and methodologies of *Ijtihad*, see: አልዩ አባተ፣ ሦስተኛው የሸሪዓ ምንጭ፣ ኢጅቲሓድ፥ Jimma University Journal of Law, Vol. 11, 2019.

[6] Richard C. Martin, *Encyclopedia of Islam and the Muslim World*, Maturidi, Al-, Macmillan Reference USA (2004).P. 443.

[7] M. Abdul Hye, Ash'arism, http://www.muslimphilosophy.com/hmp/14.htm (Accessed: 13 Aug 20).

out in many Quranic verses has the purpose of reminding humanity and calling to the original and uncorrupted human nature *(Fitra)* whenever human beings go away from natural values. If society upholds them well, the revelation will have a confirmation role and encourage individual members to be steadfast and maintain a balanced society where natural principles and virtues such as justice, equality, fairness, piety are maintained. In other words, the role of revelation in respect of such universal objective values is not of instilling them to be the fabric of communities, but to maintain and uphold them as a reminder. This does not rule out the area in which divine revelation has a full value-instilling role, which is manifest mainly in theological and spiritual areas in which human *Fitra* and rational ability have limited or no normative role.[8]

4. The Naturalistic and Positivistic Aspects of the Sharia

The positivistic aspect of sharia is manifest in its juristic reasoning framework as rightly noted by contemporary Islamic thinkers like Tarik Ramadan that sharia is a set of principles and general norms that aims to recognize and protect universal human values.[9] It is not in the intention of the primary sources to provide detailed specific regulation for every individual and societal interaction. The function of promulgating specific rules considering the prevailing circumstances on the ground is left to the human intellectual endeavor. In other words, besides the divine prescription of the overarching principles and objectives of the law, detailed substantive and procedural rules are left for people of knowledge and insight to put forth suitable law amenable to the changing circumstances of societies. This task of intellectual endeavor is referred to as *Ijtihad* (Independent Reasoning) in the Islamic civilization.[10] This opens the potential for the enactment of laws that in reality are repugnant or contrary to the norms of justice and objective human values within the juristic framework of *Ijtihad*. Or less seriously, the

[8] See: Yasien Mohamed, The Ethical Worldview of the Qur'an, Yaqeen Institute for Islamic Research (2019), p.1. In matters related the existence and nature of the divine/supernatural being, *Fitra* has strong cognitive role, whereas in metaphysical matters, which look for physical description, *Fitra* and reason have no role at all. Only revelation will provide the information in this regard whatever the authenticity or reliability of the description or narration is.
[9]Tariq Ramadan, *Western Muslims and the Future of Islam*, Oxford University Press, Inc., (2004), pp. 31-32.Watch Also: Tariq Ramadan, Has Political Islam Failed, Head To Head, Aljazeera Head To Head Al Jazeera: "Has Political Islam Failed?" Https://Www.Youtube.Com/Watch?V=Ucwgs0iuyce(Accessed On: 13, Aug, 2020).
[10]Mohamed Abdel-Khalek Omar, Reasoning In Islamic Law: Part One, *Arab Law Quarterly*, Vol. 12, No. 2 (1997), p. 148.

rules promulgated through *Ijtihad* may not serve the purpose in question in light of the prevailing circumstances which in long run may not contribute to the realization of moral values.

The greater part of legal regulation of human interaction in sharia reflects the positivistic nature of sharia jurisprudence. Legal positivism has given primary importance to empirical reality to define law. Whatever route it may take to come to a rule what is governing the behavior of society is what is defined to be law according to positivistic legal theory. When Islam attaches great importance to *Ijtihad* (rationalization) as a source of knowledge and law, in particular, it means what would be laid down as law a *Mujtahid* (jurist) either individually or in a group (council – *Ijtihad Jama'i)* is the law will govern the conduct individuals and society.[11] What makes the law of *Mujtahid* (jurist, councils, parliaments, etc.) in the definition of positivism is that it is possible for legal rules deduced from the exercise of *Ijtihad* to be against the universal moral standards inherent in the nature of humans and recognized and protected by the primary source of sharia i.e. Quran and Sunnah. Despite the non-compatibility of juristic laws to moral values does not automatically invalidate the legislation based on *Ijtihad* for all practical purposes. The change to the rules has to go through the process of *Ijtihad* again. In other words, the fact that the rules enacted through *Ijtihad* are contrary to moral values or do not serve the purpose of moral objectives has to be appreciated/acknowledged by *Ijtihad* itself. Until then the law or rules laid down will serve as binding as those moral laws. The 'what is' understanding of the law of positivists, rather than "what ought to be" is reflected in this aspect of sharia.

