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WOMEN INCARCERATION VICTIMIZED THEIR CHILDREN: A CASE STUDY OF WOMEN PRISONS IN GHANA

Mariama Aidoo*

Abstract

This article concentrates on the problems incarcerated females and their children face in Ghana. Researchers and human rights activists have identified some primary concerns about the infringement of rights of incarcerated women across the globe including Ghana. Their challenges include gynaecological problems, food insecurity, sex trade by vulnerable groups for protection, sleepless night, and poor health conditions and childcare. Their children also encounter severe problems like poor academic performance; victimization, trauma, and stigmatization from peers; high drop-out rates; and juvenile delinquency which takes them to prisons in their adult lives. But the specific reasons why these problems continue to exist, leading to human rights abuses of female inmates and their children, have not yet been answered among researchers in Ghana, and this research is poised to fill that gap. Financial constraint and sheer disregard for children and women's rights and their vulnerability are some of the reasons found to be the causes of these woes. To draw the attention of stakeholders to these problems, a doctrinal analysis of both primary and secondary resources related to the topic was adopted. Consequently, the normative analysis and explanations of the materials, portray that, imprisonment is not serving its purpose and that, community service order is the best alternative for women offenders, so they can continue their caretaking responsibilities in accordance with the Bangkok Rules.

Keywords: Financial constraint, Human rights, Ghana Prisons Service, Incarcerated women and their children, Community service order

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1. Introduction

This research primarily aims to unearth impediments to penal reform for female offenders in Ghana and advocate alternatives to incarceration, including the development of the Community Service Order (CSO). Some Ghanaian female prisoners are mothers and CSO will enable them to serve their sentence in the community, access rehabilitation programs, and maintain their caretaking responsibilities. Research has been conducted on prisons and prisoners in Ghana and beyond, but few published works relate to female prisoners and their plights, such as poor health conditions, childcare, gynaecological problems, food insecurity, sex trade by the vulnerable group for protection, and sleepless night (Todrys et al., 2011). To Park and Alison (2001), the incarceration of these mothers victimizes their children as the children's physical, emotional, social, and psychological development are affected, thereby increasing their vulnerability.

Most of the family members who take up the caretaking responsibilities maltreat these children, so they experience poor academic performance; school drop-out (Teiko, 2017); trauma, and stigmatization from peers; and juvenile delinquency which takes them to prisons in their adult lives (Mallicoat, 2021). The specific reasons why these problems continue to exist, leading to human rights abuses of women inmates and their children, have not yet been answered among researchers in Ghana and this paper is set to fill that gap. Whether it is a mere disregard for the human rights of women offenders and their children, or financial problems, the writer will detangle the issues.

In Ghana, it is believed that the socialization of children into society is the mother's responsibility. She teaches the children the language, cultural and subcultural aspirations of society, and her absence is considered a threat to the family and society (Anku, 2021). For K.O. Ibrahim, the Chief Executive Officer of Crime Check Foundation, Ghana (personal communication, January 29, 2021), this is among the reasons why human rights activists in Ghana constantly requested that the government implements non-custodial sentences, so the women can continue their traditional duties. These activists became elated when Ghana signed the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) which promote CSO because women offenders pose no risk to the community (UN Office of Drug and Crime [UNODC], 2010). A bill on the CSO was prepared for parliament to pass into law, but it has been in parliament for over seven years without ratification. He doubts if the bill will be given the necessary attention, while his non-governmental organization (NGO) keeps lobbying for it (Ibrahim, personal communication, January 29, 2021).

Other stakeholders have called on NGOs like World Vision International and the National Council on Women and Development to lead an advocacy movement that will urge the government to introduce a literacy program for women offenders instead of incarceration. They argue that operating women's prisons is a waste of human resources as we cannot justify the custody of only 302 female inmates and the employment of over 500 female prison officers for supervision. The crimes of these women seldom cause any public panic, hence the need to abolish female incarceration in Ghana (Appiahene-Gyamfi, 1995).

A doctrinal analysis of both primary and secondary materials relevant to the topic is the main methodology (Van, 2011, pp. 4-10) to unravel why human rights abuses of incarcerated women and their children continue to exist in Ghana. The primary sources are international

laws, cases, national legislation and regulations on prisons and human rights. The secondary sources may include academic articles; policies; reports; and informative interviews with stakeholders, lawyers, and NGOs in Ghana to solicit their opinions on proposed community service for female offenders. This paper begins discussion on women's incarceration in Ghana and whether it has been successful or otherwise. It will also deliberate on the factors causing human rights abuses of incarcerated females. Finally, a few recommendations will be provided based on some best prison practices that favor women offenders in other African countries and beyond.

2. Women Incarceration in Ghana

In the World Female Imprisonment List, incarceration among women around the world rose from 625,000 in 2012 to 714,000 in 2017, and debatably, population growth is one of the reasons assigned for this rise. Africa is portrayed as having the lowest (3.4%) with Ghana recording 0.6% in 2017 (Roy, 2012 & 2021). In the World Health Organization African report (2019), incarceration of Nigerian women is on the increase compared to Ghanaian women because their drug addiction leads them to commit crimes. Drug use among men in Ghana is higher, with an estimated ratio of 50:1. Under-reporting justifies this wide ratio gap because, among other things, Ghanaians frown on women drug use and stigmatize the users (Bird, 2019). Despite this, it is a call for concern, as their children are victimized and to address it, this article relies on the following theories: strain, masculinization, opportunity, marginalization, and chivalry to explain why some Ghanaian women commit crimes leading to their incarceration. Also, it is vital to access how the introduction of imprisonment in Ghana has affected the punishment of female offenders and whether the Department of Social Welfare (or 'Social Welfare') does its work accurately to support the mothers and their children in Ghana's penitentiaries.

2.1.What Incites Women to Commit Crimes?

Corke (2019) tagged women criminality as 'vanishing females' as it was eradicated from history. Women offenders were demonized, leading to witch-killing mania. A phenomenon which existed in the dark ages of Europe (Diaboli, 1963) that continues to exist in Ghana. On July 23, 2020, a 90-year-old woman was accused of witchcraft and was lynched to death in Ghana (Duodu, 2020).

For Parkes (2016), it is worrying to know that women incarceration keeps increasing across the globe. They experience higher strains which lead them to commit both minor (Broidy & Agnew, 2004) and major crimes (Islam et al., 2014). The United States v. Mensah is an example. The offender is a national of Ghana, a developing country, who may be facing hardships so her desire for money inspired her fraudulent behaviour (United States Department of Justice, 2020). Women are involved in other criminal activities like bribery and corruption; children, drugs, and arms trafficking; terrorism; organized crimes (Alrefath, n.d.); and infanticide (Backhouse, 1984). The following theories give details of why women commit these crimes.

2.2.Strain and Marginalization Theories

Agnew (2021) explains strain as the "relationships in which others are not treating the individual as he or she would like to be treated" (pp. 319-320), and his or her response can lead to criminal acts. Crime may be committed if one's aspiration is not met as the social structures of society can pressurize the person to deviate from the right means to achieve set goals (Merton, 1938). A woman is likely to steal to finance an important social activity or to support the family (Broidy & Agnew, 2004). Women who experienced abuse in the past easily vent their anger on anyone under their care, to annihilate the hated part of themselves (Motz, 2008). For Broidy and Agnew (2004), the root of female crime is oppression. When women are oppressed and encounter abusive parents, unemployment, and loss of interpersonal relationships, they commit crimes to manage the situation (Anku, 2021). Kazic and Aidoo revealed that crime among women increased by 2.7% between 2004 and 20013 while men`s criminal activities decreased by 9% in the same year (Kazic & Aidoo, 2021). Among the following are the reasons for such increase. A Ghanaian woman poisoned her husband when she was unable to endure continuous molestation by the husband for 8 years (Amnesty International, 2012). In R v Inglis the vegetative state of a boy traumatized his mother, and she eventually killed him because his condition was unbearable.

Hirschi's Social Bond Theory describes women criminality as a lack of social bonds. Women who experience poor parental management in their early lives, have self-control deficits and engage in crime when the opportunity presents itself. Social control reduces the tendency to commit crime as everyone has the drive to be aggressive (Key Idea: Hirschi's Social Bond, n.d.). Attachment has a psychological affection, so its impairment affects the child. Such children have no affection towards their parents or anyone else and will not be embarrassed if a relationship goes sour after committing a crime (Hirschi, 1969). The "idle hands are the devil's workshop" (Key Idea: Hirschi's Social Bond, n.d., pp. 58-59), therefore those engaged in prosocial activities are less likely to commit crimes. Chesney-Lind argues that the socialization process in a capitalist social structure marginalized women's position as they receive unsecured jobs and salaries. So, their response to this marginalization may produce crime. Opponents to this theory claim that it could not explain the increase in white-collar and corporate crimes among upper-class women (Islam et al., 2014).

2.3.Masculinity and Opportunity Theories

Freda Adler contended that the 'masculinization processes of women' in the 1970s accounted for the increased female criminal activities. Empowered women are involved in serious violent crimes more than non-empowered females. This theory is male-centered and cannot explain why females in Third World countries engage in crime (Islam et al., 2014). Campaniello (2014) opined that changes in social norms have allowed women to work outside the home to bridge the socio-economic disparity between males and females, contributing to their criminal acts. However, those outside the paid labor force too, are involved in loan or credit card fraud and claim government benefit when they are not legally entitled to it (Islam et al., 2014). In Ghana, unemployed women commit more crimes (Sarpong et al., 2015), or assist men to commit various kinds of crimes including child-stealing, which the Domestic Violence and Victims' Support Unit (DOVVSU) reveals its increase (Child stealing on the rise in Accra, 2011).

Nonetheless, the Chivalry theorists insisted that it is leniency shown towards women that incite their offence. Chivalry is an honorable behaviour a man may show towards a woman (Merriam Webster's Dictionaries, n.d.). The criminal justice system is lenient towards women offenders which becomes an incentive and makes them susceptible to committing crimes, though their crimes are considered less harmful per economic standards (Islam et al., 2014). Is the justice system lenient to women offenders? What accounts for the increasing numbers of incarcerated females as shown above? That notwithstanding, the justice system may be lenient towards women because of their special position they occupy in the family like procreation, childcare, and maintenance of the home (Anku, 2021). During incarceration, the children are separated from the mothers, and this is always unbearable and accounts for the high mental disorders among incarcerated women. They also acquire infectious diseases that are expensive to treat in prisons (Mallicoat, 2021).

Undoubtedly, the Bangkok Rules were adopted for courts to be lenient towards female offenders because of their children as they are the hidden victims of mothers' incarceration, but the courts barely acknowledged their plight (Martin, 2017). Article 3 of the UN Convention on the Rights of the Child 1989 and Article 19 of the African Charter on the Rights and Welfare of the Child require those in authority to act in the best interest of the child. Everyone must ensure that the physical, psychological, spiritual, moral integrity, and human dignity of the child are preserved. Thus, in making decisions that affect children one must evaluate the positive or negative impact it will have on them (Committee on the Rights of the Children, 2013).

The Bangkok Rule 2(2) provides that females with childcare responsibilities should not be detained during trial. Section 313(A) of Ghana's Criminal Procedure Code 1960 (Act 30) demands that the sentence of a pregnant female must be suspended until an appropriate time. Similarly, Ghana's 1992 Constitution states, "special care shall be accorded to mothers during a reasonable period before and after childbirth" [Article 27(1)]. Are these provisions implemented in Ghana? Evidence from Ghana prisons reveals that there are several pregnant women inmates, indicating that the courts do not adhere to the above provisions. Occasionally, NGOs help them financially with antenatal and postnatal care in the hospitals outside the prisons (Ibrahim, personal communication, January 29, 2021).

3. Introduction of Imprisonment in Ghana - Punishment before Colonial Rule

Before colonial rule, the different ethnic groups in Ghana had their own punishment systems.[1] In the Northern part, murder was a sin against the Earth and the Ancestors. Among the Ashanti tribe, murder, sexual offences, cowardice in war, and witchcraft were heinous crimes that break the ties between the society and the tribal gods. In both tribes, offenders were obliged to make sacrifices or are killed to appease the gods. The Fante tribe instituted a utilitarian approach. If a person stole food out of hunger, he went free (Seidman, 1966). The Ewe tribe's 'Trokosi' system was rather inhumane. Any aggravated offence was a sin against the gods, and the offender was killed or instead, gave out his prepubescent girl to the priest. She served as a slave and sexual partner to the priest, while he restricted her movements. In 1998, Parliament of Ghana passed a law to abolish it when over 3500 young girls were reported to be

[1] The British made Ghana (Gold Coast) its colony in 1874 and brought a lot of changes to the justice delivery sysstem and cultural aspirations of the Ghanaian people. Since independence from the British rule in 1957, Ghana has maintained the Anglo-Saxon legal system introduced by the British.

serving under 'Trokosi' (Greene, 2009). Whether the perpetrators obeyed this ruling, calls for an in-depth investigation into it because there is always a disconnect between the laws and implementation in Ghana (Ministry of Gender, Children and Social Protection, 2014).

3.1.Prisons System During and After Colonial Rule

Even though some of the pre-colonial punishments were inhumane, offenders were not imprisoned. They served their punishment from home while caring for their families (Akoensi, 2014). Governor George Maclean began the prison system in Ghana with 91 debtors incarcerated in 1841. Later, he officially instituted prison cells in four forts (Seidman, 1966): James Fort (1662), Cape Coast Castle (1664), Winneba Castle (1694), and Fort William/Anomabu (1753), which housed 129 inmates (Salifu, 1980). This was the leadup to the adoption of the Prisons Ordinance 1860 as a guide to the provision of safekeeping measures for inmates, to conform to the prison system in England. The prison operated on three pillars: the separate system, penal labor, and minimum diet (Seidman,1966). Presently, England has non-custodial punishments including CSO (Parliamentary Office of Science and Technology [POST], 2008), whereas Ghana continues to operate on these pillars. Theoretically, they have been improved in the current prison Act (Sections 32, 35(1)(a), 37, and 42(4)), but practically, they are in their worse forms (Fatoki, 2021).

Currently, the number of prisons in Ghana is 43 out of which 7 are female. As of June 2021, the total population of female inmates is 188 (Institute of Crime and Justice Policy Research, n.d.), including four pregnant women and a nursing mother (Ibrahim, personal communication, January 29, 2021). As the initial intent for prisons was for males only, presently females have been added to the same facility while no significant expansion has been made to suit them, increasing their vulnerability (Sarpong et al., 2015). Ghana Prisons Service (2015) reports that the appalling state of the prisons needs total overhauling.

3.2.While Mothers Remain in Prison, Who Takes Care of Their Children?

When the father is incarcerated, obviously the mother is in control, but incarceration of a mother often incites a question like 'who takes care of the children?' Teiko's (2017) research discloses that men are unable to cope with childcare responsibilities when the woman stays in prison for more than four years. McLeod's (2017) research reveals that mothers' incarceration has negative effects on children's adjustment. They become hostile towards their caregivers and are likely to engage in social vices which can send them to prison in their adult lives. These children are six times more likely to become incarcerated themselves, and it is prevalent among those whose mothers are incarcerated (Martin (2017). For the women, the biggest punishment during incarceration is separation from their children. One female inmate bemoaned, "I can do time alone OK. But it's not knowing what's happening to my son that hurts most [sic]" (Parke & Alison 2001, para 1). Another one said, "I just don't want to be here. I want to go home. My child is my problem. I want to go home [sic]" (Amnesty International, 2012, p. 6).

Article 9 of the UN Convention on the Rights of the Child provides that children must not be separated from their parents. Does it also mean innocent children should be in prison with their mothers? Appiahene-Gyamfi (1995) answers that it is a violation of the rights of the children found in the prisons. Amnesty International reports (2012) that in Ghana, only Nsawam

Women Central prison operates mother and baby unit to keep the mother-child bond after birth, but the food and medical care of the babies are not covered by the prison service. The mothers rely on families and/or donors to care for the babies. Hence, CSO as an alternative to incarceration for women is crucial.

In Bowlby's attachment theory, children are programmed to survive on the attachment they form with their primary caregiver after birth. Certainly, mothers as primary caretakers provide this essential attachment (McLeod, 2017). Ghanaians believe that girls' maturity, knowledge in menstruation, marriage, and sexuality depends on the mother, therefore they need the mother's guidance in their early years of life (Teiko, 2017). How are these children cared for after the mother's incarceration? The UN Special Rapporteur observed that women who deliver in Ghana's prisons wean the baby after two years and the Social Welfare separates the children and places them under institutional (orphanage homes) or foster care if no reliable family member is identified. The women dislike this moment and complain that the separation is done when it is not due (Méndez, 2014). But which one is preferable, maternal, or institutional care? The Social Welfare officials confirmed that maternal, or parental care is superior to orphanage homes. Some of these children abscond from the orphanages or family homes because of neglect, discrimination, deprivation, and exploitation to stay in ghettos thus, losing the country's future professionals to the street (Acquaye, Opong & Larbi, personal communication, January 28, 2021). The adolescent girl among the neglected children automatically becomes the mother. She may be involved in social vices to fend for herself and her younger siblings. Irresponsible men take advantage of her and impregnate her, increasing their impoverishment (Teiko, 2017).

Programs in the orphanages are also unreliable as it creates adjustment problems for the children during family reunion. The children who profess faiths other than the one found in the institutional homes are unable to practice their faith (Acquaye, Opong & Larbi, personal communication, January 28, 2021). The foster care system was adopted in 2019 to gradually fade out the orphanages. By this, they can place the children under caregivers with similar ethnic or religious beliefs, fulfilling the provisions under Article 25 (3) of the African Charter on the Rights and Welfare of the Child. Presently, fifty (50) voluntary foster parents have been trained, issued licenses, and are being monitored too, because they cannot adopt such children. Their eligibility depends on their health, security, and employment statuses. They are not paid for this responsibility, so the Social Welfare pays the medical bills of the children. Women who finish serving their prison term may decide to allow their children to continue to stay in the institutions because of financial difficulties and she can go for them at any time (Acquaye, Opong & Larbi, personal communication, January 28, 2021).

Officials from Social Welfare acknowledged that their outfit is faced with enormous constraints, impeding their progress. They enumerated several laws like Foster Care Regulation (2007) and Human Trafficking Act (2005), that Ghana has adopted to protect vulnerable groups, but these children continue to suffer. For them, enforcement is not encouraging for a lack of human and financial resources (Acquaye, Opong & Larbi, personal communication, January 28, 2021). Both the Regional and District offices have limited logistics and budget, contributing to their ineffective supervision and inability to protect these vulnerable children. There is no incentive to work, poor salaries, and no allowance for those who work on weekends (Acquaye, Opong & Larbi, personal communication, January 28, 2021). The 'prison after care agents' are liaisons between the incarcerated mothers and the children. They plan for the children to visit their mothers and organize counselling for the children after their mothers' incarceration. This

activity is ineffective for lack of funds (Acquaye, Opong & Larbi, personal communication, January 28, 2021).