The main drawback of a positivistic understanding of the law is the lack of a normative approach to law, which means it does not provide standards or values the law should uphold or should not disregard or violate. It (positivism) simply reads the existing legal order that rules the conduct of society and state. The problem with this approach is that it is open for what is known as a rule by law whereby law is used as an instrument to do all kinds of injustice and oppression against society. It impliedly endorses situations where a sovereign can create any law and enforce it and avoids the sense that unjust law has to be challenged for lack of substance expected from the law. Positivism in its empiricist approach to law reinforces one of the negative implications of the concept of rule of law. Rule of law as a constitutional value instills common understanding and

[11]See: Aznan Hasan, An Introduction to Collective *Ijtihad (Ijtihad Jama'i)*: Concept and Applications, The *American Journal of Islamic Social Sciences*, Vol. 20 No. 2, p. 1.

conception (feeling) that everyone should obey the law including those who are in authority. Whatever the content of the law might be, the value-free definition of law without attaching it with justice, freedom, and liberty, public interest has no purpose to serve. Further, the empirical approach to law has a negative impact of weakening civic initiative to challenge unjust laws and governance. It impliedly forces citizens to submit to unjust laws of a sovereign, societal culture, and religion. Natural law features of Islamic jurisprudence cure this drawback of positivism.

The naturalistic nature of Sharia is manifested in the recognition and protection of fundamental principles of justice and human freedom in the source of sharia. The naturalistic position of the sharia provides normative guidance to the intellectual effort of *Mujtahids* to rule society by law. Thus, the legislative exercise and the resulting substantive and procedural laws would not be arbitrary and in violation of the first principles. Despite the embodiment of fundamental universal values in the nature of humans, they need to be somehow recognized and protected by the kind of liability that Islam asserts in its theological worldview. This is a next life liability that brings human beings into account for what they have done or earned in their earthly life. This shows how sharia, as a religious legal system is underlined by the theological worldview of Islam. Meaning that the theological outlook of Islam provides personal accountability in the life after death. Rational arguments have been put forth by the Quran for the inevitable existence of the afterlife one of which is the quest for complete and ultimate justice.[12] As clarified earlier, justice might not be served for two main reasons. One is the laws that are supposed to fulfill the requirements of justice might not achieve this purpose. The other scenario is when laws are not respected and enforced by individuals and institutions despite being just and beneficial in their substance. In such circumstances, the universal human values articulated in the Quran will serve as the returning point to which society and government should strive to make the cornerstone of their existence. Generally, the Sharia having the two approaches of positivism and natural law theory and by instilling the sense of liability not compromised by the failures of worldly law enforcement mechanisms has far better potential increasing a balanced society.

Besides improving respect for human values, Islamic jurisprudence instills other positive norms or virtues that will make humanity better. This will be realized not only through the retaliation of

[12] See: Quran 45:22.

other fundamental virtues of humanity that operate beyond the bounds of legal relationships. These include the virtues of altruism and mercy. Societal life will be much more conducive, harmonious and peaceful when one cares for others, not simply as part of one's pursuit of pleasure, but also takes virtues to be bliss in the next life. A world becomes a better place for living, not just a place where justice is established but also mercy and love are prevalent in societies and across the global community. To sum up, two broad advantages/principles be discerned in the ultimate source/origin of objective norms of humanity. From creator God and the resulting accountability for worldly activities make the obligation to uphold justice and obey law an ultimately justified human value. Hence, it immensely improves the respect to law realization of justice in a society.

5. Conclusion

The Sharia fills the gap of secular jurisprudence by identifying the ultimate source of the duty to respect fundamental norms of humanity, and it instills the sense of accountability for the respect and protection of such values at the individual, societal, state, and interstate levels.

The challenge facing secular legal systems today is the absence of these completing thoughts of Sharia i.e. affirmation of the ultimate initiator and maintainer of the ideals and ultimate accountability of individuals in the hereafter. This has resulted in a relatively weak rule of law and law enforcement at the national and international levels. The fact that citizens, state administrations, and governments in international relations obey laws on utilitarian grounds is exposed to compromises in favor of individual selfish interests and emotions.