3.3.Gauging the Effectiveness of Imprisonment

To call on the government of Ghana to institute and implement non-custodial sentences like the community service order (CSO) for women offenders, it is crucial to determine if imprisonment has been successful or failed. Imprisonment is the imposition of involuntary physical confinement to restrict an offender's freedom of movement (Peter, 1995, p. 3). In Ghana, the aim of incarceration is deterrence, protection of the public, rehabilitation, reformation, resocialization (Appiahene-Gyamfi, 1995), and reduce recidivism. Rule 4 of the Mandela Rules provides that the time spent in prisons must be geared towards programs that will allow reintegration, law-abiding and self-supporting lives after prison (Penal Reform International, 2019). Has imprisonment been successful in fulfilling these purposes?

To Cesare Beccaria, imprisonment deprives offenders' freedom for a certain duration and that will stick in their minds and effect change or serve as deterrence (Thorsten, 1967). Jeremy Bentham believed that his prison concept, *panopticon*, a Greek word for "all seeing" would have been the ideal model but it was rejected. It was designed to save resources and enhance inmates' conformity to authority because they will feel that they are under constant surveillance when they are not (White, 1995). Appiahene-Gyamfi (1995) thinks that the criminal justice system, penal laws, and incarceration must be obliterated completely, because imprisonment is repressive, and deterrence has never been achieved. The administration of justice is "too costly, too painful, too destructive, too inefficient, too slow, and too complex for a truly civilized people" (p. 1). The penal policies and strategies to achieve the purpose of incarceration in Ghana are inadequate, dysfunctional, and have failed to reduce crime. The re-socialization program is inappropriately done and has failed to make the inmates good citizens after prison. Again, the public and all actors in the criminal justice system are confused about their unique roles to achieve deterrence and reduce recidivism in Ghana (Appiahene-Gyamfi, 1995).

In Ofori-Dua et al.'s (2015) research, 34% of Ghanaian inmates were recidivists, making them conclude that incarceration is not serving its purpose. This led to overcrowding and the death toll increased from 72 in 2010 to 82 in 2011. They suggested that CSO must be considered in Ghana. Still, it is uncommon to record overcrowding in female prisons, the Kumasi prison recorded 47 instead of 30 female inmates in 2011. Their condition puts them at higher risk of acquiring HIV/AIDS due to the sharing of sharp objects like razors, needles, and engaging in unprotected sex (Amnesty International, 2012). Rehabilitation must be the ultimate goal. Incarceration has negative consequences on third parties, so the governments must focus on investing highly in economic and community development (Pritikin, 2008). Likewise, an excerpt from the Kampala Declaration on prison conditions in Africa states: "imprisonment does not serve the interests of justice, nor does it protect the public, nor is it a good use of scarce public resources" (The Kampala Declaration, 1996, p. 4).

3.4.Reasons for the Human Rights Abuses of Female Inmates

The factors contributing to the human rights abuses of female inmates in Ghana are multifaceted, but the space allowed in this article accommodated the crucial ones. Among the

reasons are financial constraint and sheer disregard for women offenders and their children. The prison service complains that its annual budget is insignificant that they are unable to implement vital programs as the law requires of them (Ghana Prison Service, 2015). Nevertheless, suboptimal implementation of laws is found to be part of the Ghanaian society, contributing to the country's under-developed status. Professor Opanyin Agyekum of the University of Ghana observed that Ghana has laws prohibiting many things, but the personnel put in charge of implementation is the country's biggest problem (Despite Media, 2021). So, is the prison service right to attribute its lax implementation of laws to financial limitation?

3.5.Budget Allocation to Ghana Prison Service

The prison service often complains of inadequate budget allocation which hampers its ability to run important activities to bring dignity, reformation, and rehabilitation to inmates (Ghana Prison Service, 2015). As usual, the 2022 budget statement presentation did not address the prison service but specified programs to revamp the police service (WoezorTV, 2021). The Prisons Service Council (2016) confirmed that the 2013 budget was reasonable, but it declined in 2015 and 2016. The profit from the Agricultural activities in the prisons is also inadequate and the public does not patronize products from prisons, so they will earn income to supplement its budget. For instance, the James Camp Prison's cement block factory produces only 300 instead of 2000 quality blocks for lack of funds (Ghana Prisons Council, 2015). However, several philanthropists periodically donate cash and groceries to the prisons as a response to their grumbles (Ibrahim, personal communication, January 29, 2021). In September 2021, Crime Check Foundation donated GH¢30,000.00 (*CCF Donates Cash to Prisons Service*,) to the prisons and the populace quizzed if all these resources are used purposefully. Or they are diverted without reaching the inmates (Fatoki 2021, p. 41)? In September 2021, Crime Check Foundation donated GH¢30,000.00 to the prisons and Ghanaians quizzed if the money would be used purposefully (Ghanaians React to GHS 30,000 Donation Made to Ghana Prison Service, n.d.).

Currently, the daily amount allotted per prisoner is GH¢1.80 and the constant call for an upgrade to GH¢5.00 has fallen on deaf ears (Amnesty International Ghana Advocates Increase in Feeding Grants for Prison Inmates, 2021). For this reason, the prisoners lack nutritional food and basic amenities, breaching Sections 1 & 2 of the NRCD 46 which instruct them to prioritize inmates' welfare and safe custody Similarly, Sections 35, 36, and 37 of the NRCD 46 is not implemented, accounting for the poor healthcare of inmates, unhygienic environment, and unaccommodating space in the prisons. Inmates confirmed, "They don't give us shaving stick. We never get soap to wash unless your family bring you soap [sic]" (Amnesty International, 2012, pp. 23 &34). The women easily get skin and vaginal infections, but their healthcare service is poorer than the men (Sarpong et al., 2015,). If CSO is applied in favor of women offenders, their prisons can accommodate the men to reduce the mess at the men's penitentiaries, until the government is ready to implement CSO for all.

3.6.Disregard for Incarcerated Women and their Children's Human Rights

Women are expected to lead a morally good character in Ghana, confirming Lombroso's assertion that "women, as required by their nature, are in fact the defenders of the social order" (Şahin, 2015, p. 1496). Hence, they experience stigmatization when incarcerated and family

members may distance themselves from such women (Anku, 2021). A brief history of how women were relegated to the background will give some clues as to why incarcerated women and their children are not given the necessary attention until today. Mikell (1992) contends that before, during, and after colonialism in Ghana, women were sidelined with regards to inheritance, property acquisition, education, economic and social activities. Wives and children were not entitled to inherit their respective husbands and fathers' estate upon demise. The sole heir was the deceased's maternal nephew (Mikell, 1992).

During the British colonial rule and its introduction of the court system, some brave women pursued their rights to inherit their husbands' estate in court, though unsuccessful because of the strong application of the indigenous laws (Mikell, 1992). In *Quartey*, the plaintiff's claims were dismissed. The judge recapped the principles of the customary law that denies a widow and her children from inheriting the husband's property. No matter her support for the husband in acquiring the property, it is not joint ownership, unless he gifted her something before his death. This and other outcries by widows who lose everything after the death of their husbands led to the adoption of the Intestate Succession Law 1985 (PNDCL 111) to correct the irregularities in the indigenous system of inheritance. It offers protection and security to widows and their children (Gedzi, 2014). The law also provides a system of distribution of the property so that the man's family, the children, and the widow are satisfied. It prohibits ejection of the widow and children from the deceased's house before the devolution of the property (Provisional National Defense Council Law [PNDCL] 111, Sections 3 to 17).

In terms of education, boys are always the preference, especially if the family's finances are weak. The notion that girls would be married off no matter their education clouded the family's thinking, even after Dr. Kwegyir Aggrey's popular assertion about the importance of educating the girl child (Famous Quotes and Sayings, n.d.). Now, both boys and girls are given equal opportunities to explore their aptitudes, but some cultural and economic obstacles prevent the girls and women from exhibiting their full potentials (Amu, n.d.). In 2017, the Free Senior High School policy was introduced to protect those with financial glitches, close the educational rift between boys and girls (Free SHS policy in Ghana, n.d.), and fulfill UN's Sustainable Development Goal 4.1.

The advocacy to recognize women's rights in Ghana is an admission that women are invisible creatures in society, and incarceration worsens their predicament, especially issues relating to healthcare (Braithwaite et al., 2005). Sarpong et al. (2015) disclosed that the healthcare givers in the male prisons get the opportunity to update their skills, whereas their female counterparts do not. Why are female inmates facing challenges when Ghana has substantial women advocacy groups like Women's Initiative for Self-Empowerment (Torto, 2013)? And why are these groups not campaigning for a pregnancy test before incarceration as stipulated in Section 313A of the Criminal Procedure Code? Do they frequent the prisons to listen to the women inmates at all? The impact of these prominent groups on Ghanaian women is undoubted, and the expectation on them to persuade the government to adopt the CSO for women offenders is high. About five women offenders are on the death row and these groups seem to be unaware. At the 19th World Day against the Death Penalty 2021 dubbed, "Women and the Death Penalty, an invisible reality," Mr. Frank Kwaku Doyi, the director of Amnesty International Ghana appealed to all stakeholders to jointly help to scrap death penalty from Ghana's criminal justice system. It violates the right to life under the Universal Declaration of Human Rights. (160 Inmates on Ghana's Death Row, 2021).

As human rights activists push for the eradication of death penalty, and the establishment of CSO in Ghana, the quandaries of the victims must also be a priority. Thus, a proper compensation scheme should be instituted for them (African Union, 2003). A Ghanaian lawyer Musah Suleman (personal communication, September 24, 2021) indicated that victims are usually satisfied when culprits are punished harshly because their idea of punishment is different from what punishment seeks to achieve, so education and valuable reparation will be helpful. They will understand why CSO, and other related punishments reduce crime, but death penalty does not (Death Penalty Information Center, n.d.). A victim of fraud alleged that the fraudster's 68-year-old mother was aware of her son's activities thus, she was arrested when the son escaped. She was seriously sick that she could not even control her faeces and urine, had swollen legs because of diabetes, and walk with difficulty. She was fined GH¢3600.00 (CAN$763.20) but was imprisoned because she could not pay the fine. Her documentary is pathetic, and one wonders why Ghana's criminal justice system does this to its own citizens. Crime Check Foundation paid the money imposed on her, and she was released (Crime Check Tv Gh, 2018).

The Banjul Charter indicated an intention to remove all forms of colonialism from Africa as the people struggle to gain dignity and liberation. But how do the African leaders treat their own people, particularly offenders, when they get the power to rule? Inhume treatment abound, violating the spirit and letter of the AU's Banjul Charter (African Union, 1981).

4. Recommendations

If women offenders are respected without stigma and given the necessary rehabilitation, they will be useful to society as well as their children. All stakeholders have a part to play in the implementation of the following recommendations:

1. Ratification and subsequent implementation of the Bangkok Rules must be a topmost priority because women prisoners are vulnerable, their reintegration into society is difficult, their incarceration adversely affects their children, and they do not cause public panic (UNODC, 2010). A State Attorney C. B. Keteku (personal communication, January 26, 2022), mentioned that the kinds of offences that are commonly prosecuted among women in Ghana attest to this. In the Eastern Region for instance, between 2020 and 2021, misdemeanors were common but only four women were prosecuted for a capital offence and few second-degree felonies like theft were recorded.

2. If the bill on CSO is eventually passed, the guide to its implementation must ensure that it exhausts all the work the court can impose on the women. Kenya adopted the Community Service Order Act Cap 93 to regulate the CSO and provides all the list of work to be imposed on the women offenders.

3. The well-being of the children of incarcerated mothers must be an urgency, therefore, social welfare and the 'prison after care agents' must be resourced so that they can perform their responsibility towards these children.

4. A special supervisor should be assigned to the prisons like the correctional investigator in Canada (Zinger, 2020) and as done by the AU and UN Special Rapporteurs. The Commission on Human Rights and Administrative Justice is supposed to do this in Ghana, but the scope of its work is too broad, thwarting its prisons supervision (Constitution, 1992).

5. The services of Penal Reform International are needed in Ghana. It facilitated the public education and the structures of the CSO system in Kenya and other East African countries. In Kenya, Canada, and even United Kingdom, the people consider CSO as too lenient and public education created awareness and acceptance (Penal Reform International, 2016).

6. In 2019, the writer's visit to Bosnian biggest prison with Assist. Professor Ena Kazic, a law lecturer at the International University of Sarajevo, discovered that well-behaved inmates are allowed to visit their homes occasionally. They spend some time with their families to relieve boredom, stress, strengthen family bonds, and return to prison. Incarcerated women who get the opportunity to see their children during this visit are full of joy and this example is worthy of emulation as Ghana is yet to institute CSO.

7. Women advocacy groups, NGOs, or individuals must be proactive enough to be able to submit a private bill on affirmative action policy to parliament. There are women members of parliament and several women organizations who can work together on this agenda. Adoption of affirmative action act is likely to hasten the ratification of the CSO bill.

8. In Kenya, Canada, United Kingdom (POST, 2008), and Hong Kong (Social Welfare Department, 2005), the women under CSO are not paid for their work. As most of the women offenders in Ghana are impoverished, it would be suggested that they are given some token when working under the CSO, to care for their dependant(s) and avoid recidivism.

5. Conclusion

It is vital to draw the attention of all patrons to the need to reconsider how mothers' incarceration victimizes the children and families in Ghana. Such children are likely to engage in delinquent behaviors and the country losses its future professionals to the street and eventually to the prison (Mallicoat, 2021). If the child's best interest is the goal as specified in Article 2 of the Children's Act and Article 3 of the Convention on the Right of the Child, an alternative to incarceration is needed to ensure a continuous bond between mother and child. Experts continue to persuade the government to adopt CSO, verbal sanctions, confiscation, and parole (Amnesty International, 2012) to eradicate the victimization of children of incarcerated women in Ghana.

Sometimes the mother's incarceration brings double victimization to the child and the trauma they through must be of great concern. A seven-year-old son of Rosemond Alade Brown was in such a situation. In The Republic v Rosemond Alade Brown, the defendant was sentenced to 90 days imprisonment for breaching the publication of obscenity rules (Criminal Code of Ghana, 1960) and Domestic Violence Act (2007). No doubt she abused the child by taking her nude picture with him and she posted it on her Instagram page. But her imprisonment also victimized the child as she is a single parent caring for the boy. CSO would have been a perfect punishment to keep the bond between them. CSO also helps to decongest the prisons and makes the offenders more responsible. Women under CSO in Kenya can attest to this (Ngetich, Murenga and Kisaka, 2019).

In the nutshell, the preceding discussions expose the weakness of the Ghanaian criminal justice system and how it adversely affect the children of incarcerated women. The writer is convinced that, implementation of the above recommendations will reduce the hardships and human rights abuses of the incarcerated women and their children, who are the country`s future leaders.

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INTERNATIONAL ANTI-DUMPING LAWS AND COMPETITION: MAPPING THE WAY FORWARD IN INDIA

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Abstract

Dumping occurs when the goods exported by one country are at a price that is generally less than the usual selling price of that product. Anti-dumping measures were introduced into the International Trade regime to safeguard and protect the market from the wrath of such cheap international practices. In India, it is enforced via the rule embodied in 9A of Customs Tariff Act of 1975. The competition law regime also aims to protect the market from such unfair practices of trade. Competition laws evolved, while anti-dumping laws were confined within the shackles of the WTO regime. Despite budding from the same family tree, the two regimes diverge widely in practice. Contrary to competition law which aims at promoting consumer welfare and competition, antidumping laws have become a protectionist tool in the hands of the countries, used for protecting domestic producers. This paper attempts to discuss this area of conflict between anti-dumping laws and competition laws and attempts to identify the issues around the existence and implementation of anti-dumping measures. It advocates for replacing antidumping laws with International Competition Laws focused on ensuring healthy competition and consumer welfare.

Keywords: Anti-Dumping, Dumping, Legal Remedies, Protectionism, WTO

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1. Introduction

International Trade Law, as governed by the World Trade Organization, ensures fair play in global trade. Binding Tariffs and applying them equally to all trading partners are mandated by WTO via its Most Favored Nation Clause, thereby ensuring a smooth flow of trade in goods and services. However, WTO has listed certain exceptions, which allow member countries to bypass such rules. One of such exception is the action taken by member countries against dumping, i.e., the act of selling by other member countries, of goods, at an unfairly low price in the market of other member country. Similarly, some subsidies as well as countervailing duties are also allowed to offset the effect of such unfair trade practices on the domestic industries of the member country.

If a company is involved in exporting products to other countries at a cost that is lower than what it normally charges for it in its own market, then such a trade practice is called dumping. Dumping can create trade distortions and thus anti-dumping rules come into the picture (Sykes, 1998). Anti-dumping measures, along with other tools and safeguards, are methods for protecting domestic industries from the wrath of cheap international imports (Aggarwal, 2002). Although the World Trade Organization regime aims at decreasing the tariff and non-tariff trade barriers, anti-dumping measures have acquired the status of an important tool for the protection of the domestic players and industries. They allow the nations to temporarily protect their economies against the shocks and disturbances in trade patterns (Matsushita, 2017), provided they can show genuine injury to the domestic industry. Many members often consider it to be essential for furthering free and fair trade-in and within the country (WTO). Article *VI of General Agreement on Tariffs and Trade* (GATT, 1994) *as well as the Antidumping Agreement provides framework for the members of the WTO* for tackling and responding to dumping.

Since its acceptance in the 1990s, the antidumping measures increased International Trade by 80% from 1990-2003 (Yilmaz,). The measure was essential as dumping had emerged as one of the major issues in international business and commercial laws. Globally, *India has used these anti-dumping measures very frequently.* India initiated 180 cases between 1995 and 2000 which amounted to 12% of the total cases initiated all around the world (Choubey & Singh, 2003). In India, *Sec. 9A of the Customs Tariff Act, 1975 and Customs Tariff Rules, 1995 form the basis for inquiry and investigation into dumping activities.* These are in line with the international rules as laid down in the WTO. In India, the anti-dumping duties are recommended by the Department of Commerce, which is finally imposed via a Notification from the Finance Ministry.