The idea of ultimate human liability not only advances the respect to law at the individual citizens' level but also at the corporate and state administration levels where direct individual accountability is weak. This problem becomes bigger in international relationships where accountability is very loose due to the weak enforcement regime of international law. Systemic breaches of universal values have less chance to be checked in interstate relationships as the perpetrators (states) have a much stronger authority and power stemming from sovereignty as compared to the law enforcement capacity of the international legal system.

We have witnessed in the recent history of international relations that states have broken universal values for national interest and political superiority despite the solemn promise and commitment of sovereign countries to respect and protect human rights after the Second World War. Countries including those that are forerunners in bringing world states into a pact to respect and protect human values have been involved in the most heinous and mass violation of human rights under the guise of fighting terrorism and preventing future nuclear wars. This can successfully be attributed to the development of a selfish and materialistic political state where individual accountability and God-consciousness have been eroded through time.

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Jimma University School of Law Legal Aid Center 2021 Report: The Success Stories and Challenges

Beki Haile Fatansa[*]

Introduction

It is believed that peoples' right to human rights in general and rights to due process, fairness, and right to speedy trial and hearing should not be dependent on an individual's pocket power. On the other hand, justice has never been equal for the rich minority and the poor majority as well as vulnerable as they are unable to hire a lawyer for their case. What makes the problem bad to worse is that it is women, children, migrant returnees, internally displaced persons, prison inmates, HIV/AIDS victims, and veterans who are unable to seek and enforce their basic constitutional and human rights.

Jimma University School of Law Legal Aid Center (hereinafter 'JUSL-LAC') was established to nut out the gap between access to justice and indigence and vulnerability as its main objective among others. Although it is a long-aged experience in the developed world to help the poor and vulnerable by establishing such kind of centers, JUSL-LAC is the first of its kind in South, Southwest, and West Ethiopia, and is one of a handful number of pioneers in the nation.

In addition to the academic staff of Jimma University School of Law and the full-time employed lawyers for the centers outside of Jimma town, JUSL-LAC runs its daily business by utilizing clinical students and volunteers who study law at the University. Each volunteer and clinical student is expected to contribute four hours per week and academic staff members are expected to handle and supervise clients' cases.

Currently, JUSL-LAC is rendering legal services at **eleven (11)** centers in Jimma Zone namely, *Jimma main office, Jimma Woreda Court, Jimma High Court, Jimma Zone prison administration, Agaro, Gera, Shabe, Dedo, Serbo , Omo Nada, and **Setemma*** and is keen to keep up the already started good work. JUSL-LAC opened its 11th center at **Setemma** Woreda, in the year 2021.

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1. **Background**

Jimma zone is one of the largest zonal administrations in Oromia regional state with an estimated total population of three million. Half of the total population are women. Jimma University is a public higher educational institution established in December **1999 by** the amalgamation of Jimma College of Agriculture (founded in **1952)** and Jimma Institute of Health Sciences (established in **1983)** to contribute its best to the academic world and serve the population of the zonal administration in many spheres. The two campuses are located in Jimma city **335** km southwest of Addis Ababa with an area of **167** hectares.

Jimma University is Ethiopia's first innovative Community-Oriented Education Institution of higher learning. In line with this philosophy, Jimma University School of Law Legal Aid Center was established based on the unanimous decision of the Academic Commission of the then Law Faculty (now School of Law) on Dec 25, 2008, primarily with the vision of providing free legal services to indigents and *vulnerable groups like the poor, women, veterans, HIV/AIDS victims and children in and around Jimma town on one* hand, and to expose students Law School to the practical aspect of the law on the other hand.
Justice is the major concern of our democracy that we cannot take for granted. Our laws guarantee basic rights and protection for all of us – not just those who can afford to hire a lawyer. The Constitution also requires that justice should be available without unnecessary delay. By contrast, we usually find family cases in which women’s rights are violated, children abused by trafficking and domestic ill-treatments, and other classes of the society adversely affected by the system. On the contrary, the people have failed to defend the injustice, and even when they want to do so, they face many tackles. These problems resulted because of the deep-rooted financial problem the society is trenched in. Indeed, vulnerable people who have the means to pay for a lawyer also face the problem of getting access to justice. Providing free legal service to these vulnerable groups means the difference between food on the table and hunger, life and death

penalty, shelter and homelessness, economic stability and insolvency, productive work, and unemployment.

The initiative to establish JUSL-LAC came up because of this apparent growing need of our society to have access to justice. The Civil Procedure Code and FDRE Constitution have attempted to help the poor to have access to justice by allowing suit by pauper and bestowing the right to get appointed council respectively.

But this attempt alone does not suffice to watch justice in motion. **First**, allowing suit by pauper in a civil matter by itself alone is not a guarantee to have access to justice. It simply means that one can bring his/her claim to courts without paying court fees. Although it is one step in creating access to justice, it is way far from creating access to justice in its full sense. The person should be able to effectively defend his/her rights upon initiating a civil suit. This can be done if the person gets legal support even after s/he institutes her claim. In civil matters, our laws (like the laws of other nations) do not provide a duty that the government shall appoint a counsel for a needy person in civil matters. Therefore, the attempt to create access to justice for the needy in civil matters is very limited.

Secondly, the Constitutional guarantee that accused persons have the right to be represented by a state-appointed counsel if they do not have financial means and thereby a miscarriage of justice may happen is hampered by the government's limited resources. Besides, the law provides legal assistance when the accused has no sufficient financial means – it does not address other vulnerable groups such as women, children, HIV/AIDS victims, veterans, and disabilities who are usually underserved. Therefore, the constitutional guarantee to create access to justice in criminal matters is hampered by a lack of resources and a lack of comprehensive focus on all types of vulnerability. It is intending to achieve these objectives that the JUSL-LAC is established.

Apart from helping the society, the JUSL-LAC would help the students to know how the law is being practiced. Law students should be able to acquire practical knowledge to be able to serve society in the future and be able to cope with the dynamic world under a tornado of change. Traditionally, law students were not exposed to the practice of law. This had been making the students unable to live up to what is expected from them. The Justice and Legal Systems Reform

Institute of Ethiopia (which is renamed the Federal Justice and Legal Research and Training Institute) have also noticed this problem and has spearheaded the inclusion of practical courses in the Ethiopian Law School Curriculum.

For prospective law graduates, trying to serve society without having a glimpse of the legal practice could be like trying to walk while you don't have one leg. Providing free legal service to society without equipping graduates of law with practical legal knowledge would not solve the legal problems of society in the long run. Doing so would be like '*hitting a snake on the trail – not on the head'*.

Indeed, creating access to justice for the needy should be coupled with producing competent legal professionals who work in the justice system. The last decade's practice in legal education in Ethiopia shows that law students were being taught merely based on theory. In this type of legal education, it is difficult to produce law graduates who understand the legal problems of society and who put their effort into solving those problems rather than watching as a passerby. When graduates are theory-based, they will have a reduced capacity to create access to justice and play a role in the democratization process of the nation.

Indeed, this is why the vision of JUSL-LAC should be both creating access to justice for the needy and equipping law graduates with practical legal knowledge. The experience law students acquire by working at JUSL-LAC would make them agents of change in the Ethiopian legal system, and would give them the exposure to see legal problems of the society ahead and makes them aspire to solve the problems upon their graduation.

In order to remedy the problems stated in the above paragraphs, and reach out to the ardent hope and fervent desire of the society, a further justice for all initiative is still required. The best, actually the most prominent, initiative is to employ the ripe and talented skill of the Junior lawyers, law school instructors, and students in order to cast this prevailing problem aside. Thus, organizing to make use of this skilled manpower by sustaining, the existing centers, and opening new legal aid centers has paramount importance in the lives of hundreds of thousands of people JUSL-LAC aspires to serve.

Having these multifaceted goals JUSL-LAC has been rendering its cherished legal service at eleven centers including the one at the head office. Initially, service delivery was started by

opening two centers at Jimma Zone High Court and Jimma Woreda Court. However, the number of centers was increased to *six* in the year 2003 E.C by opening new centers in Agaro, Dedo, Serbo, and Jimma Zone Prison Administration. In 2008 EC new centers have been opened at Gera, Omo Nada, and Shabe Woreda courts. This year, in September 2021, JUSL-LAC has opened a new center at Setemma Woreda as part of the Cooperation on Migration and Partnerships for Sustainable Solutions initiative (COMPASS) in partnership with IOM Ethiopia. Currently, the Center has a total of eleven (11) sub-centers.