Similarly, with the initiation of the process of economic liberalization in 1991, India started its journey towards becoming a market economy. The Competition Act 2002 was passed replacing the Monopolies and Restrictive Trade Practices Act (MRTP, 1969). The new Competition Policy was aimed at promoting overall efficiency in the newly liberalized economy. *The two have a common origin as they aim at protecting the market from unfair trade and unethical practices, however subsequently they diverge their path* (Khan, 2016). Initially, the competition laws and the anti-dumping rules were considered complimentary to one another. However, as can be seen, these two rules can be said to be at crossroads.

Competition law focuses on promoting competition in the market, whereas antidumping laws follow a rather narrow approach, i.e., of protecting the domestic industry (CCI, 2009).

Moreover, several scholars have suggested, over the years, that anti-dumping laws have certain fundamental problems. *The large-scale use of such measures has raised concerns about the misuse of this measure as a protectionist tool.* This article tries to highlight and bring to light the conflict between competition and antidumping laws and advocate against the usage of antidumping regulations in the International Trade Regime. The paper starts with highlighting the history of anti-dumping rules and Competition laws, globally as well as in India. Further, the paper tries to highlight the relationship between anti-dumping laws and the competitiveness of a market. Finally, the paper advocates the need for an International Competition Law and concludes with the suggestion that the antidumping regime is not so efficient while the competition regime of the international application is the most efficient way to promote and protect the competitiveness of the domestic as well as the global market.

2. Research Methodology

The paper arises due to curiosity to find answers to an existing problem in the Indian Markets today. Scientific research and review were carried out to find out the truth about the subject matter of the paper. The research paper has followed doctrinal research methodology and analytical, wherein the researchers have reviewed various acts, rules, and regulations of the Government as the primary source for data collection. The secondary sources of data have been the judgments of the Hon'ble Supreme Court and High Courts, expert opinions, journals, and news articles. The researchers have analyzed the critical issue through an examination of the statute, and historical or comparative growth of any legal jurisprudence in the subject matter in India or any other jurisdictions. The research databases like Westlaw, Hein Online, JSTOR, and Manupatra are used for the collection of secondary data for the analytical study.

2. Finding and Discussion

2.1. History of Anti-Dumping Rules and Competition Laws

Anti-dumping rules were initially developed in the early part of the 20th Century. *Canada was the first nation that introduced such a legislation in the year 1904 which was subsequently followed by Australia in 1906 and the USA in 1916. The UK also adopted its first legislation in 1921*. Despite this, it remained an unused instrument even after being incorporated under GATT 1947. Later, trade negotiations focused on a more standardized approach for antidumping measures, and it was later adopted in spirit after the Uruguay Rounds. The parties are given the right to apply anti-dumping measures if the import is damaging or has the potential to damage the domestic industries of the contracting party. Similarly, if the import is affecting the competitiveness of the market by causing appreciable adverse effects, they may apply such measures against such imports.

The rationale and jurisprudence behind the application of anti-dumping measures justify it on numerous socio-economic grounds. Distributive justice, however, can be a primary factor aiding the growth of anti-dumping laws, thus aiming to maintain a balance between countries and their industries participating in global trade. The power imbalance is relevant in

trade discourse, as countries take aid of this imbalance to implement various forms of trade distortions (Khare, 2019).

Competition or Anti-trust law, on the other hand, has a long history. It dates back to the Middle Ages when cartels were supposed to be tackled (Fox, 1999). *The Clayton Act of 1914 and the Sherman Act of 1890 can be said to be the first modern body of legislation dealing with Competition Laws* (Passmen, 2009). Gradually, as the problem of cartels and monopolies grew, competition norms were introduced and strengthened. India on the other hand, introduced the competition law framework in 1969 as the MRTP Act, which was subsequently replaced with the Competition Act, 2002 in light of the changing business and market environment. This law has grown multifold with rapid industrialization and integration of the global market. The basic aim of competition law in any jurisdiction is to ensure economic efficiency, while prohibiting and sanctioning business conduct that is antithetical to the competitiveness of the market like collusive agreements etc.

2.2. Dumping: Effects on Local Markets in India

Dumping, as explained earlier, can distort markets easily and GATT has, in view of this, authorized signatories to apply duties to offset dumping if "it causes or threatens to cause material injury to an industry within the territory of importing country." Dumping is a mechanism which determines the competitive outcomes in the markets by distortions and not by its relative competitiveness. Over the long run, dumping can deter investments in the market where it is happening and may permit a less efficient business to displace an efficient competitor by mere market distortions. Thus, it can be said that dumping erodes the national industries and leads to job losses for reasons unrelated to normal competition in the market and thus needs to be regulated.

In India, the deluge of Chinese imports, for example, has adversely affected India's manufacturing sector, particularly the MSME sector. Dumping by China has caused many Indian industries to operate below profitable levels and eventually shut down leading to job losses and losses of national GDP. In view of this, for example, in December 2022 India had imposed anti-dumping duty on stainless steel, seamless tubes, and pipe imports from China to remove the injury it was causing to the domestic industries.

2.3. Governments' Efforts against Dumping and Promoting Domestic Competitiveness

Indian government has performed a proactive role when it comes to ensuring that dumping doesn't affect the competitiveness of the market. To ensure that dumping doesn't affect the domestic market, GOI has been imposing anti-dumping duties against exporters who cause substantial injury to domestic industries in India under *Sec. 9A of the Customs Tariff Act, 1975 and Customs Tariff Rules, 1995*as explained earlier. Initially, the law was promulgated to protect the Iron & Steel sector, however, today applies to any product causing grave damage to the different domestic industries in India.

For initiating anti-dumping proceedings an application must be filed by the domestic industry or the Directorate General can take cognizance on its own. After the initiation of an investigation, views are invited from domestic producers constituting 50% of the total domestic market. Based on preliminary inquiry, the provisional duty can be levied (https://www.dgtr.gov.in/faq).

The act lays down that government can impose anti-dumping duty after it conducts inquiry and determines the normal value, export value and the margin of the product being dumped. As per the *Directorate General of Trade Remedies*, under the Ministry of Commerce, apart from cheap imports and injury to domestic industries, a causal link between the two must be established before any investigation can be initiated. After it is established, DGTR recommends to the central government regarding imposition of the anti-dumping duty, which as per the International and Domestic Laws, cannot be more than the margin value of the dumped product. If approved by the Cabinet Committee on Economic Affairs, which is chaired by the Hon'ble Prime Minister of India, the duty is imposed.

Apart from this Government of India also provides subsidies to the food industry, within the permissible limits of WTO as per Peace Clause, agreed under Bali Ministerial Conference of 2013, which allows developing countries to provide subsidies under public stockholding programs until a permanent solution for food subsidies is agreed. Apart from this, requirements like Domestic Content Requirement in the products like solar panels has been aimed at promoting local industries engaged in this sector. India also imposes certain import quotas on items imported to ensure that, firstly domestic industries are promoted and secondly to manage its trade balance with countries. Finally, to promote domestic manufacturing of arms and weapons, India has also prepared a negative list of imports, containing items which are prohibited from being imported and must be produced domestically in line with the Make in India initiative.

All of this ensures fair competition in the market while also ensuring that domestic producers are not at a disadvantage due to foreign market manipulation.

2.4. Antidumping Laws and Competitiveness of the Markets

As already stated, the two laws stem from the same family tree. They were thought to be able to complement each other. But the two diverged into different paths. Also, competition law evolved widely and rapidly as compared to the antidumping norms (Wooton & Zanardi, 2005). On the contrary, the legal regime of antidumping has evolved within the confines of WTO and is being criticized as being a protectionist tool in the hands of governments aiming to protect their domestic industries. The interface between the two can be understood on a conceptual and empirical level. The modern interpretation and application of antidumping laws have facilitated the kind of unfair and anti-competitive behavior which is intended to penalize and prevent in the market (CCI, 2009).

Dumping acts as a threat to the domestic firms in the country of import as consumers prefer the cheap imported goods over the domestically manufactured goods. This benefits consumers in the short run but is detrimental for them and the market in the long run. The firm will gradually increase its prices at monopolistic levels, after removing all other competition. Thus, generally, anti-dumping laws create a level playing field for domestic producers. However, they are applied on a discriminatory basis and create unnecessary tensions amongst trading partners. Antidumping rules have been used as a mechanism to protect the inefficient domestic markets.

Considering the importance of competition laws as well as the antidumping laws in influencing trade and commerce within domestic markets, it becomes essential to study the relationship between them. It is also essential considering India is amongst the topmost users of the antidumping measures. Experts are of the view that antidumping laws are nothing, but

Competition Law applied in extraterritorial context, however, due to issue and lack of growth, it has outlived their utility (Oliver, Jean Maries & Jaime, 2000). Moreover, the laws of antidumping have failed to solve or address competition-related concerns as every act of price discrimination affecting the domestic industry is attached with sanctions, which can certainly affect or be in conflict with Competition Law. Antidumping rules allow quantitative trade restrictions, which are otherwise not allowed under Competition Law, while it penalizes certain price differentiations and related agreements which may be valid and justifiable under Competition regimes globally.

Despite the Uruguay Rounds improving the GATT rules, *the antidumping rules have been used to protect the local industries from valid and legitimate competition.* Although these measures can be considered as good protection valves for countries facing liberalization, they create political and economic tensions (McGee, 1994). Unlike Competition Laws, antidumping rules while remedying injuries to local industries fail to address the question of public welfare. Similarly, the antidumping rules are indifferent to the question of economic efficiency and focus on the protection of domestic producers only. *It is the competition law that ensures optimum utilization of resources thereby leading to economic efficiency* (Sharma, Singham & Venkatswamy, 2011).

Despite the popularity of antidumping norms, the theoretical understanding of such action has been criticized. *Economists do not support antidumping laws because for them the price discrimination involved in the transactions is fair and rational* (McGee, 1993). Further, the anti-dumping laws do nothing to offer protection to the domestic industries and local markets which they intend to protect. Considering that the number of international players is ever-increasing, it becomes impossible to complain against all of them. Also, *an uncompetitive company, which is given protection, might not benefit from it in the long run*.

Despite the saying that the consumer is king, the antidumping measures protect producers at the cost of consumers. *The protection measures often lead to higher prices, low quality, and a lowering of the standards of the products as well as the markets, thus hurting the consumer* (Taylor, 2006). Competition law on the other hand aims for and assures consumer welfare by regulating quality and standards in the market. Many authors have argued that anticompetitive effects arise from the mere existence of antidumping laws (McGee, 2008). Due to the presence of these norms, foreign suppliers will be hesitant in competing aggressively. *This leads to an increase in prices by the domestic players who are assured that they cannot be underpriced by foreign suppliers* (Chugh, 2010). Moreover, anticompetitive effects arise out of how the antidumping laws are implemented. Notwithstanding the presence or absence of predatory intent on the part of the seller, *the mechanical definition of dumping makes every export at a lower value subject to investigations* (Singham, 2007). Also, any and every producer, within the meaning of *domestic industry*, can request investigations under the antidumping regime in India (Bhatt, 2003). *This has led to many cases of frivolous complaints and has disrupted the balance of the foreign player in the market*. These infirmities in the rules and procedure can very well lead to anticompetitive results and can therefore challenge the very existence of a competition law regime.

On the point of conflict or relation between these branches of law, the Supreme Court in *Haridas Exports v Float Glass Manufacturers Association* (2002 6 SCC 600) analyzed the jurisdiction of the MRTP Commission with respect to the antidumping provisions in the Custom Tariffs Act. Hon'ble court, in that case, had observed that both these laws were

operating in separate fields and had differing purposes, and thus jurisdiction of one is not ousted by the presence of the other, as the MRTP act is not having extra-territorial jurisdiction. As things stand, courts consider anti-dumping and Competition as being mutually exclusive. However, now that the Competition Act 2002 has replaced the MRTP Act, this stand might change considering that the new law has provisions which enable its extra-territorial jurisdiction.

3. Conclusion: Need For International Competition Law

Considering the costs associated with the presence and imposition of anti-dumping duties, it is considered as trouble-making diplomacy (Hora, 2015). *Commissioner of the International Trade Commission stated that the purpose of antidumping is not to protect consumers, but the producers thus granting economic benefits to the producers and economic costs to the consumers* (Araujo Jr, 2001). The main aim of antidumping is to protect the interest of various domestic players and industries. However, the less efficient ones also get protected as a consequence of this.

As already discussed, antidumping also fails on the grounds of economic efficiency and consumer welfare. All of this has led to a demand at the international level that the anti-dumping laws must be dumped and replaced by international competition laws, focusing on the welfare of the consumer, rather than the producers. *A standard competition law regime will potentially shift the focus of the measures from the firms to the consumer, thereby creating efficiency, increasing choices, and generating competition in the market* (Bhalla, 1995).

The antidumping law still holds well because formation and application of the international competition law has not been politically and diplomatically possible (OECD, 2000). The lack of unambiguous and clear laws of competition in the multilateral trading regime has led to the mushrooming of anti-dumping laws globally. Within WTO, there is an absence of norms regulating competition, thus countries must either use domestic competition law or resort to measures like antidumping. As a consequence, if a foreign enterprise abuses its market dominance, the lack of extra-territorial application of the competition regime limits its ability to deal with such acts of transgression (Wooton & Zanardi, 2002). Therefore, governments end up resorting to the use of antidumping laws as an alternative (Epstein, 2002).

These criticisms lead us to a conclusion that these antidumping regimes are destroying the competition by being protectionist in nature. Still, it will be unjust to argue that antidumping laws and rules are inherently anti-competitive. The thin line difference between protection and competition must be ensured. The effect of antidumping would depend upon the manner of their application (Lester, Mercurio & Davies, 2012). If applied to grant undue protection, then it will certainly hamper competition thereby hampering the interest of the consumers.

However, considering the rate at which global trade has grown over the years, *WTO mandates nation-states to be open to international market forces* (Bossche, 2005). This requires fair play in the market between the domestic as well as foreign players, which can never be ensured in the regime of antidumping laws. The act of price discrimination, as far as it doesn't hamper the competition, is deemed a valid measure under the competition laws, while the same act will be deemed unlawful under anti-dumping rules. The rules should be abandoned as they fail to ensure a free and fair market and also fail to provide a safety valve for the domestic industries and firms facing pressure in the form of cheap imports. As per

WTO, the international competition policy will be a more effective tool for achieving an efficient allocation of world resources (Messerlin, 1996). Thus, considering the obligation and the upper hand of competition law over anti-dumping laws, the author proposes that International Competition Law must be substituted for antidumping laws in the global trading regime or that the antidumping laws are amended so as to ensure compatibility with the competition law regime nationally as well as globally.

Considering these points, propositions, arguments, and comments highlighted in the paper, it is essential to map a way forward for the antidumping regime, if it is to remain in practice and in consonance with the conflicting Competition regime. The necessary changes or amendments can be:

- Obligation to prevent abuse of the Agreement: Considering the impact of antidumping on trade, members must *establish an obligation to establish transparent and standard antidumping procedures for preventing any abuse* or impact of the measures on the efficacy of the market.

- *Incorporating consumer welfare and economic efficiency as essential conditions* for the implementation of antidumping duties and measures.

- *Public Interest Test:* Picking up cues from nations such as South Korea as well as European Union etc., the public interest test can be introduced in the antidumping laws. It will introduce competition concerns into the antidumping regime.

- *Reducing the imbalances between Antidumping and Competition Law norms*. The current anti-dumping measures must be improved to reflect the importance of healthy competition.

- The *definition of 'domestic industry' must be altered and must include a majority of the total domestic producers of the product in dispute rather than including every single market player*. This can ensure the reduction of frivolous investigations.

- Finally, we need to minimize the discretionary powers of the state vis-à-vis antidumping rules, which will thereby ensure transparency.

It is hereby suggested that any anti-dumping proceeding should not be initiated unless it meets all the substantive criteria required under the regime of competition laws. This can ensure that the antidumping measure is not reduced to a mere political tool. Moreover, despite shortcomings, it will not be feasible to completely strike off antidumping laws in the absence of any effective alternative, which will require the consensus of the global trading community, aided majorly by WTO, i.e., till the time a substantive code on International Competition Law is not agreed upon.

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AN APPRAISAL OF THE REGULATORY FRAMEWORK FOR PREFERENCE SHARES ADMINISTRATION: A SOJOURN FROM NIGERIA TO BRAZIL

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Abstract

In corporate law financial system, the issuance of preference shares is common, and the holders of such shares have accrued special rights. Preference shareholding is based on the same concept all over the world but form, substance, and procedure it takes depend on the law of the country being considered. This article considers the concept of preference shares in Nigeria and Brazil putting into consideration the corporate laws guiding such practice. It observes that though there are differences in the provisions of the laws of these two jurisdictions, however, there are areas of convergence and divergence between the two jurisdictions and in the broader context of global working of corporate system, the concept of preference shares is the same all over the world. It brings out areas of convergence and divergence between the two jurisdictions and in the broader context of the global working of corporate system**.** The company's ownership is known through shareholding. There are various classes of company shareholding; these classes give the holders different benefits apart from the universal purpose of receiving dividends. This article discusses preference shares as a foundation for shareholding through legal and regulatory frameworks governing companies and an examination of the concept in Nigerian and Brazilian corporate law.

Keywords: Regulatory, Framework, Preference, Shares, Administration

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1. Introduction

Preference shares administration is an important aspect of corporate practice which is governed by the law. According to Tripathi, A. N., and Maheshwari (2003, P.74), corporate ownership and its administration requires adequate process through an efficient law and regulation.

2. The Concept of Shares

Shares can be described as units of ownership in a company. It refers to the size of investment of a person in a company. Adewumi T.A & Jolaosho T.O (2022, p.31) describe shareholders as owners of the company with several rights among which voting right is one.

Kee, H. Y., & Luh, L. L (1999, p.554) in describing the concept of shares, opine that the ownership in the corporation is divided into pieces known as shares and the number of pieces held by members represents the percentage of their ownership. The description given here is quite instructive because shareholding is evidence of company membership and shares issued par value.

C. C. Langdell (1898, p.536) emphasises the importance of the document known as "share certificate" he mentions that no other document can confer ownership of shares on any member. I quite agree with Langdell that shares are not physical assets but can only be felt by the share certificate of the corporation, which is the only evidence of shareholding. In other words, a share is an abstract that can neither be seen nor touched except through document which confers ownership and accompanying rights.

In analysing implication of shareholding, Grantham, R (1998, p.554) opines that the shareholders as owners are to be in total control of the company, the management and the benefits thereof. However, C. Thomas Attix, Jr (1951, p.999) opines that the notion of shareholders as owners of the company had lost its efficacy today when he states that turning to outsiders for financial assistance for the purpose of the growth of corporate entities has widened the gap between ownership and control.