2. Organizational Structure of the Center

To enable the center attain its objective and contribute effectively in the furtherance of access to justice, the organizational structure of **JUSL-LAC** was framed to different structures. On the top of the organizational structure is the director who is empowered to supervise the day-to-day activities and operation of the Center. Under the director, there are two vice directors, one vice director for service provision and quality management with the power and the duty to manage and coordinate the different activities of the Centers and the other vice director for research and capacity building with the power and duty to direct and conduct capacity building activities for service providers, beneficiaries, and organs involved in the administration of justice; to direct and conduct researches related to the vision and mission of the Center, and to conduct promotions about the availability of free legal service and build the public image of the Center.

3. Partners

JUSL-LAC is currently working with IOM Ethiopia, Justice for all-Prison Fellowship Ethiopia, Ethiopian Human Rights Commission, Addis Ababa University Center for Human Rights, Oromia Supreme Court, and Oromia Justice Bureau as its partners. JUSL-LAC is currently implementing a Cooperation on Migration and Partnerships for Sustainable Solutions initiative (COMPASS) project funded by IOM to enhance migrants' access to legal services at six woredas located in Jimma Zone such as Jimma town, Agaro, Dedo, Omo Nada, Settema, and Gera woreda. Justice for all-Prison Fellowship Ethiopia built a well-furnished service delivering center having five classes full of office furniture in Jimma Zone Prison Administration compound and handover the same to the Center. The Oromia Supreme Court also supports the center with

service delivering offices and finance. Oromia Regional State Attorney General supports the center by giving and renewing advocacy licenses. At the same time, the Center works in collaboration with Justice Bureaus, Courts, and Community based organizations located in Jimma Zone.

4. Linkages with the Stakeholders

To be effective, legal aid service requires the cooperation and coordination of various stakeholders. Accordingly, JUSL-LAC has many stakeholders with which its cooperations are vital in the accomplishment of the center's objectives. Accordingly, Jimma zone high court, different woreda courts, Jimma zone Justice office, different woreda justice offices, Jimma zone prison administration, police offices, woreda labor, and social affair offices, women and children affairs offices, Ethiopian human rights commission Oromia branch office, and kebele administrations are among the main stakeholders with which JUSL-LAC has a linkage.

5. The Services provided by the Center

There are three main activities that JULAC provides. These are legal services, legal education, and research and capacity building.

1. Legal Services

These services are those services that in one way or other connected with justice sectors and administrative government organs. Through its legal services, the Center provides the following major services to its clients

- Free Legal Counsel
- Writing Statement of Claim
- Writing Statement of Defense
- Writing r different applications to the court and other organs
- Advocacy (Representation before the court)
- Mediation (with the view to reaching amicable solutions)

So far the Center is offering these legal services to the population in its **eleven (11**) service centers located in seven towns (Dedo, Serbo, Agaro,Shebe, Gera, Omo Nada, Setemma and Jimma). In seven of the service centers, at Dedo, Serbo Shebe,Gera, Omo Nada, Setemma and

Agaro, the Center has managed to employ junior lawyers to run the services. The Center however relies on School of Law students to run the services at Jimma Woreda Court, Jimma zone High Court, and Jimma Zone prison Administration. The students are assisted by the academic staff of the School. The Center's office located in the JU Main campus functions as a coordinating center for all the services and functions.

2. Legal Education (Awareness Raising Program)

The Center understands that majority of abuses and human rights violations suffered by the vulnerable parts of the population are the result of a lack of awareness especially of the rights of these groups. Accordingly, it strongly believes that ensuring respect for their rights can better be realized through effective and broad-based community legal education programs. Thus far the Center has relied on the Jimma University Community Radio in which it has been able to run four hours-long awareness-raising program per week in two languages (Amharic and Afan Oromo) but there are critical limitations both in terms of the structure, breadth, effectiveness and sustainability of running the program through this medium.

Accordingly, different laws related to Prisoners' Rights, Child and Woman's Right, Human Rights Laws, Procedural law and Self-Advocacy skill, Oromia Land Law, Family Law, Law of Property and Succession, Employment and Labor Law, Tort Law, Anti-Corruption Law, Administrative law and good governance, Law of Contracts and Commercial Laws have been broadcasted through the community radio to enhance the society's basic knowledge on those subject matters.

The Center, however, aims to run the program effectively by utilizing various available means and media such as community organizations, centers, and other channels with broad audiences but this requires the availability of adequate financial and infrastructure (including transportation) supports.

3. Research and Capacity Building

Legal service and legal education programs at the Center must be supported by appropriate evidence. Research is, therefore, a critical part of its strategic approach as it helps to identify the need and areas of focus for its services. In addition, it also helps engage with the community and stakeholders in addressing the problems more effectively and sustainably. In addition, research

also plays a crucial role in empowering and building the capacity of the community, stakeholders, and the Center itself in dealing with the root causes of the problem of human rights violations and lack of access to justice to the vulnerable members.

Thus far there is no baseline research conducted not just in Jimma Zone but in the whole country in relation to the state of need for free legal aid service. There is also no standard developed in relation to providing the service. In fact, the level of awareness of the idea of free legal aid and its role is at a critically low level in the Country. The Center aims to address these problems by using research and capacity building as its strategic approach. To this end, the following are areas in which the Center needs strong support for its areas of activities

- ❖ organizing thematic and generic conferences and workshops and training programs
- ❖ publication
- ❖ conducting baseline survey for legal aid service need in Jimma Zone
- developing standards and guidelines for the provision of services

In this regard, due to high budgetary constraints, the center has only managed to develop standards and guidelines for service provision.

6. Service Delivery Mode and Service Quality Management System

JUSL-LAC employs different modes of service delivery. The service delivery model varies purposely to attain the objectives of the center, which are community services and equipping law students with practical skills. For centers found in Jimma city, JUSL-LAC uses fourth and fifth-year law students to deliver the services and in those centers outside of Jimma town, the center uses junior lawyers as they are at a distant place from the university.

Besides, the center also uses volunteer law school staff and licensed lawyers. The center doesn't compromise the service quality and employs different service quality controlling mechanisms to these ends. Accordingly, the center has daily and weekly meeting with the students and it has also developed strict reporting.

7. Summary of overall activities

The **JUSL-LAC** service shows tremendous progress from time to time in quality and accessibility and currently, thousands are benefiting from the service of the center annually. Resisting all the challenges it faced, the center has managed to reach **four thousand eight hundred thirty-four (4834)**. The service distributions were counseling **2430**, ADR/ mediation **233,** document preparation **1680,** and representation **501.** Out of the total cases it represented and disposed of **by** the court, the center won **75** and lost only four. The cases the center won were represented and litigated **by** fifth-year law students. The service fee the center provided is estimated to be **9,668,000** birr. The winning rate of the center is **99.5 %.** This is mainly due to the fact clients who come before the center have strong cases but lack only the financial capacity to litigate before the court. An estimated 450,000 people have benefited from the Radio program and over 5,000 brochures were distributed on various legal issues. The types of the services rendered and the beneficiaries together with the centers that have provided the legal service have been summarized as follows.

Type of legal Service	**Jimma Woreda**	**Jimma Zone High Court**	**Head Office**	**Jimm Zone Prison**	**Agaro**	**Serbo**	**Dedo**	**Gera**	**Shebe**	***Omo Nada***	***Setemma***	***Total***
Counseling	360	210	288	160	214	226	250	180	218	232	**92**	**2430**
ADR	63	16	35	-	39	14	11	15	12	10	**8**	**223**
Documents	250	218	148	242	108	184	120	119	149	97	**45**	**1680**
Representation	160	44	66	32	62	29	17	28	18	33	**12**	**501**
Total	833	488	537	434	423	453	398	342	397	372	**157**	**4834**

7.1. Subject matters on which legal awareness education has been delivered through JUFM

Based on the assumption that at least 10% of the population the FM Radio reaches would listen to the broadcast, the total number of a beneficiary is estimated to be about 450,000.