The earlier view represents that of the 1950s. Today, the shareholders are in control through the directors representing shareholders' interest. Modern company law had taken a step forward to ensure the appointment of technocrats to the Board in the form of independent directors to curb the excesses of the executive management.

The Nigerian Companies and Allied Matters Act (CAMA) 2020 (Act No. 3 2020) provides that "share" means "the interests in a company's share capital of a member who is entitled to share in the capital or income of such company; and except where a distinction between stock and shares is expressed or implied, includes stock" (Section 868 CAMA 2020). Benefits and obligations attached are provided for under section 138 CAMA 2020 that subject to the provision of the law, the rights and liabilities attached to the company's shares or any class shall: "(a) be dependent on the terms of issue or the company's articles; and (b) notwithstanding anything to the contrary in the terms of the articles, include the right to attend any general meeting of the company and vote at such a meeting". So, it is basic that shares entitle the owners access to company meetings.

CAMA 2020 forbids non-voting and weighted shares in section 140. The exception to this is stated under section 140(3) which provides that "Nothing in this section shall affect any

right attached to a preference share under section 168". This provision shall be discussed in the later part of this article.

Under CAMA 2020, a company where authorised by its article of association can create categories of shares which cannot be treated equally if they are not of equal status (Section 143 CAMA 2020). The law further provided that "Without prejudice to any special rights previously conferred on the holders of existing shares or class of shares, any share in a company may be issued with such preferred, deferred or other special rights or such restrictions, whether with regard to dividend, return of capital or otherwise, as the company may determine by ordinary resolution" (Section 144 CAMA 2020).

The Brazilian Corporation Law did not specifically define what shares are but Article 1 states that "The capital of a corporation or joint stock company shall be divided into shares, and the liability of the partners or shareholders shall be limited to the issue price of the shares subscribed to or acquired." Article 11 further provides for the establishment of shares thus:

Article 11. The bylaws shall establish the number of shares into which the capital shall be divided and shall establish whether or not the shares shall have a par value.

Paragraph 1. The bylaws may create one or more classes of preferred shares with par value for a corporation whose shares have no par value. Paragraph 2. The par value shall be the same for all shares of a corporation.

Paragraph 3. The par value of the shares of a publicly held corporation shall not be less than the minimum value established by the Comissão de Valores Mobiliários.

Article 15 describes types of shares to be common, preferred, or fruition "depending on the nature of the rights or advantages which it confers upon the shareholder" (Article 15 of the Brazilian Corporation Law). Paragraph 1 of Article 15 provides that "Common shares of a closely held corporation and preferred shares of closely and publicly held corporations may be of one or more classes". Article 15(2) further provides that the number of preferred shares without voting rights, or subject to the restriction on voting rights, may not exceed fifty percent (50%) of all issued shares.

On the issue of common shares, Article 16 provides that:

There may be different classes of common shares of a closely held corporation, depending on:

I - their convertibility into preferred shares;

II - a requirement that the shareholder be a Brazilian citizen; or

III - the right to vote separately to fill certain positions in administrative bodies.

Unless expressly provided for, an amendment to that part of the bylaws which regulates the different classes of shares shall require the approval of the shareholders of all shares thereby affected.

From the above, in Brazil, the common shares of a closely held corporation may be issued in different classes.

3. The Concept of Preference Shares

The concept of preference shares at common law is not of much difference to today's concept except with the provisions of the law which restrict the benefits to prevent abuse of privileges attached to such shareholding.

I agree with Tat (1992, p.128) that the right of preference shareholders is a matter of contract between the company and the preference shareholders. It is however important to mention that the law of each country provides guides on the relationship between a company and its preference shareholders.

To Pickering (1963, p.499), preference shareholding has some unsatisfactory characteristics; this is not entirely true, although its nature may change from time to time, it is still the same preference shares. Modern company law has made its features consistent. This we will see as we discuss the statutory provisions of the countries in issue. Perhaps the best description of preference shares can be seen in the work of Laws (2018, p.6) where he describes the concept as a right to fixed, higher and cumulative dividends.

In all of the above, one thing is most common about preference shares; the right of preference shareholders to prioritise dividend payment above ordinary shareholders.

4. Preference Shares under CAMA 2020

In Nigeria CAMA 2020 provides for the administration of preference shares and this section is discussed under subheadings for better understanding.

4.1 Issue with rights attached

CAMA 2020 provides that shares may be issued with special rights or restrictions concerning dividends, and return of capital that the company may determine by ordinary resolution (Section 144 CAMA 2020). The company mentioned in this provision are members of the general meeting, that is, the shareholders of the company.

However, the law forbids a company limited by shares from issuing preference shares that cannot be redeemed; the law however allows a company subject to its articles of association to issue preference shares that are redeemable upon such conditions as prescribed in such articles or terms of issue (Section 147 CAMA 2020).

4.2 Right of a preference share to more than one vote

Despite the provision of section 140 CAMA 2020, section 168(1) CAMA 2020 allows the company's article to provide that preference shares issued shall carry the rights to attend general meetings and on a poll at the meetings, to more than one vote per share in the following circumstances, upon resolution:

(a) "during such period as the preferential dividend or any part of it remains in arrears and unpaid, such period starting from a date, not more than 12 months or such lesser period as the articles may provide, after the due date of the dividend".

(b) “which varies the rights attached to such shares”
(c) "to remove an auditor of the company or to appoint another person in place of the such auditor" or
(d) “for the winding-up of the company or during the winding-up of the company”.

Section 168(2) CAMA 2020 further provides an instance where a preference share can be entitled to more than one vote as an exception to section 140 CAMA 2020. It follows that where the required percentage of votes expected from the preference shareholders is not met, a special resolution can be made to make each preference share entitled to additional votes to one vote per share. It follows that the additional votes per share can be as many as possible. It is however doubtful if this is the intention of the law.

On the issue of when a dividend is due, following from section 168(2), section 168(3) CAMA 2020 provides that dividend becomes due on the date in the articles and where such is not provided for, it will be a day after the expiration of the year in issue.

Above is about the dividend accrued to the preference shareholders. It is however unclear how a preference shareholder can claim a dividend that is due but not declared putting into consideration the provision of section 428 CAMA 2020 which prohibits a company from declaring dividend where declaring such will throw the company into debt.

4.3 Construction of class rights

Section 169 CAMA 2020 provides for the rules of construction in the company's articles concerning the rights attached to shares. The rules are:

(a) “unless the contrary intention appears, no dividend is payable on any shares unless the company resolves to declare such dividend”.
(b) "unless the contrary intention appears, a fixed preferential dividend payable on any class of shares is cumulative, and no dividend shall be payable on any share ranking after them until all the arrears of the fixed dividend have been paid".
(c) “unless the contrary intention appears, in a winding-up arrears of any cumulative preferential dividend, whether earned or declared or not, are payable up to the date of actual payment in the winding-up”.
(d) “if any class of shares is expressed to have a right to a preferential dividend, then, unless the contrary intention appears, such class has no further right to participate in dividends”.
(e) “if any class of shares is expressed to have preferential rights to payment out of the assets of the company in the event of winding-up, then, unless the contrary intention appears, such class has no further right to participate in the distribution of assets in the winding-up”.
(f) “in determining the rights of the various classes to share in the distribution of the company’s property on a winding-up, no regard shall be given, unless the contrary intention appears, to whether or not such property represents accumulated profits or surplus which would have been available for dividend while the company remained a going concern” and
(g) “subject to this section, all shares rank equally in all respects unless the contrary intention appears in the company’s articles”.

The rules above show clearly the rights of preference shareholders which include;

(i) Fixed dividend
(ii) The dividend is cumulative and it has priority of dividend payment over ordinary shares
(iii) In winding up, arrears of any cumulative dividend must be paid.
(iv) Preferential shares with claimed preferential dividends cannot have further right in the remaining dividend.
(v) Where there are preferential rights to payment out of the company's assets at winding up, there will be no further right to participate in the distribution of the company's assets.

From the above rules, the law still gives the company the choice to vary these rules by the word "unless the contrary intention appears" in its provision.

5. Preference Shares in Brazil

The Brazilian Corporation Act (Federal Law No 6,404/1976) is the law governing the administration of companies in Brazil. The provisions on preference shares are discussed below.

5.1 Advantages of Preference Shares

The Corporation Act in Article 17 provides for the benefits of preferred shares as follows:

i. "priority in the distribution of fixed or minimum dividends";
ii. "priority in the reimbursement of capital, with or without premium"; or
iii. "the accumulation of the preferences and advantages provided for in items i and ii".

The advantages are well spelt out in the above provisions.

Article 17(1) provides for the conditions under which preferred shares can be accepted for trading in the securities market (despite the priority right to reimbursement of capital with or without premium). It provides that such preferred shares should have at least one of the following:

(i) "the right to have an interest in the dividend to be distributed, corresponding to at least twenty-five percent (25%) of the net income for the year, calculated as outlined in Section 202, according to the following criteria":

a) "a priority in the receipt of dividends mentioned in this item, corresponding to at least three percent (3%) of the share's net worth"; and

b) "the right to have interest in the profit distributed in conditions equal to the common shares, after a dividend equal to the minimum priority as outlined in item a is assured; or

(ii) "the right to receive a dividend, for each preferred share, at least ten percent (10%) higher than the dividend assigned to each common share"; or

(iii) "the right to be included in the public offering for alienation of control, in the conditions outlined in Section 254-A, in addition to the right to receive dividends at least equal to the common shares dividend.

Article 17(2) provides that “In addition to those outlined in this Section, the bylaws must precisely indicate preferences or advantages assigned to the shareholders without voting rights, or with restricted voting rights”. This means that the bylaws can add more advantages to the preference shares apart from those mentioned in the law. It also means that the preference shares have no voting rights or have restricted voting rights.

Article 17(3) provides that “Dividends, even when fixed or cumulative, shall not be distributed to the detriment of the share capital unless the corporation is liquidated and this advantage has been expressly afforded” (Former paragraph 1 turned into paragraph 3 by Law n. 10.303, of October 31, 2001). This provision is clear, the dividend which is fixed or cumulative cannot be paid in a way that will affect the share capital except the company is being liquidated and that right has been expressly provided for. It means that no matter the situation, where the company is a going concern, a dividend cannot be paid out of the company's share capital.

Article 17(4) provides that except it is provided in the bylaws, the priority dividend is not cumulative, and fixed dividend share has no right to share from the remaining profits, and "the share with minimum dividend has an interest in the profits distributed in conditions equal to the common shares after a dividend equal to the minimum is paid to such shares” (Former paragraph 2 turned into paragraph 4 by Law n. 10.303, of October 31, 2001).

The law further provides “that the bylaws may not exclude or restrict the right of preferred shares to participate in capital increases resulting from the capitalization of reserves or profits except with respect to shares with fixed dividends” (Article 17(5) of the Brazil Corporation Act). This means that the bylaws of the company have the discretion not to exclude preferred shares in the participation of capital increase except the preference shares with fixed dividends.

Also, Article 17(6) allows the bylaws to “confer upon the preferred shares with priority in the distribution of cumulative dividends the right to, in such years where earned profits were insufficient, receive such dividend to the account of the capital reserves provided for in § 1 of Section 182” (Former paragraph 5 turned into paragraph 6 by Law n. 10.303, of October 31, 2001). This means where the earned profits cannot satisfy the cumulative dividend of the preferred shares with such priority, the dividend will be paid from the capital reserves.

The law makes provision in corporations' object of privatization, for the creation of a special class of preferred shares owned exclusively by the privatizing entity. It provides further that the "bylaws may confer specific powers upon such shares, including the power to veto resolutions of the general meeting in certain matters” (Article 17(7) Brazil Corporation Act). The above provisions have shown the characteristics of preference shares in the Brazil Corporation Act.

Article 18 gives the corporation the power to make bylaws that gives the right to one or more classes of preferred shares to elect one or more members of the administrative bodies by separate ballot. It further provides that "the bylaws may require that specific statutory amendments be approved at a special shareholders' meeting by the shareholders of one or more classes of preferred shares”.

5.2 Disclosing Details of Preference Shares in Bylaws

Article 19 provides in clear terms that "the bylaws of a corporation having preferred shares shall state the advantages attributed to each class of such shares and the restrictions to which they shall be subject, and may provide for redemption, amortization or conversion of shares from one class into another and into common shares, and of the latter into preferred shares, and shall establish the respective conditions for each of the foregoing". In essence, the law allows the conversion of shares from one class to another and from common share to preferred share or vice-versa.

6. A Comparative Study of preference shares in Nigeria and Brazil

The administration of preference shares in Nigeria and Brazil had been discussed above. It is important to carry out a comparative study of these laws for mutual lessons from these countries.

6.1 Voting Rights

Nigeria

As previously discussed, in Nigeria, section 168(1) CAMA 2020 allows the company's article to provide that preference shares issued have the right to attend general meetings and on a poll at the meetings, to more than one vote per share upon resolution in the following circumstances:

(a) "during such period as the preferential dividend or any part of it remains in arrears and unpaid, such period starting from a date, not more than 12 months or such lesser period as the articles may provide, after the due date of the dividend".
(b) "which varies the rights attached to such shares"
(c) "to remove an auditor of the company or to appoint another person in place of such auditor" or
(d) "for the winding-up of the company or during the winding-up of the company".

Also, section 168(2) CAMA 2020 provides further on an instance where a preferred share can have votes additional to one vote per share.

Brazil

However, Brazil's preference share is without voting right or with restricted voting rights (Article 17(7) Brazil Corporation Act). There is no provision in the Brazil Corporation Act clothing preference shares with rights to vote except in Article 18 of the Brazil Corporation Act which gives the corporation the power to make bylaws that gives the right to one or more classes of preferred shares to elect one or members of the administrative bodies by separate ballot and nothing more.

Article 17(2) provides that "In addition to those set forth in this Section, the bylaws must precisely indicate preferences or advantages assigned to the shareholders without voting rights, or with restricted voting rights".

6.2 Dividend Rights

Nigeria

Section 144 CAMA 2020 provides "that shares may be issued with special rights or restrictions with regard to dividend, return of capital which the company may determine by ordinary resolution". Section 169 CAMA 2020 provides for the dividend rights of preference shares and it can be summarised as follows:

(a) Fixed dividend
(b) A dividend is cumulative and it has the priority of dividend payment over ordinary shares
(c) In winding up, arrears of any cumulative dividend must be paid.
(d) Preferential shares with claimed preferential dividends cannot have further right in the remaining dividend.
(e) Where there are preferential rights to payment out of the company's assets at winding up, there will be no further right to participate in the distribution of the company's assets.

The above is the dividend rights of the preference shares.

Brazil

On the dividend right, there is priority dividend right, fixed dividend right, and minimum dividend rights. These dividend rights vary as provided for under Article 17(4) of the Brazilian Corporation Act. Article 17(4) as previously stated provides that except it is provided in the bylaws, the priority dividend is not cumulative, and fixed dividend share has no right to share from the remaining profits, and "the share with minimum dividend has an interest in the profits distributed in conditions equal to the common shares after a dividend equal to the minimum is paid to such shares" (Former paragraph 2 turned into paragraph 4 by Law n. 10.303, of October 31, 2001).

The Corporation Act vividly analysed the dividend rights available to the three classes of preference shares which can be summarised as follows:

- the priority dividend is not cumulative.
- fixed dividend share has no right to share from the remaining profits.
- the share with a minimum dividend has an interest in the profits distributed in conditions equal to the common shares after a dividend equal to the minimum is paid to such shares.

The preference share with priority to the cumulative dividend will be paid from the capital reserve where the earned profit is insufficient (Article 17(6) of the Brazil Corporation Act).

7. Lessons Learnt

The lessons learnt from these jurisdictions are as follows:

In Nigeria, the preference shares as provided for under CAMA 2020 have rights to vote and under special circumstances, can have more than one vote. In Brazil, the preference shares have no voting rights or restricted voting rights.

The classification of preference shares under the Brazil Corporation Act is very clear. The preference shares are of three classes: preference shares with a priority dividend, preference shares fixed dividend, and preference shares with a minimum dividend. There is no such classification under CAMA 2020 except the general description of the rights of the preference shares.

8. Conclusion

There has been an attempt for a comparative study of the legal framework for preference shares administration in Nigeria and Brazil. This article has been able to show that preference shares are all the same from country to country, that is, the right to a fixed dividend that ranks higher than that of the "ordinary shares" as it is called in Nigeria and "common shares" as it is called in Brazil.

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COMPARATIVE APPRAISAL OF NIGERIA'S COMPANIES AND ALLIED MATTERS ACT 2020 WITH SOME SELECTED JURISDICTIONS

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Abstract

Corporations are key players in the pursuit of economic development; hence the role of the law is to ensure that there is an enabling environment to promote business continuity toward economic development sustainability. In Nigeria, the principal company legislation is the Companies and Allied Matters Act (CAMA), and after subsisting for 20 years, the Nigerian legislature revised the Act in 2020. This paper adopts an analytical approach by relying on both primary and secondary data in reviewing this Act with the aim of ascertaining whether it is an innovation or a mere revision. It examines its impact on corporate governance practice in Nigeria *vis-a-vis* the need to align with international best practices in corporate law practices. The paper examines the challenges that might confront the implementation of the Act and leeway. The status and powers of the Corporate Affairs Commission (CAC) and matters arising therefrom are also discussed. The paper identifies a dearth with reference to matters on stakeholder considerations, single shareholders, powers of the CAC with respect to the suspension of trustees, and the appointment of interim manager, as well as pre-incorporation contracts. The paper concludes with recommendations that are proffered in light of what applies in other jurisdictions as well as with respect to the peculiarity of the Nigerian situation.

Keywords: Business continuity, CAMA, Corporate Governance, Economic development; Economic sustainability

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1. Introduction

According to the World Bank's Ease of Doing Business Report (WBEDBR), Nigeria was ranked 146 globally in 2019 and 131 in 2020, with marginal improvements in recent years. It has been projected that the 2020 Companies and Allied Matters Act (CAMA) is largely responsible for the advancement (PWC Nigeria, 2017). The role of the business sector in every economy cannot be over-emphasized. This is because of the magnitude of influence it (i.e. the business sector) has on economic development. The generation of money and the expansion of infrastructures are two indicators of economic development and achieving these goals is correlated with the function that enterprises play in the economy (Soliyev and Ganiev, 2021, p. 12). As of 2017, the Organization for Economic Cooperation and Development (OECD) reported that the business sector contributed 72 percent of the Gross Domestic Product (GDP) in OECD countries (Manyika *e tal* 2021). Corporations are income and revenue producers. Corporate Social Responsibility (CSR), taxation, earned salaries, and infrastructure development are just a few ways that a company's economic values are returned to the economy, and the sum of these factors drives economic development in a country (Soliyev and Ganiev, 2021, p. 12).

In this regard, the role of the law will be to create an enabling environment where businesses can easily thrive. An enabling environment is one that encourages foreign investment while also ensuring business sustainability and continuity for indigenous or domestic businesses. The presence of a business-enabling environment results in economic growth over time which ultimately culminates into much-needed economic growth and development (Anyanwu, 2014, p. 468).

The Nigerian legislators must have had knowledge of the impacts and necessity for an enabling business environment when they enacted a new CAMA in the year 2020. Accordingly, Senator Abdullahi Yahaya, who sponsored the Bill at the Senate, remarked that it was geared towards "enhancing Nigeria's business environment and making it competitive among its international colleagues… while eliminating unnecessary regulatory provisions for small companies." (Umoru, 2020) This Act brought about sterling innovations that have been the subject of applause as well as criticisms by commentators as well as the business community. In fact, the Act has been the subject of litigation, within the first year of its enactment, and many have condemned some of the innovations as needless as well as a "witch hunting" exercise.

The aim of this paper is to assess some of these innovations in the light of international standards while also addressing their application with regard to the peculiarity of the Nigerian business environment. It seeks to determine if the introductions made to the 'letters of the law' are innovations or mere revisions. Innovations in the sense that new provisions that adhere to international best practices and promote sustainability have been added to the law. A revision, on the other hand, would mean that the introductions merely restate earlier provisions without making a material contribution to the effort to promote business sustainability and Nigerian economic development.

For attaining the set aim and objectives, the paper employs a comparative approach by selecting jurisdictions that have approached some of these 'introductions' differently and which are believed to be capable of promoting corporate sustainability and economic growth and

development. The paper is divided into four parts that address the topic sequentially. At this juncture, it should be noted that a comparison is made with jurisdictions such as South Africa, the United Kingdom, and India because of socio-legal and economic affinity with Nigeria as South Africa, at present, is regarded as the fastest growing economy in Africa while the United Kingdom and India are commonwealth jurisdiction like Nigeria hence, Nigeria can learn some salient lessons from these jurisdictions.

2. Juxtaposing Economic Development, Business Continuity, and Business Exigencies

There are several theories that surround the concept of economic development as well as its true meaning. Notwithstanding this, there is a growing consensus that economic development may be the structural transformation of an economy through the introduction of more mechanized and updated technologies for the purpose of increasing income, labor productivity, and employment, as well as the standard of living of the population (Panth, 2020). It is said to occur when individual agents can develop the capacities that allow them to actively engage and contribute to the economy (Fieldman *e tal*, 2016). This is expected to cumulate towards lowering transaction costs while also increasing social mobility (Fieldman *e tal*, 2016). Thus (Schumpeter, 2011, p. 34) has posited that entrepreneurs are the agents of change in an economy and a driving force behind economic development. This assertion is premised on the fact that entrepreneurs identify opportunity and innovate and in doing so, they contribute towards the factors that impact economic development through business ventures. Consequently, by providing jobs, engaging in foreign investment, constructing industries and plants, and participating in CSR, which consequently improves the standard of living for the populace, corporations are key influencers of economic development. However, in the absence of business continuity, economic development becomes easily impaired.

Business continuity refers to a management process that identifies risks, threats, and vulnerabilities that could impact an entity's continued operations and operations and consequently build organizational resilience and the capacity for effective response (Atkinson, 2020). Essentially, it denotes putting structures in place that minimize the risk of corporate failure and guarantee corporate profitability. The relevance of business continuity to economic development can be gleaned from the fact that if the business community is sacrosanct to economic development, then sustaining businesses is key to sustaining economic growth and development. There are several approaches that corporate entities take towards continuity and in recent times, there is a growing campaign toward recognition and institutionalization of corporate sustainability.

A series of events around the globe, particularly as it relates to environmental degradation, propelled the recognition of sustainability. Consequently, in 1987, the Brundtland Commission and the World Commission on Environment and Development (WCED) defined sustainable development as "meeting the needs of the present without compromising the ability of the future generations to meet their own needs." Corporate sustainability is aimed at examining a corporation's performance in terms of social, economic, and environmental factors for the purpose of reducing costs, managing risks, creating new products, and fostering change (Jacob-Hernandez, James-Valdez and Ochoa-Jimenez, 2021). On the other hand, business

exigencies are events that impair the business of a corporation which when not adequately managed, can negatively impact business continuity. Thus, there is a need to engender a symbiotic co-existence between these forces in order to realize economic growth and development.

3. X-Raying Innovative Provisions of CAMA 2020 as Harbinger for Economic Growth and Sustainability

This section of the paper answers the research question of whether or not the CAMA 2020 is an innovation or a mere revision. In doing this, a clinical survey of some newly introduced sections is undertaken on a subject matter basis. These provisions are selected in light of their relevance to corporate sustainability and business exigencies *vis-à-vis* the provisions of CAMA 1990.

3.1 Introduction of Single Member Companies

The Nigerian business community is estimated to contribute about 75% towards the Nigerian economic growth and of this 75%, Small and Medium sized Enterprises (SMEs) are responsible for contributing 48% of the national GDP. Statistics also records that SMEs account for 96% of businesses as well as 84% of employment in Nigeria. Aminu, Adamu and Ibrahim (Aminu, Adamu and Ibrahim, 2018, p. 236) have asserted that the SME subsector of the economy holds the key to the nation's quest for economic growth and development. This assertion, is premised on their assessment of the impact of SMEs in other jurisdictions (Aminu, Adamu and Ibrahim, 2018, p. 237). In the European Union (EU) for instance, the SMEs constitute 99.8% of all businesses as well as account for the employment of around 76 million people, which represents around 67.4% of the total employment in 2010 (Lyndon and Opinion, 2018, p. 55). Similarly, in South Africa which is a fast growing economy in Africa from which Nigeria can learn as well, SMEs account for 91% of businesses, 60% of employment and contribute 52% of the country's total GDP (PWC Nigeria, 2021). Globally, it is also estimated that SMEs contribute over 50% of the GDP in developed nations (Lyndon and Opinion, 2018, p. 54).

Realizing the economic importance of SMEs to Nigeria's economic growth and development, based on the experiences of jurisdictions like South Africa and the EU mentioned above, couple with the need for Nigeria to align with modern trends so as to improve her socio-economic fortunes, the legislators introduced single member companies via CAMA 2020.

Prior to the enactment of CAMA 2020, the 1990 CAMA (i.e. section 18) required that for the formation and incorporation of a company in Nigeria, the minimum number of members is two. The effect of this is that entrepreneurs who are desirous of flagging a startup would have to pitch their ideas to a potential co-founder before being eligible for incorporation (Orojo, 2008, p. 33). The consequence was that where such an entrepreneur is unable to get a co-founder or is unwilling to pitch ideas, he/she will have to settle for establishing a sole proprietorship business which has limited advantages compared to an incorporated company under Part C of the CAMA.

Sole Proprietorships (SP) which were registrable under part B of the CAMA 1990 as business names could not afford the entrepreneurs with the benefits of incorporation spelled out under section 37 thereof. Principal among the benefits is the legal recognition for business continuity as was held in *Union Bank (Nig.) Ltd. v Penny-Mart Ltd.* (1992). By the incidence of incorporation, companies are guaranteed business continuity and this ensures that the lifespan of the company is severed from those of its members while also ensuring that the economic benefits of a corporation are not hindered. In the absence of this, SPs which could have been registered as corporations are deprived of that right, with the effect left to be felt in economic growth. Similarly, SPs are protected against certain taxes which are levied against corporations, and it is needless to emphasize the impact of taxation on economic growth, particularly in a sector that is highly liquid. An appropriate tax system can lead to optimal resource allocation and increased economic growth (Beranova and Lenaka, 2012, p. 100).

Consequently, by virtue of the provision of section 18(2) CAMA 2020, a single person may now incorporate a private company in Nigeria, by complying with the provision of the law, with respect to private companies. Such companies are also not required to have two directors pursuant to section 271 of CAMA 2020 and as such the entrepreneur could be registered as both a member and the director. The capital outlay is also relatively small, which is ₦ 100,000 subject to other provisions that may be made by sector-specific regulators. Additionally, such companies do not have a legal obligation to appoint company secretaries. The import of this is that the cost of running the business becomes significantly reduced as contemplated under Section 330 (1) of CAMA 2020.

This provision indubitably improves the ease of doing business for SMEs or startups in the economy and promotes business continuity which was not available under the erstwhile CAMA 1990. However, notwithstanding its impact on business continuity, the important question is: to what extent has it adequately catered for the subject? It must be stated that Nigeria is not the first economy to deviate from the initial judicial position in *Salomon v Salomon* (1897) for the requirement of two members in incorporating a company. In fact, the reality is that Nigeria happens to be one of the last few jurisdictions to onboard the train of this anachronistic, obsolete, and rigid position of the law. With this in mind, some jurisdictions such as the United Kingdom, South Africa, and India, all have provisions that recognize the right of a single person to incorporate a company. In examining the rather progressive position of these jurisdictions, one is able to identify a gap that can be filled under Nigerian law.

Business continuity involves the process of creating systems of prevention and recovery to deal with potential threats to a company (Punla, Santos and Noleal, 2017). In other words, it is a holistic management process that identifies potential threats to an organization and the impacts to business operations that those threats, if realized, might cause and which provides a framework for building resilience (Herbone, 2010, P. 981). While business continuity has been perceived by many to be a function of the risk management and audit department of a company, it is yet contestable that laws should be designed in such a way that it guarantees it.

The 2013 Companies Act of the Republic of India recognizes, "one person" companies (precisely section 2 thereof), which have similar standing as the private companies in Nigeria, with single entities. However, notwithstanding this similarity, the Act went further in making provisions for business continuity in these companies under the provision of section 3 thereof.

By virtue of the provision of this Act, at the point of incorporating the company, the Memorandum of Association of this company must indicate the name of another person other than the founder (subscriber), who will, upon the attainment of his consent, become a member of the company, in the event of the death or incapacity of the subscriber.

Further to this, the nominated party has the right to withdraw his or her consent to being appointed, and the subscriber also has the right to change the party. This is done by giving notice to the commission and making the change within the memorandum. Such changes to the memorandum, however, are not deemed to be an alteration of the memorandum. The importance of this provision is that it guarantees business continuity by insulating the company from experiencing the legal consequences of SPs businesses. The biggest criticism of a single-member company is that although upon incorporation, it theoretically has perpetual succession; however, in reality, what it has is tantamount to what applies to SPs. This is because the personal representatives of the founder will have to formally apply to the company by presenting probate or letters of administration, before stepping into the shoes of the subscriber, for the management of the business of the company. Undoubtedly, such a pause in the company's business activity, no matter how short, is capable of and does affect its business fortunes and also dissuade its customers or clients who may link the company to the founder and who may be unwilling to proceed (in the absence of a legal obligation) with the business relationship. This Indian model of the single-member company is examined with a view to providing a safe guide for the implementation of the scheme under CAMA 2020. India is a commonwealth jurisdiction just like Nigeria and has to a reasonable extent, implemented the single-member company admirably. Nigeria stands to benefit from her experience, especially with regard to corporate sustainability and business continuity which is the underlying justification for x-raying the position there. In comparison to CAMA 1990, one can safely argue that the single-member company model is an innovative introduction under CAMA 2020 worthy of sustenance.

3.2 Stakeholder Considerations

The powers of a company are often vested with the Board of Directors (BoDs) of the company as well as the Members in General Meeting (MGM) and the interplay with which they exercise their separate powers form the fulcrum of corporate governance. Corporate governance essentially denotes a set of processes and structures for controlling and directing an organization (Abdullah and Valentine 2009, P. 88). It had been argued by the OECD that one key element in improving microeconomic efficiency is corporate governance. This is because corporate governance exerts a strong influence on resource allocation while also improving the global industrial competitiveness of a country (Maher M and Anderson, 2020). Corporate governance practices will often distinguish between the ownership and management interests within the company. Thus, in this regard, Section 87 of the CAMA 2020, provides thus:

a company shall act through its members in general meeting or its board of directors or through officers or agents appointed by, or under authority derived, … the business of the company shall be managed by the board of directors who may exercise all such powers of the

company as are not by this Act or the articles required to be exercised by the members in general meeting.

Therefore, the BoDs are vested with the power to determine the way the affairs and business of the company will be conducted. In doing this, Section 305(3) of CAMA 2020 provides that a director shall act at all times in what he believes to be in the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skillful director would act in the circumstances and, in doing so, shall have regard to the impact of the company's operations on the environment in the community where it carries on business operations. Subsection 4 further provides that "the matters to which a director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members."

The importance of these provisions lies in the fact that a corporation is an amalgam of diverse interests. These interests include that of the directors, the members, the employees, the creditors of the company, the host community as well as the government among others. Thus, collectively, these interests are referred to as corporate stakeholders (O'Sullivan, 2003, P. 23). In the management of the business of the company, good corporate governance practices require that those who are involved should ensure that adequate consideration is given to the corporate stakeholders, and this is the stakeholders' theory of corporate governance (Marshall, 2014, p. 13).

It must be emphasized that there are different theories of corporate governance all of which are geared towards explaining the interconnected interests within a corporation and the role of the management in determining their priority for the purpose of satisfaction. These theories range from the agency theory and expand into shareholders theory, stewardship theory, stakeholder theory, resource dependency theory, and transaction cost theory, among others.

The stakeholder theory posits that the management of the company must work to balance the competing interests within the corporation. Therefore, while the directors may be interested in profit generation, the members in dividends, the employees in salaries, the government in taxes and infrastructural development, and the host community in skill acquisition, employment opportunities, and community development. The task of those who hold the powers of the company is to ensure that all these interests are adequately balanced with none being prejudiced no matter how insignificant. The powers of the company are vested in the Board of Directors (BoDs) and the members in the general meeting under Section 87 of CAMA 2020. Hence, the obligation for stakeholder consideration rests on them.

Prior to the enactment of the CAMA 2020, the BoDs who are the ones involved in the daily management of the business of the company do not have a legal obligation to consider the interests of other stakeholders under the CAMA. The obligation to consider their interests was only covered under the different codes of corporate governance.[2] However, unlike a law,

[2] See Principles 24, 26 and 27 of the Nigerian Code of Corporate Governance 2018, Principle 10.2 0f the Code of Corporate Governance for the Telecommunications Industry 2016, Section 4 of the Code of Corporate Governance for other Financial Institutions in Nigeria 2018, section 28 of the code of corporate governance of Public Companies 2011.

these codes are only guides that set minimum standards for companies in the execution of their business activities and their non-compliance was not enforceable at law.

The emphasis on approaching corporate governance from the stakeholder approach is often supported by the argument that this will promote corporate sustainability and business continuity (Eunsup, 2014, P. 65). Corporations thrive in their capacity to be competitive, and managing a corporation in a manner that the interests of the stakeholders are considered will enhance the company's image. The approach is estimated to also improve customer and employee loyalty which will ultimately reduce business risk, cut operational costs and increase sales.

Notwithstanding the prospective benefit of this innovation, it is however arguable that this might be in the longer period, nothing other than a dead letter provision in the absence of its enforceability. The provision of section 305(9) of the CAMA 2020 provides that these duties imposed on the Directors can only be enforced by the company itself. The immediate effect of this, therefore, is that irrespective of the unwillingness of the directors to approach corporate governance from the stakeholders' perspective, the stakeholders have no right to enforce this provision against the directors.

The point being made is not to encourage stakeholders' actions against the company, because to do so, will be to encourage a multiplicity of suits against the company many of which could also be frivolous and vexatious. Additionally, the duties of the director are to the company itself and not to the stakeholders, this is because the contract is between the company and the directors and not with the directors and another stakeholder as contained under section 46 of CAMA 2020. However, compliance may be enforced through punitive sanctions by regulatory authorities.

In the Republic of India, where a director breaches his duties (which includes provisions on stakeholders' consideration), under the Act, such breach is punishable with a fine which shall not be less than one lakh rupees (₦500,000) but which may extend to five lakh rupees (₦ 2,000,000) pursuant to section 166 (7) of Indian Companies Act 2013. A similar provision like this will allow the Corporate Affairs Commission (CAC) in Nigeria to bring a suit against the BoDs or in the alternative, impose a fine on the board of directors where their business conduct impairs stakeholder's consideration, particularly with respect to activities that are clearly visible such as environmental degradation, nepotism among others. CAMA 2020 should have adopted this Indian position to ensure accountability and responsibility from the BoDs in its innovative quest considering the potency of the Indian position.

3.3 Pre-Incorporation Contracts

Business exigencies often require company promoters to enter into contracts and various agreements on behalf of the company, prior to the company's incorporation, and these contracts are referred to as pre-incorporation contracts. The principle of corporate legal personality as established in the case of *Salomon v Salomon* (1897) is that a company is a separate entity from its members and directors and although they may act on its behalf, their liabilities are separate. Therefore, although a recruitment process may be facilitated by the promoters, it is the company that employs them. Also, although the negotiation for the lease or

purchase of the office space may be done by the promoters, it is yet the company's property. In this regard, therefore, pre-incorporation contracts have become a necessary evil in the incorporation of a company.

The common law position as reflected in the case of *Kelner v Baxter* (1866) and the case of *Newborn v Sensolid Ltd* (1954) is that where the pre-incorporation contract was signed on behalf of the company, by the promoter, the promoter will be personally liable. Also, where the contract was signed in the name of the company yet to be incorporated, then the contract was a nullity.

The rationale behind this was that legal capacity remains a necessity for contract and in the absence of incorporation, a company lacks legal capacity. Similarly, it is impossible for a person to act as an agent of a non-existing entity; therefore, a promoter could not enter into a contract on the company's behalf prior to its incorporation. Further, to this, the company cannot ratify these contracts after incorporation, because by the principle of ratification, the principal must be in existence at the time the contract was being made, for it to be eligible to ratify the said contract. With Nigeria being a common law jurisdiction, cases decided in this line, evidenced that the common law approach created a herculean task for the promoters in floating and setting up the company as seen in the decisions in the cases of *Caligara v Giovanni Sartori & Co Ltd* (1961) and *Edokpolo v Sem-Edo Wire Industries Ltd* (1984).