Airing Time and Broad Cast Language	**Subject matters on which the radio legal awareness creation education is delivered**											**Total**
	Prisoner's Right	**Child and Women's Right**	**Tort Law**	**Family law**	**Labor Law**	**Illegal Human Trafficking**	**Land Laws**	**Oromia Land Law**	**Procedural and Self Advocacy skill**	**Human Rights Laws**	**Migration**	
Afan Oromo	**2 hours**	**3 hrs**	**2 hours**	**3 hours**	**3 hours**	**3 hours**	**2 hours**	**3 hours**	**2 hours**	**4 hours**	**4 hours**	**31 hours**
Amharic	**2 hours**	**3 hrs**	**2 hours**	**3 hours**	**3 hours**	**3 hours**	**2 hours**	**3 hours**	**2 hours**	**4 hours**	**4 hours**	**31 hours**
Total	**4**	**6**	**4**	**6**	**6**	**4**	**4**	**6**	**4**	**8**	**8**	**62 hours**

7.2. Some of the Cases the Center Represented and Won in 2020/21

Our center, in its different centers, has represented hundreds of cases on behalf of its clients some of which are disposed of while the rest are still pending. The number of cases has been increasing year to year and this year too. In the year 2020/2021 alone, until the time of the report about 75 cases have been decided in our favor. These cases were those whom our fifth-year law students and lawyers in different centers have represented the clients and won at Jimma Woreda Court, Jimma Zone High Court, Agaro Woreda Court, Serbo Woreda Court, Shabe Woreda Court, and Omonada Woreda Court. **The following are the details of the sample cases entertained by the center.**

5. Some of the Cases Represented by the Center

S.N	Name of the client and story of his/her case	Sex	Type of the case	Court entertained	File no.	Judgment/award
1	**Jemila A/Jihad**	F	Famil	Jimma	24304	Able to gain a house

	✓ The migrant returnee who just come back from Saudi Arabia. The beneficiary as returned, unfortunately, found her marriage on the verge of divorce and took the matter to the court.		y, Property	Town Woreda Court		estimated to be Five hundred thousand (500000 ETB) from a division of common property due to divorce. She also gained custody of her minor children's payment of maintenance.
2	**Amarech Teshome** ✓ She was in Beirut and returned to Ethiopia in 2018. After she comes back, her husband abused her and also snatched her property away. She came to our legal aid center in 2021 demanding legal aid. ✓ Our center managed to conclude their case through negotiation and finally,	M	Property	Jimma Town Woreda Court	65708	The suit is withdrawn and the parties able to agree by negotiation. Accordingly, the beneficiary gets back her property which is estimated to be 350,000 ETB.
3	**Roza Ahmed and Kuzema A/Jihad** ✓ Their case was regarding a nuisance created on their property. ✓ Our center takes filed a possessory action	F	Property	Jimma Town Wored Court	65002	The beneficiary won the case and it is decided that the nuisance be ceasing and the cost they incurred to be reimbursed.
4	**Umi Temam** √ The beneficiary who lives in Jimma town was planning to migrate. While her mother	F	Family/ Prope	Jimma Town W/Cour		It is decided that the property claimed by her

	and stepfather are divorced, her stepfather claims Umi's house to be his. She approached our center and the center provides her with pleading writing and representation.		rty	t		stepfather belongs to Umi. The property is estimated to have a value of 750,000 ETB.
5	**Semira A/Bulgu**	F	Prope rty	Jimma Town W/cour t		The court's decision over the matter is in favor of the beneficiary who is the client of our center.

7.2. Challenges

Despite the challenges surrounding it, JUSL-LAC is rendering exemplary community service and equipping law students with practical skills. There are several challenges which hinder the center's service delivery. The followings are the major challenges, among others.

- **Financial Constraints** - the existing finance is not sufficient, timely, and is not sustainable
- **High turnover**- there is a high turnover of center lawyers due to very low salary
- **Lack of phone service**- particularly for center lawyers to communicate with their clients
- **Absence of secretaries**- specifically outside Jimma city where lawyers are carrying out the legal service and other jobs (particularly typing and reporting) lonely
- **Busy schedule**- from the coordinators of the center and the service providers, compared to the increasing number of service seekers
- Lack of responsiveness from some stakeholders

Summary

The center is providing legal services such as counseling, preparation of pleadings, and representation on litigations for children, women who are victims of domestic violence, people living with HIV, people living with disabilities, etc. In addition, the center admits students for clinical courses and externship programs and they acquire basic knowledge of the practical world. Moreover, the center is providing basic legal education to hundreds of thousands of residents of Jimma Zone via Jimma Community FM Radio. Capacity-building training is also one of the functions of the center to enhance the knowledge of the center lawyers.