Therefore, the coming into effect of CAMA in 1990 sought to ameliorate this by providing that any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation. Hence, thereupon, the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto as contained under section 72(1) of CAMA 1990. Also, prior to ratification by the company, the person who purported to act in the name or on behalf of the company shall, in the absence of an express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.

This provision has been retained under section 96 of CAMA 2020, however, where the objective of a law is to improve the business climate within the country, it is argued that improvements could have been made to the Nigerian approach to pre-incorporation contracts, with particular reference to balancing the conflicting interest, novation and release, right of action, burden of liability and time frame for ratification. It is contended that simply allowing the company to ratify the contract post-incorporation does not absolve the promoters from the totality of the hardships that pre-incorporation contacts may engender, and without abrogating the fundamental principles of the law, the necessity for pre-incorporation contracts, should drive the law to create a balance for protecting the interests of the parties involved.

3.4. Balancing the Conflicting Interests

A pre-incorporation contract involves three conflicting interests. These are those of the promoter, the company, and the third party. Under Nigerian law, the liability for the failure of the contract rests heavily on the promoter, and the justification for this is that; 'because of his role in the incorporation of the company, he is in a better position than the third party to predict

the likelihood of the incorporation of the company, as well as the ratification of the pre-incorporation contract (Cassim, 2007, P. 36).

However, there has to be a balance in the appropriation of liabilities, this is because it is inequitable for a company to enjoy the benefits of a pre-incorporation contract, while also refusing to ratify it, which is precisely the event that took place in the case of *Kelner v Baxter*. Under the New Zealand Companies Act No. 105 of 1993, section 182(5) expressly provides that prior to the ratification of a pre-incorporation contract, a company cannot enforce or take any benefits from such a contract. With a provision like this, the promoters will have no difficulty in offsetting the liability they may have incurred with respect to the contract. This is contrary to the Nigerian position that provides that the promoters will take the benefits and the liabilities, in which case, the company is not deterred from obtaining benefits from such a contract.

Again, in a similar vein, under section 21 of South Africa's Companies Act, a company is expected to decide as to ratification within a period of 3 months and where it fails to make a decision within the stated time frame, it will be deemed to have ratified it and be entitled to benefit from and be liable under the contract. Hence, it is to communicate either an approval (whether in whole or in part or subject to some conditions) or its refusal within the stated time frame. The benefit attributable to this is that it precludes the company from enjoying the long-term benefits associated with the pre-incorporation unratified by it. It also helps the third party to ascertain the party liable within the contract, and who an action for enforcement can be brought against.

The laws in South Africa (i.e. section 21(5) of the South African Companies Act 2008) and New Zealand (i.e. Section 184(1) of the New Zealand Companies Act 1993) further ensure the security of the interests of the promoter, by giving the promoter a right of action against the company for any benefit the company may have acquired from the contract in the event of a rejection by the company. The rationale behind a pre-incorporation contract is that such contracts are incidental and necessary for the benefit of the company, and where this is the argument, the promoter should not be burdened unfairly with an act done in pursuit of the company's overall objective.

Again, in the incorporation of a company, there is often more than one promoter of the company. In Nigeria, the law is silent as to who bears the liability for the failure of a company to effect ratification. It will be harsh to impose the liability exclusively on the signatory to the contract, who may simply be one of the promoters who had negotiated the contract or an agent of the promoter as was held in *Bay v Illawarra Stationery Supplies Pty Ltd* (1986).

Under the South African Law (i.e. Section 21(2) of the South African Companies Act 2008) liability under the pre-incorporation contract is imposed on all promoters jointly and severally. Hence, there is an even distribution of the liability. The provision of section 96 of the Companies and Allied Matters Act can be expanded to clarify this ambiguity and consideration may be given to the South African Law on the liability of the promoter, provided that the contract falls within the scope of the promotion, and such a person was a promoter at the time the contract was executed.

3.5 Novation and Release

Novation is a principle under the law of contract and business law that permits a party under contract to replace an obligation with another obligation, add a new obligation, or replace a party to an agreement with a new party. The laws in South Africa, Australia, and New Zealand recognize the power of a company to do this, particularly, by substituting the contract between it and the third party in substantially the same terms as the pre-incorporation contract. Where this is the case, in these countries, the Promoter will be discharged of his liabilities under the pre-incorporation contract, which is an equitable provision.

Again, allowing the parties to exclude, the promoter's liabilities if they so wish is essential to the principle of freedom of contract and will promote a flexible corporate law system. Under the Australian Corporations Act particularly section 132(1) thereof, a party to the pre-incorporation contract may release the promoter from all or part of his or her liabilities under the pre-incorporation contract, as provided for under the Act, by signing a release. This provision may also be implemented in Nigeria, allowing a third party to limit the promoter's liability for the company's failure to ratify the contract, as it may promote the ease of doing business in the Country.

3.6 Suspension of Trustees and the Appointment of Interim Managers

Non-profit organizations contribute significantly towards economic development in any country. This is a fact supported by evidence of their contribution towards providing essential services which positively impact the lives of citizens, such as building schools, hospitals, orphanages, and religious centers (Rehman, Marwan, and Din, 2020, p. 4100).

The CAMA 2020 regulates not just businesses but also non-business entities. Hence, the Act is divided into three parts, which cover the regulation of companies on the one part, sole proprietorships and partnerships on another part, and incorporated trustees on the other part. Incorporated trustees (IT) are organizations with charitable objectives; therefore, they are often incorporated for purposes other than to make profits. It is an association of persons, coming together for any religious, educational, literary, scientific, societal, development, cultural, sporting, or charitable purpose as contained under section 823(1) of CAMA 2020.

However, in difference to a corporation, the corporate status in an incorporated trustee is not vested in the organization itself, but in the trustees. Therefore, the power to sue and be sued, as well as the acquisition of properties, is vested in the trustees and not the organization itself per section 823(2) of CAMA 2020.

With the coming into effect of CAMA 2020 however, section 839 CAMA, gives the Corporate Affairs Commission (CAC), the powers; under certain circumstances to suspend the trustees in an IT, and appoint interim managers during the continuance of the suspension. This innovation, however, was not well received by many sectors, particularly within religious circles. Consequently, in 2021, the Incorporated Trustees of the Christian Association of Nigeria (CAN) brought an originating summons against the Minister of Trade and Investment as well as the registrar of the Corporate Affairs Commission. CAN urged the court to declare the provision of section 839 null and void, in what has been tagged "a deliberate attack against the Christian community." However, it must be stated that the suit was dismissed by the court

for being improperly constituted. This, therefore, begs the question as to the contentions and arguments posed by the Christian community, and for the purpose of addressing some of these concerns, this provision is hereby reproduced hereunder.

The Commission may by order suspend the trustees of an association and appoint an interim manager or managers to manage the affairs of an association where it reasonably believes that:

(a) There is or has been any misconduct or mismanagement in the administration of the association;

(b) It is necessary or desirable for the purpose of:

(i) Protecting the property of the association,

(ii) Securing a proper application for the property of the association towards achieving the objects of the association, the purposes of the association of that property or of the property coming to the association,

(iii) Public interest; or

(c) The affairs of the association are being run fraudulently.

This power however, may only be exercised with the approval of the minister of trade and investment as provided for under Section 839(11) of CAMA 2020, and the suspension will be ordered after an application is made by way of a petition to the Federal High Court by the CAC itself or by one-fifth of the members of the organization pursuant to section 839(2) thereof. The Act defined misconduct to include;

"The employment for:

(a) The remuneration or reward of persons acting in the affairs of the association, or

(b) Other administrative purposes, of sums which are excessive in relation to the property which is or is likely to be applied or applicable for the purposes of the association."

The criticisms of the religious organizations have been premised on the supposed attempt of the government to influence or control religion in the country, consequently, in an interview, the President of the Pentecostal Fellowship of Nigeria (PFN); Ayoyinka Jegede stated that:

The government has brought in a controversial aspect of the CAMA that infringes on the religious freedom of the non-governmental organization that is serving the ordinary people of Nigeria. The Church stands against violations. We are opposed to those sections of the law that suggest that somebody can sack the trustee of a church and appoint a manager.

Their argument is often supported by the fact that Nigeria remains a secular state as argued by as guaranteed by the provision of the constitution (Agbedo, 2022). Thus, section 38 of the 1999 Constitution provides thus: "Every person shall be entitled to freedom of thought, conscience, and religion, including the freedom to change his religion or belief and freedom (either alone or in community with others and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice, and observance."

In support of the concerns, (Ayodele and Ojekunle, 2021, 50) argued that giving the CAC such discretion as contained under Section 839(1) CAMA is not advisable because power corrupts and absolute power corrupts absolutely. They demonstrated by citing the cases of *Lopez v AG Osun State* and *State v S.O Ilorin & Ors* (1983) that in the past when the government exercised its discretion in matters of state policy or public interests, their activities have not been devoid of questionability. However, notwithstanding these contentions and challenges to this provision of the law, the writers of this article submit, that business exigencies favor this provision of the law. While ITs are not business entities, it will be unwholesome to disregard the pecuniary risks associated with their operations. Trustees of an IT have fiduciary obligations to the organization and by the fundamental principles of the doctrines of equity, they are acting in the interest of other entities, who for proper and effective administration are not involved in the daily operation of the organization. Like (Agbedo, 2022) has rightly pointed out, power corrupts and absolute power corrupts absolutely and to simply commit the administration of an organization into the care of an entity without a means to check their excesses may be an ineffective practice and enthronement of tyranny.

A fundamental aspect of corporate governance is the principle of majority rights and minority protection as established in the case of *Foss v Harbottle* (1843) and statutorily recognized under Nigerian law under section 341-373 of CAMA 2020. Thus, by this principle, the law recognizes corporate democracy but also balances it by making provisions for checking the excesses of the majority and protecting the rights of the minority. In securing the protection of the minority, the law (i.e. section 366 of CAMA 2020) enables the CAC to carry out investigations into the affairs of a corporation. Further to that, petition for the winding up of the company, and yet the business community is yet to petition for the provision to be expunged pursuant to section 573 of CAMA 2020. It must be reiterated that most criticisms of this section seem to always omit the explicit provisions of subsection 2 of section 839, which provides that the power of the CAC is subject to an order of the court. Therefore, although the CAC has the power to order a suspension, such suspension can only be made after an order of the court is issued in that regard.

In the United Kingdom, ITs are referred to as charities and their regulation is subject to the powers of the Charities Commission, by virtue of the Charities Act. Section 46 of the Act, gives the commission, the power to carry out an investigation into a charity. Where after its investigation, it finds that there has been any misconduct or mismanagement in the administration of the charity or it has become necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of any property coming to the charity then the commission may:

a. Order the suspension of either the trustee, officer, agent, or employee of the charity, pending consideration being given to such person's removal, and appoint such additional charity trustees it considers necessary.

b. Order that any person vested with the title to the charity's property should not part with such property without the commission's approval;

c. Order that any debtor of the charity should not make any payment to the charity in the discharge of its debts without the approval of the commission.

d. By order restrict the nature of the transactions which the charity may engage in or limit the amount which may be made in the administration of the charity without the approval of the commission;

e. Appoint an interim manager to act as receiver and manager in respect of the properties and affairs of the charity.

Consequently, the position in Nigeria is *impair material* with what is obtainable in the UK which counters the arguments of religious sectors as to the law being an intentional attack by the government against the Christian faith. The sustainability of a course, objective, or venture is often determined by the governance structure and the management prowess. Consequently, where the affairs of the administration are being fraudulently operated and wholly mismanaged, then it is highly probable that the business may not be sustainable in the long term. Trustees of IT hold significant powers within their reach and have equity dictates, they should be accountable. NGOs operate through voluntary donations, given in pursuit of a course and it will be highly detrimental to public safety and order if it becomes a channel for economic crimes. Notwithstanding the rationale and justifications posed in support of this provision, the writers of this article are, however, not oblivious to the apparent inadequacies of the law.

In the first instance, every IT is formed in pursuit of a course or objective and it is this objective that unifies the members together, while the removal of a trustee may be justifiable for the purpose of guaranteeing sustainability, we submit that the appointment of a trustee or interim manager, who has no understanding of the objective of the organization or who, although is familiar with it, does not subscribe to it, is equally detrimental to the sustainability of the organization.

Secondly, we submit that suspension does not inure in perpetuity, therefore, our contention is in the loophole that evades this law. Where the CAC exercises its power of suspension, the law has to make adequate provision for the duration of time within which the suspension should continue. Similarly, during the continuance of the suspension, the law ought to make provision for whether the allegation made against the suspended trustee would be tried to ascertain its truthfulness and to arrive at a decision on whether the trustee should be removed or reinstated.

Lastly, there has to be a proper process that invigorates the findings of the CAC as a ground for the removal of the trustee. The law provides that the trustee will be removed where the CAC "believes" that the trustee has acted in a certain manner as provided under the law, however, an action so fundamental to the operation of the organization should not be premised simply on a belief but should be informed by factual evidence. In similitude to what is obtainable in the UK, the CAC should be required to carry out an investigation before carrying out an investigation, and their powers to investigate should be informed by real and tangible events and evidence.

4. Conclusion and Recommendations

Evidence and theories affirm that the business community will continue to matter in matters of economic development, and as a matter of fact, economic development may be

unattainable in the absence of the influence of the business community. The law remains a driver for change and in the relentless pursuit of economic development law remains instrumental. Consequently, the task of law will be to secure and create an enabling environment where corporations can function productively and sustainably for the purpose of attaining economic development.

The Nigerian legislators are not oblivious to this fact and consequently, they have remodeled the principal law i.e. CAMA in the corporate sector for the purpose of mobilizing the much-needed change and attaining the much-needed development. However, from the lens of scrutiny, the introduction to the law appears to be more of a revision than an innovation. Consequently, the law requires more restructuring in the quest for attaining its set objectives, therefore, it is recommended that:

1. For the purpose of business continuity, the provision on single member companies should make provision for succession planning, by nominating at the time of incorporation the personal representative of a shareholder, for the purpose of preventing pauses in corporate administration, which might impact negatively on the business of the company;
2. To invigorate the effect of stakeholders' considerations as provided for under the law, the directors should be subject to pecuniary sanctions for non-adherence to the dictates of the law in that regard as well as for their breach of duties;
3. The provision of the law on pre-incorporation contracts has become obsolete and should be reformed for the purpose of balancing the competing interests involved in the execution of the pre-incorporation contract, as well as novation and release, as discussed in the body of this work;
4. With respect to the powers of the CAC to suspend a trustee in an IT and appoint interim managers, the law should be amended for the purpose of requiring that the decisions of the CAC to exercise these powers on the grounds provided for under the law, should be subject to conducting an investigation into the affairs of the company. Also, the law should provide for the qualifications of the interim manager, and chief among this should be a requirement that the manager demonstrates clear belief in the objects of IT.
5. Lastly, the law should make provision for the duration of time, in which the suspension of a trustee will inure so that CAC does not engage in and create the undesirable phenomenon of permanent suspension of trustee (s).

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THE IMPACT OF THE CORONAVIRUS PANDEMIC IN THE UK, THE US AND EU MEMBER STATES

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Abstract

This paper, critically analyses how the coronavirus pandemic evolved as a contagious disease that became a menace to public health and culminated into the worst global crisis in this century. The paper exposes how the overburdened and underfunded health care system of the three jurisdictions was made vulnerable. Most governments took an unsystematic approach, by initially making effort to conceal the level of the virus severity, while others took proactive steps to block the spread due to their level of disaster risk preparedness. This paper exhibits the socio-economic impact of coronavirus outbreak and the numerous protective measures taken to contain the spread of the virus by the government and the resultant outcomes of those measures. The paper then provides insights into numerous government's dilemma of saving citizens and the planet on the one hand and keeping the financial systems in motion on the other.

Keywords: coronavirus pandemic, public health, socio-economic impact, EU member states, government's dilemma

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1. Introduction

Coronavirus (COVID-19) is among the family of coronaviruses that cause illnesses such as common cold, severe acute respiratory syndrome (SARS) and Middle East respiratory syndrome (Roth et al., 2021). Some of the identified COVID-19 symptoms include shortness of breath, cough, fever, muscle or body aches, sore throat, headache, fatigue, new loss of taste or smell, vomiting and nasal congestion or runny nose (Sciejew, 2021). COVID-19 can be severe; the viral infection has caused increasing number of deaths in many countries since its discovery in Wuhan, China in December 2019 (Noor et al., 2020). Scientists derived the name "coronaviruses" from the crown-like spikes that appear on their surfaces when seen under a microscope (Sahoo & Pandey, 2020). From the time of the outbreak, the virus has mutated from alpha to delta and currently omicron. Human-to-human infections caused by animal coronaviruses are rarely seen as was evident in two previous coronaviruses namely MERS-CoV and SARS-CoV (Gupta et al., 2021). However, the SARS-CoV-2 virus is considered a beta coronavirus when compared to MERS-CoV and SARS-CoV (Gupta et al., 2021). One major similarity is that the origin of all three viruses has been traced to bats. The sequences from the US patients are like the one that China initially posted, thus, consolidating claims that COVID-19 pandemic emerged from an animal reservoir. Nonetheless, global scientists are still investigating the exact cause of this virus (Slagle, 2021).

2. Methodology

Using the strategic management tool that comprises of Political, Economic, Social, Technological, Environmental and Legal (PESTEL) help to analyse the implication of measures adopted by the governments of the UK, the US and EU Member States (Chhabra et al., 2021). The PESTEL model build a more holistic view of the coronavirus pandemic. The findings from the PESTEL analysis highlights the benefits and pitfalls that needed to be considered when identifying appropriate solutions. SWOT (Strengths, Weaknesses, Opportunities and Threat) is another analytical methodology (Srdjevic et al., 2012) for multi-criteria decision making that was adopted to critically evaluate PESTEL. The combination of SWOT and PESTEL provides a more accurate and extensive analysis of the complex and multidimensional environment associated with the coronavirus pandemic.

3. Analysis

3.1. The Political Impact

The acronym "P" emphasises on important role of politics in business. The political influence requires organisations to weigh various threats and opportunities prior to expanding their business scope. Thus, political factors have direct impact on organisation and other stakeholders in decision-making process. There is direct correlation in government regulation and free markets which often guide businesses in making long term plans. In the context of the coronavirus pandemic, global political disruption was enormous as the spread of the virus was on its upward trajectory which resulted in various political measures (Landman & Splendore, 2020). Governments enacted legislation, then enforced policies and drafted guidelines for the

population to curtail the rapid spread of the virus. The indefinite postponement of legislative activities occurred during the initial outbreak and deaths of numerous politicians were reported around the globe. Elections were postponed due to fears of spreading the deadly virus.

3.2. The Political Impact in the UK

In the case of the UK, the population was impacted in many ways which precipitated the government to embark on various measures. Overall, the death rate was considered moderate for the UK general population, but higher with the elderly and individuals with chronic underlying conditions during the first outbreak of the virus (Williamson et al., 2020). The coronavirus pandemic casted a shadow on the extent of underfunded healthcare sectors that consequently reduced their capacities to minimum (Alder et al., 2020). The government enacted Coronavirus Act which gave a leeway for elections (local councillors, police commissioners and mayor of London Assembly) that ought to have been conducted in May 2020 but postponed to May 2021 (Coronavirus Act 2020, s 59).

A surge in demand for Personal Protection Equipment (PPE) caused severe shortage that added to the problem of the pandemic during the first months of the crisis, as medical staff did not have sufficient resources to carry out their duties as needed, which reflected on the lack of government preparedness for a pandemic (Nyashanu et al., 2020). The PPE procurement predicament existed pre coronavirus pandemic as the national stockpile reached critical level during the pandemic (Oehmen et al., 2020). Health care workers on coronavirus wards in hospitals recorded nearly three times higher death rates of asymptomatic infection in comparison to health care workers in ordinary wards (Rivett et al., 2020). Some health care workers were reluctant to take breaks as they felt guilty of wasting PPE and they also went to the extent of purchasing their own PPE to combat the shortages from their employers (Singh et al., 2019).

3.3. Measures Adopted in the UK

Necessary measures were taken by the UK government to mitigate the spread of the coronavirus and reduce the demand for Intensive Care Unit (ICU) beds. To curtail the spread of the virus to other healthcare facilities and communities, protect healthcare workers and safeguard risk groups, the following measures were adopted (Tabish, 2020). Firstly, the government adopted the policy of lockdown to dissuade movement of people to avert the rapid spread of the virus. People were permitted to travel for food shopping, to purchase medical needs, exercise once a day within the vicinity and only report to work if necessary (Douglas, 2020). Sporting events, schools, restaurants, bars, gyms and other leisure related businesses were included in the closedown policy (Public Health England [PHE], 2020, November). This measure forced closure of offices and companies and encouraged remote working practices where practical. The government in turn encouraged the measures by paying 80 per cent of employees' salary directly to their organisations (Brewer & Gardiner, 2020).

Secondly, since transmission normally happens via droplets which requires close contact, the government implemented social distancing by 2 meters and mandated the wearing of face masks in public places to mitigate the spread of the virus (Yin et al., 2020). The UK policy makers drew a conclusion that, the physical distancing measure will reduce contact

levels which can lead to decline in number of cases. The measure after evaluation sufficiently controls the impact on the reproduction number (R_0 from 2.6 prior to lockdown to 0.62).

Thirdly, contract tracing was another policy measure copied from other countries to mitigate the spread of the coronavirus as the number of infections continued to increase by the day. The merit of this policy is its ability to identify potentially infected individuals prior to the emergence of severe symptoms and if contacted in sufficient time transmission can be averted (PHE, 2020, February).

Fourthly, the UK government proceeded immediately with awarding of contracts for procurement of PPE as the number infected with coronavirus continued to grow. The limited available PPE were prioritised to high-risk areas of the healthcare sector which contributed to lower death rates amongst the anaesthetists (Cook et al., 2020). However, those companies selected by the government purchased faulty antibody tests from China worth £129 million and ordered 10 million tests from Roche and Abbott for £191 million with little evidence of their effectiveness (Keeling et al., 2020).

Finally, economic support was provided to individuals and companies as a measure to prevent economic collapse and to secure business continuity (Goede, 2020). The government implemented a 'furlough scheme' to avoid mass redundancies. The measure gave both the government together with employers and employees a time lag to mitigate the prevailing circumstance. The scheme allowed businesses to keep employees in their payroll and government covered 80 per cent (or £2,500, whichever is lowest) of their salary for the period when they were absent from work. The government released £350 billion to allow mortgage lenders to offer a three-month mortgage holiday for those having financial constraint. The government also allowed six-month rent holiday (Nicola et., 2020).

3.4. The Outcome of the Measures Adopted in the UK

Unquestionably, the measures adopted by the UK government to mitigate the spread of the coronavirus consequently resulted in both negative and positive outcome. In sieving through each measure, it can quickly be identified that some of those policies were not rigorously thought through prior to their implementation. There was alleged misappropriation of financial resources and high level of cronyism during contract allocation for procurements of resources needed to mitigate the spread of the virus (Goede, 2020). Contracts awarded were often not documented which left the government open to charges of cronyism of £17.3 billion allocated for such contracts. In period of emergency, governments are known for their shortcomings in procurement proficiency, as accountability measures are downgraded. However, the UK government appeared worst comparatively to other western countries for awarding contracts to cronies during the coronavirus pandemic. The government fell short of following due process for competitive tendering as only 38 percent contracts were awarded through existing structure designed for government procurement of goods and services. The 61 per cent remainder was awarded directly to cronies without the usual contract vetting (Jones & Hameiri, 2021).

The track and trace system that was procured to curtail the spread of the coronavirus failed to meet the highly anticipated result. Awarding of the contract by the government to inexperienced private companies with no track record often closely connected to Conservative politicians largely attributed to the palaver. The government ought to have used the expertise of the Public Health England for procurement of the equipment and PPE (Rogers, 2021). Another negative outcome is the constant U-turn of policy decision by the government. For instance, stream of data analysis discovered the national Public Health England PPE guidance changes constantly which were reported daily in early April 2020. Policy inconsistency often led to confusion and lack of confidence in managing patients with coronavirus without appropriate PPE (PHE, 2020, April).

3.5. The Political Impact in the EU Member States

To avert the spread of the virus across the EU Member States, electoral processes were suspended (Scott, et al., 2020). However, postponing elections gave rise to growth of repressive regimes as authoritarian governance recommenced in some Member States. For instance, Viktor Orbán in Hungary suspended the national parliament and pronounced a state of emergency for unstated length of time. Draconian laws were immediately introduced to inhibit the freedom of speech soon after the suspension of elections in Hungary by the president, Viktor Orbán (Scott et al., 2020).

The coronavirus affected the political and socio-economic fabric of all EU Member States. As a result, some Member States began looking inward and started prioritising their own interest and forewent the solidarity of the Union. Germany, France and the Czech Republic decided to introduce limited exports in effort to protect the supply of medical equipment such as face masks despite shortages in other Member States (Kelly, 2020). Nonetheless, the EU Member States needed continuous cohesiveness in their responses to obtain and supply medicines and equipment to countries that were struggling in order to prevent the spread of the virus across the borders.

3.6. Measures Adopted in the EU Member States

Many Member States relied on existing laws before the emergency or adjusted pre-existed legislations to mitigate the spread of the virus (Crego & Kotanidis, 2020). The reoccurring trait noticed across the 25 Member States regarding containment measure is restrictions, closure of businesses, quarantine obligation, testing obligations and travel bans as outlined. Coordinated efforts were agreed with respect to support for businesses in the health care sector by the Commission (European Commission, 2020). More so, 25 EU Member States responded positively to the Commission request for medical equipment to be supply to health systems. Manufacturers supplied more PPE for patients, health care workers and the public after the request by the European Commission in a coordinated effort (Goniewicz et al., 2020).

Respective EU Member States Parliaments were directedly involved in the management of the coronavirus pandemic by adopting budgetary, legislative and oversight powers as measures accorded by their legislation (newly formulated or existed) to contain the virus. For instance, Austria, Croatia, Demark, France, Germany, Ireland, Malta, and Poland, enacted new legislation and amended existed laws to strengthen the government in adopting

measures needed to curtail the spread of the virus. National Parliaments adopted ordinary oversight to gather fresh information on prevailing situations and the measures used to deal with the pandemic (Crego & Kotanidis, 2020).

Many EU Member States took unilateral measures to close their national borders from foreigners in fear of transmitting the coronavirus if permitted entry, it was extended across the Schengen zone (Anghel, 2020). The closure of borders provided a pretext for national populists and Eurosceptics to encourage public fear. Centralised emergency powers in the larger political sphere of anti-immigration were experienced more by Eastern European leaders, such as Viktor Orbán of Hungary, who asserted that foreigners are to be blamed for the spread of the coronavirus. At the same time, the Romanian president, Klaus Iohannis, made remarks to dissuade Romanians that domicile abroad to cease from returning home during the lockdowns in order to avert the spread of the coronavirus. These statements aimed intentionally to serve political purposes and legitimise intolerance.

3.7. The Outcome of the Measures Adopted in the EU Member States

Concerns in the EU Member States were brought about by the pandemic, especially in countries that were hard hit by the virus. A poll conducted yielded a negative political impact in Italy as it showed 88 per cent consented that the EU was less helpful in assisting the country to contain the virus which resulted in one of the highest death rates from the coronavirus across the EU Member States (Cherkaoui & Arnold, 2020). The France and Germany governments were condemned by other EU Member States for blocking the export of important medical supplies (Maulaya & Jasuma, 2021). Those actions raised the question of the basis on which solidarity of EU Member States is formulated.

3.8. The Political Impact in the US

An unprecedented number of deaths from the coronavirus put the US government under immense pressure during the outbreak. Deceased bodies were piled in refrigerated trucks as hospital morgues were overwhelmed. Furthermore, disproportionate deaths and infections were recorded in nursing homes, veteran's facilities, and prisons. The health care systems in the US were severely impacted by the outbreak of the coronavirus pandemic with shortages of hospital beds, breathing ventilators, masks, and PPE. President Trump shifted total responsibilities on the states to mitigate against the virus and directed them to acquire the necessary equipment as his administration is not a 'shipping clerk' for these supplies (Maulaya & Jasuma, 2021).

3.9. Measures Adopted in the US

The US government legislated a $2.1 trillion rescue package directed at keeping workers in employment as opposed to bailing big corporations. The bail out also targeted households and small businesses directly which aimed at maintaining aggregate demand and allowing business to continue their operation. Direct cash payment of $1,200 was given to all

adults Americans and $500 to children (Basbay, 2020). Extra funding was provided by the government to assist the unemployment programme that was under pressure as over 30 million workers lost their jobs within two months (Bernard &Lieber, 2020). In early February 2020, during the onset of the coronavirus outbreak, the US government created surveillance systems in five cities to measure the level of contagion of the virus which enabled experts to predict the next hot spot. The government plan encountered a setback as the program was delayed for weeks leaving the US administration with limited knowledge of the rapid spread of the virus (Mirvis, 2022).

3.10. The Outcome of the Measures Adopted in the US

System modelling used by the US government to mitigate the coronavirus containment and spread provided important information for decision and policy making. However, the models had some limitations, as each modeller used different inputs and assumptions, and mathematical formulae which ended up with different picture of the virus progress. For example, the Institute for Health Metric Evaluation (IHME) model used results in other countries to extrapolates US trends, while the Columbia and Massachusetts Institute of Technology (MIT) models used epidemiological case data that provided different result on approximating the peak and flattening of the virus (Mukherjee, 2020).

The government allowed all spectrum of the society, including cottage industries of small manufacturers and home-sewers to make masks for everyday use to mitigate against the spread of the virus. Meanwhile universities and pharmaceutical companies collaborated to develop and test products and potential vaccines (Mirvis, 2022). However, the management of the coronavirus pandemic in the US was problematic and more complex as strained relationship became apparent between the federal and states' right and responsibilities. To exemplify, the federal government left the onus on the states to implement guidelines to slow the spread of the coronavirus. In April 2020, the federal government issued three-phased reopening guidelines which were later rescinded and left to states to implement.

3.11. The Economic Impact

The first "E" in PESTEL refers to the economic metrics that influences either the success or the failure of organisation. The economic factor is pivotal to organisation survivability as global economies are constantly adjusting to the macro and micro-environment (Abigail & Zheng, 2021). In relation to the coronavirus pandemic, the restrictions on local and global movements because of the pandemic created immense economic shock around the globe. The impact of the pandemic resulted in the immediate contraction of global Gross Domestic Product (GDP), low investment, widespread inflation, fragmentation of global trade and recession in many countries (Schaltegger, 2020). The governments of the three jurisdictions adopted different strategies to counter the pandemic.

3.12. The Economic Impact in the UK

The economic impact of the coronavirus in the UK economy was immense as the Gross Domestic Product (GDP) fell by 9.8 per cent in 2020, the highest since the 1920 depression (Office for National Statistics, 2021). The severity of the impact is spread across all sectors of

the economy with particular emphasis on hospitality, entertainment, travel and tourism; young and unskilled bore most of the burden (Hodgkin & Sasse, 2021). Apart from restriction of movement resulting from Brexit, the coronavirus has induced an exodus of EU workers out of the UK which has caused shortage of labour in most sectors (Deloitte, 2020). All large sectors of the UK economy are under strain but the one that suffered most is the food sector, comprising of food distribution and retailers as the population began to panic buy and stockpiling food. An increase of £1 billion worth of food was hoarded in UK homes because of panic buying. The stockpiling of food affected food banks as the population became self-centred, less generous and donation reduced dramatically (Petetin, 2020).

Number of businesses went into liquidation as a result of lockdown measures enforced by the government to curtail the spread of the virus. Most of the population in the lower spectrum of the earnings distribution (apart from key workers in health care sectors and social care) were obliged to shut down and 80 per cent of those workers were not able to work from home. In contrast to a quarter of the highest earner of the population that work from home. Younger citizens and ethnic minorities were more affected by the lockdown due to the level of unemployment and the low disposable income that exists with the cohort (Blundell et al., 2020).

3.13. Measures Adopted in the UK

Stimulus plans of over 20 per cent of GDP were proffered by the government as way of a safety net designed to prevent the economy from collapsing (Tabish, 2020). Financial support was also given to businesses including Value Added Tax (VAT) deferrals, business loans, and business rate holidays. Included in the stimulus was an increase in welfare payments, wages were subsidised by the government and the self-employed were provided with profit guarantees (Berry et al., 2020). Other measures implemented by the government to stimulate demand was the 'Eat Out to Help Out' campaign. Participating businesses gave £10 discount per person on food and non-alcoholic drinks consumed in the restaurant premises from Monday to Friday.

Over £350 billion was committed to pay over 80 per cent of all private sector wages up to a minimum of £2,500 to prevent employers from discharging workers (Partington, 2020). However, Her Majesty Revenue and Customs reported on the Public Accounts Committee that approximately 5 to 10 per cent of furlough cash was erroneously awarded. It was suggested that more than £3.5 billion claims were paid out (Sawyer, 2021). The UK government pledged a sum of £330 billion Coronavirus Business Interruption Loan Scheme (CBILS) designed to support small and medium sized businesses. To ensure the scheme runs smoothly, the government through the Bank of England introduced the Quantitative Easing (QE) programme to expand over £200 billion borrowing and relaxed free lending for businesses (Berry et al., 2020). However, fewer loans were granted by the banks under the CBILS scheme as some banks were reluctant to borrow where repayments were not certain irrespective of the government guarantees.

The Self-Employed Income Support Scheme (SEISS) introduced by the government provided grants to self-employed individuals or partnerships who can evidently through a tax return from 2018-2019 and self-employment as prove of their main income. The self-employed were protected with a profit guarantee worth up to 80 per cent of their average monthly profits

(or £2,500, whichever is the lowest) that reflect tax payment in previous years. Also, the self-employed (small shop owners, taxi drivers) that has a record of tax payment were also supported by the government in a similar approach adopted by the US government (Partington, 2020). However, those that commence their self-employment (7 per cent of the self-employed workforce) from April 2019, were precluded from the scheme. Additionally, those that use the self-employment (8 per cent or 329,900) as a top-up income were not covered by the scheme (Enterprise Research Centre, 2020).

3.14. The Outcome of the Measures Adopted in the UK

Those stimulus policies resulted in increased borrowing to finance the schemes, which in turn increased the budget deficit that complemented decline in investment. Some household savings increased due to closures of entertainment and service establishments because of the lockdowns (Sawyer, 2021). The government was unable to leverage on taxation as a source of income to fund spending on the economy and prevent the sectors from collapsing. The gross domestic product plummeted to over 7 per cent in March 2020 and by further 19 per cent in April 2020.

3.15. The Economic Impact in the EU Member States

The coronavirus pandemic caused economic decline in the EU Member States with a contraction of 6.1 per cent in the Gross Domestic Product (GDP) worse than the times of the global financial crisis (Clark, 2021). In an effort to mitigate the economic meltdown, the European Central Bank (ECB) raised the level of asset purchase by €870 billion and terminated the limit set on bond purchases in EU Member States (Ferrara et al., 2021). The ECB created Corona-bonds, issued to stimulate borrowing at low cost. The intention was to economically stimulate Member States, such as Italy, Spain and France that were worse hit by the coronavirus pandemic. The coronavirus crisis has resulted in internal economic differences in government and private finance. The government deficit increased in some Member States that depend on tourism revenues and government surpluses evaporated (European Commission [EC], 2021, October). Policy makers across the EU Member States needed to put into consideration the existing trade-offs between supporting economic activity and public health.

3.16. Measures Adopted in the EU Member States

Measures were introduced nationally with coordinated strategies to reduce the adverse impacts on EU Member States by EU Commission. To dampen the impact of the coronavirus, a rescue package of €1.7tn was pledged to support economic activities of EU Member States ((Nicola et., 2020). With the aim of stabilising and strengthening EU Member States through the pandemic, the ECB purchased €750 billion worth of assets. The Commission provided a €25 billion investment fund to support affected businesses through their government to encourage public spending (Buck et al., 2020).

Job retention schemes were implemented by EU Member States in line with global economies to continue paying employees even when economic activities ceased due to lockdown. For example, the German government spent over €822 billion to save businesses,

pay employees wages and the self-employed were given grants. The Germany government made provisions of €500 billion in loans to support companies affected by coronavirus pandemic ((Nicola et., 2020). The government of France, Spain and Italy pledged €345 billion, €200 billion, and €25 billion respectively to assist businesses that were impacted by the novel coronavirus (EC, 2020, June). The French government introduced corporate tax postponement and payments of workers was part of the exceptional measures implemented.

3.17. The Outcome of the Measures Adopted in the EU Member States

Economic measures introduced by the European Commission and executed by national governments has caused economic division and has put pressure on EU solidarity. Restrictions of movements to prevent national health systems from collapsing caused a sharp shock on EU Member States economies. State expenditures pledges and tax holidays to stimulate business has created fiscal deficits in all Member States which will put pressure in future budget negotiations due to economic disparity in revenues and contributions (Anghel, 2020).

3.18. The Economic Impact in the US

Societal lives in the US were upended by coronavirus pandemic when the federal government and various states started enforcing restrictions on individuals and businesses in March 2020. Contrary to the recession that hit the housing and financial services badly in 2008, the coronavirus put the US economy to a halt. Planes were grounded, movement was restricted, people stopped driving vehicles leading to empty roads, demand for goods and services diminished and businesses made massive redundancies leading to unprecedent increase unemployment (Joyce & Prabowo, 2020). The Congress speedily enacted legislation that led to passage of four laws signed by the President on 6 April 2020.

The restrictions imposed by the government for employees to work from home and self-imposed isolation policy consequently resulted in declined economic activities including transportation, fast-food, hospitality and leisure activities (Cherkaoui, 2020). The US stock market index (S&P 500) plummeted to its lowest level during the outbreak of the coronavirus. The Dow Jones and Nasdaq Industrial Average fell until the US government secured the Coronavirus Aid, and Economic Security (CARES) Act 2020 which increased the confidence in the market (Bora & Basistha, 2020).

3.19. Measures Adopted in the US

To prevent the economy from collapsing, the Committee for a Responsible Federal Budget approved the US Central Bank's release of $6 trillion. The Bank cut the federal funds rate by half a per cent, announced $700 billions of quantitative easing. The US government purchased $1.9 trillion in assets and provided more than $2 trillion loan programs aimed at cushioning the blow to many businesses (Joyce & Prabowo, 2020). The Federal Reserve lowered the interest rate to make it cheaper to borrow and pump money into the economy and provide necessary support for businesses. Those steps were necessary for businesses survival and banks required liquidity to facilitate credit to businesses.

3.20. The Outcome of the Measures Adopted in the US

The economic stimulus introduced by the US government yielded numerous positive outcomes as it averted the economic system from failing. The direct one-time cash payments of $1,200 to adult Americans helped alleviated their immediate financial needs. Furthermore, the business loan package available to businesses such as airlines and cruise lines that were impacted by the coronavirus helped reinvigorate the sectors and contributed positively to the economy. The $100 billion in funding for the health care sector reignited the systems to build more capacity (Cherkaoui, 2020).

3.21. The Social Impact

The "S" in PESTEL denotes the societal influence in purchasing behaviour that is crucial in determining the success or failure of businesses (Ramya & Ali, 2016). These factors include but are not limited to population, education, accommodation, transportation, foodstuff, and employment. The implications are huge for organisations especially in periods of economic crisis where social indicators try to establish when an economy might respond to certain changes in consumer behaviour (Feldman, 1971). Social implications of the coronavirus pandemic have profound outcomes beyond its exponential infection rate that scourged across countries and continents. For example, quarantine restrictions were necessary for the governments' efforts to control public health (Marinković & Lazarević, 2021). Structural inequalities became eminent during the outbreak of the coronavirus pandemic as income, education and access to medical care made minorities vulnerable to higher risk of infection and death.

3.22. The Social Impact in the UK

Gaps in the UK healthcare sector and the social system were exposed by the coronavirus pandemic. Medical professionals lacked essential protective equipment and shortages in hospital beds and ventilators were evident. Unemployed and minimum wage employees were seeking assistance from the government that was struggling to support health care services after years of underfunding (Berry et al., 2020). The coronavirus outbreak resulted in unpresented demand for NHS services which weakened the capacity to provide adequate service to mitigate the exogenous demand of the pandemic. The impact resulted from continuous slash in funding of 1.4 per cent between 2010 and 2019 (Tahtis et al., 2021). The reduced spending in the health care sector had a knock-on effect in the provision of hospital beds, waiting time, trained nurses and other services that would have supported the system better in the period of the coronavirus pandemic. Those born outside the UK and Ireland in occupations such as commercial drivers, security guards and those working in care homes recorded higher death rates than the national average (Sawyer, 2021).

3.23. Measures Adopted in the UK

Different polices were adopted by the government with the intention of managing the suffering of patients. Those people infected by the coronavirus that are not in a recognised risk group but presented mild symptoms were managed at home with clear instructions to follow up if symptoms became progressively worse. While patients with respiratory distress that required oxygenation needed hospitalisation for proper management (Craven, et al., 2020). Additionally, to mitigate the spread of the virus, the government suggested that property sellers and buyers halt any negotiations that were in progress during the lockdown periods.

Three months 'mortgage or rental holiday' was given to those experiencing financial difficulties as result of the coronavirus pandemic. The government passed legislation to cease evictions and eviction proceedings for the period (Michael, 2020). The government went further to support the less privileged in the society by changing the welfare payments, particularly, Statutory Sick Pay was paid to those tested positive from coronavirus and were advised to self-isolate. Also, the Universal Credit standard allowance was temporary increased by £20 per week and the minimum income floor for self-employed was lifted (Sawyer, 2021).

3.24. The Outcome of the Measures Adopted in the UK

Remote working was a redundant concept in most employment sectors as physical presence is necessary. For example, many employees in retail, construction, logistics and food production were required to be physically present at work (Sanchez et al., 2020). People take employment in these industries purely because of financial compulsion - considering the precarious nature of the jobs and low payments (Berry et al., 2020). Socio-economic division in educational achievement in the UK was more accentuated during the school shutdowns. Privately educated children from affluent families were provided with learning materials and equipment such as laptops and the engagement between students and teachers was more active than those children in deprived families (Blundell et al., 2020). More so, the lockdown increased the level of domestic violence such as physical and sexual abuse. Records from Refuge Charities indicated a 25 per cent increase in helpline calls for domestic abuse during the lockdown (Refuge Charity, 2020).

3.25. The Social Impact in the EU Member States

A higher proportion of death from the coronavirus was recorded in Italy, Spain and France in comparison to other EU Member States at the initial outbreak due to ineffective management and lack of resources (Lupu & Tiganasu, 2022). Italy is known to be one of the EU Member States that supported more doctors, however, the management of the health care system experience lacked central coordination thereby exposing a large number of the over 65 years to the virus. The Spanish government's underinvestment in the health care sector impaired its capacity when the outbreak was reported in the country. The health care system became unresponsive to surge in demand for intensive care unit beds, protective equipment, diagnostic test kits and mechanical ventilator (Lupu & Tiganasu, 2022). The French health care system was equally overburdened with demand and unable to meet the needs of coronavirus patients. Assistance was sought from the Germany government to cater for hundreds of the

coronavirus patients from France. The Spanish and Italian governments received medical support from Turkey, Cuba, Russia, China, and Qatar (Cherkaoui, 2020).

3.26. Measures Adopted in the EU Member States

The measures undertaken by EU Member States included restriction of movements, teleworking, reinforcing the message of cleaning, disinfection and provision of protective equipment (European Parliaments, 2020). There was coordination amongst Member States in the provision of PPE and medical supplies. The EU Commission provided 90 per cent funding for procurement of facemasks, ventilators, laboratory supplies, medical equipment, and PPE. European industries were contacted and advised to maintain their production capacity for necessary supplies of PPE in EU Member States. On the other hand, the export of PPE was regulated to ensure sufficient supply to all Member States (Broadbent, 2020). The process is managed by the Emergency Response Coordination Centre (ERCC). Member States were encouraged to admit their citizens and residents and transit was permitted to EU citizens returning to their countries such as Romania (Mantu, 2020).

3.27. The Outcome of the Measures Adopted in the EU Member States

During the outbreak of the coronavirus, government efforts were tilted towards supporting economic activities and ensuring that political institutions remain formidable. In contrast, less attention was given to social systems which resulted in reactive crisis management. Late decisions made in favour of public health in many EU Member States contributed to greater loss of life (Pham et al., 2020).

3.28. The Social Impact in the US

Pre-existing norms, patterns and the level of income disparities in the US that permit certain group privilege over others were exposed by the coronavirus pandemic (Dickson, 2020). The healthcare system is funded through a mixture of private and public spending and is designed to make profit for shareholders with limited government intervention. The system is design to make profit for shareholders and limited government intervention. Most healthcare facilities are owned and operated by private businesses. The government was forced to pay for coronavirus tests for those patients that could not afford them as the hospitals refused to test (Goede, 2020). In comparison to other advanced capitalist countries, the US welfare system is renowned for been ungenerous and successive government has become increasingly reluctant to social spending (Moos, 2021).

3.29. Measures Adopted in the US

State Governors in the US mitigated the spread of the virus by imposing stay-at-home orders in their respective jurisdictions. The state of California issued the first stay-at-home order in March 2020 and other states emulated with the number increasing to 42 states by 20 April 2020 (Joyce & Prabowo, 2020). Residents were compelled not to leave their home except for essential work, food and medicine. Many employees were persuaded to work remotely by

the US government as a measure to mitigate the spread of the virus. Schools and day care centres were forced to close in line with the government guidelines. For instance, the Governor of Pennsylvania ordered the closure of all nonessential businesses. The consequence of the stay-at-home policy resulted in a decline in the demand for many economic activities (Cherkaoui & Basbay, 2020). Businesses struggled to pay their rents and wages, and many were forced to close due to lack of business.

3.30. The Outcome of the Measures Adopted in the US

Social distancing mandates by the government disrupted work, school, social and family relationships. In turn, the physical and organisational structures that are dependent on health care, social services, education, faith-based organisations, government and many others interpersonal interaction adjusted their practices by moving online, postponed their activities or closed down (Joyce & Prabowo, 2020). Employees that had health care plan from their employment were impacted when they lost their employment because of the coronavirus pandemic. Over 10 million people lost their job since the end of March 2020 and the loss of medical insurance became added palaver.

3.31. The Technological Impact

The "T" in the PESTEL emphasises on the technology related opportunities and threats to every organisation. The global shift in businesses to more technological and scientific solutions has become prominent as organisations try to gain competitive advantage (Sing, 1997). For example, global healthcare organisations are leveraging technological advancement to improve clinical care and telehealth services (Srivastava & Singh, 2021). The coronavirus pandemic has accelerated the global transformation of digital technology in various ways. Human behaviour such as shopping, learning, working, meeting and entertaining has shifted from offline to online as a result of digital technology dynamism (Al-Maroof, et al., 2020). Technology trends such as Artificial Intelligence (AI), robotics, drones and the use of webinar platform (zoom) has evolved beyond comprehension. Their adoption has quickly refocussed businesses goals to cope with the challenges of coronavirus impact on a global scale. Countries that maintained low per-capital mortality rates from the pandemic adopted and integrated digital technologies for testing, contact tracing, quarantine, and health care (Eum & Kim, 2022).

3.32. The Technological Impact in the UK

Corporations and the UK government embraced the design and the use of technologies in various ways. They were used not only for mass surveillance of locations, preferences, and travel habits but also for biometric data (Cherkaoui & Arnold, 2020). It is indisputable that challenges existed with collection of data and their use has caused great concern. The impact of technology overall appeared to have yielded positive outcome in the UK during period of the coronavirus pandemic.

3.33. Measures Adopted in the UK

Access to internet technology proved very essential for individuals, corporations, and the government during the lockdown. Internet played a prominent role in the UK educational system as learning was done remotely. In the public sector, the revolution of technology was immense and became a commonplace as courts started operating remotely with the use of Skype, Microsoft Team and trials were held via video technology. For businesses, new technologies were invented, and their use varied considerably, such as electronic filing and zoom meetings, online processes as employees were compelled to work from home (Coronavirus Act 2020, s 34).

3.34. The Outcome of the Measures Adopted in the UK

The Coronavirus Act 2020 permitted the use of technology for hearings to take place remotely and allowed video of legal proceedings. Prior to enactment of the Act, it would have been a criminal offence under section 41 of the Criminal Justice Act 1925 (*Spurrier v Secretary of State for Transport)*. Evidence showed how the coronavirus affected people differently based on their socio-economic status (Aziz, 2020). The outbreak of the coronavirus exposed social inequalities and digital illiteracy as 10 per cent of adult population in the UK do not have access to internet (Watts, 2020). The obvious predicaments of the digital exclusion are affordability, lack of digital skills and education which is common with the less privilege. However, the embracing of technology in the era of coronavirus might be a road to a slippery slope for surveillance as history has showed that short-term measures often have a habit of lasting longer than originally intended.

3.35. The Technological Impact in the EU Member States

Governments in the EU Member States implemented variety of technological measures to prevent the rapid spread of the coronavirus. Following drastic lockdown measures and borders closure within the Schengen zone, the coronavirus pandemic continued to evolve, which at a point forced many Member States to seek technological solutions. Some of the technological solutions includes anonymised phone location tracking and contact tracking apps (Dumbrava, 2020). The acceleration of technological measure to curtail the spread of coronavirus by Member States reinforced the existing debate of privacy protection of users. The EU has recently set limitations to the unfair use of personal data. For example, the indiscriminate sharing of data with US corporations (Klonowska & Bindt, 2020). Nonetheless, the General Data Protection Regulation (GDPR) of 2016 set out a standard of data protection (European Parliaments, 2021).

3.36. Measures Adopted in the EU Member States

Some EU Member States used anonymised phone location data that provided accurate statistics about people's movements including density and direction of movement (Orange, 2020). The Italian government was able to strengthen the lockdown measure when data was provided from telecoms that people were not adhering to restrictions (Hsu, 2020). Similarly, the Belgian government was able use location data as a measure to ensure that 80 per cent of the citizens remained in their zip code. The Latvian government gathered data from local

telecom to anonymised location which provided knowledge of crowded places and the government used the data to enforce the law in preventing people from gathering (Klonowska & Bindt, 2020). However, it is argued that the accuracy of location is dependent on the density of antennas and the availability of GSM protocol technique (Klimburg, et al, 2020). The French government was more in favour of drone technology as a most effective measure to contain the spread of the coronavirus.

3.37. The Outcome of the Measures Adopted in EU Member States

The adoption of digital technologies as a measure to contain the spread of the coronavirus was one of the best strategies implemented by EU Member States. The technologies provided data for policymakers to take appropriate and timely decisions in mitigating the virus in terms of outbreak tracking, treatment of infection and manufacturing of the vaccine (Pham et al., 2020). The use of technologies as a measure has helped governments to act on societal and economic implications of the spread of coronavirus pandemic.

3.38. The Technological Impact in the US

Artificial Intelligent (AI) and big data made it easier for the US government to contain and prevent the spread of coronavirus. Tools such as migration maps uses mobile phone signals and mobile payment applications to collate real-time data on the user location (Johns Hopkins University, 2020). The mobile data collected were used to mitigate the spread of the virus in keeping people within the isolated vicinity.

3.39. Measures Adopted in the US

The US government used numerous technologies to contain and prevent the spread of the virus. For instance, machine learning models were developed to predict the dynamism of regional transmission of the coronavirus and is used for border checks and surveillance. The US government adopted digital technologies to collate real-time data to contain and prevent the spread of coronavirus. The dashboards technology was utilised for time-series charts, geographic maps, clinical trials, contact tracing and community surveillance (Budd, 2020). Digital technology was pioneered by the US government to provide remote care to patients with mild or moderate coronavirus illness in their homes (Whitelaw et al., 2020). Anonymous data on mobile device locations were used by the US government to monitor the population (Allcott et al., 2020). Each US county used GPS data to ping mobile phones applications in order to determine pedestrian traffic patterns in locations such as restaurants, cinemas, hospitals and retail stores.

3.40. The Outcome of the Measures Adopted in the US

Digital technology used to quarantine individual that were infected or exposed to someone that was infected with coronavirus reduced the spread of the virus. Despite all the technological measures adopted to mitigate the spread of the coronavirus, digital health interventions such as those used for tracking individuals and enforcing quarantine rules can

undermine privacy. The surveillance by the government created fear and threaten civil liberties (Eck & Hatz, 2020). The AI prediction and contact tracing applications had their pitfalls (Soltani et al., 2020).

3.41. The Environmental Impact

The other "E" in the PESTEL represents the "Environment" and includes the ecological factors which require organisations to make policies that have direct impact on the ecosystem (Sexton et al., 2000). The impact of environmental factors on business is reflected on the intensity of their Corporate Social Responsibility (CSR) activities, eco-friendly Research and Development (R&D) investments, as well as the level of commitment to ethical practices (Arefyeva, 2020).

The global lockdown measures enforced by governments as a result of the coronavirus pandemic gave respite to the environment from pollution (Nigam et al., 2020) The coronavirus indirectly contributed positively towards the UN 2030 Sustainable Development Goals by reducing greenhouse gas emissions, outdoor air pollution and environmental noise level (Shulla et al., 2021). However, the coronavirus pandemic increased the use of single plastics (including PPE) due to change in the pattern of shopping from in-store to home delivery. Also, waste management shifted from recycling to incineration which had a negative impact on the environment (Ray et al., 2022). Additionally, the pandemic impacted wildlife to the extent that conservationists were required to work day and night in order to monitor and protect endangered species (Manenti et al., 2020).

3.42. The Environmental Impact in the UK

Positive outcomes from the lockdown were experienced even when the world stood still, and particularly in the UK. It is noteworthy that the impact of the coronavirus pandemic on the environment came indirectly because of the responses to the virus. However, the abrupt limiting or closure of economic sectors such as hospitality businesses, transportation and heavy industries were the main factors that contributed positively toward lowering pollution levels during the lockdown.

The working from home measure introduced by the UK government had both positive and negative impact on the environment. Reduced level of travelling during the lockdown helped in lowering the emissions due to less commuting by public transport and driving of cars, while household cooling and heating increased emissions as people worked from home (Ishwaran, et al., 2020). In addition, the closure of borders for international travelling led to a sharp decline in flying which lowered emissions and had a positive impact on the environment. The restriction had a knock-on effect on the travel industry used by airlines. However, reduced commuting and flying has resulted in staycation that boosted the local economy. Additionally, active travelling such as cycling, and walking doubled during the weekdays and tripled at the weekend compared to pre coronavirus pandemic (Robinson, 2020).

3.43. Measures Adopted in the UK

Since the outbreak of the coronavirus pandemic, the UK government has opted for green investment in renewables and energy efficiency as means of delivering jobs in comparison to traditional stimulus measures (Her Majesty Government, 2020). The new environmental priorities make the measure attractive as they can create skilled jobs that are geographically distributed (Stern et al., 2020). The government expressed the intention of investing £12 billion for a greenhouse industrial revolution as a long-term support of financial assistance for low-carbon transport and Carbon Capture and Storage (CCUS) development in November 2020 (Her Majesty Treasury, 2020). Despite the government investment initiative, it is argued that such stimulus is effective only in the long run, as opposed to short-term growth, which the economy urgently needed in the pandemic era (Popp et al, 2020) and others have documented that numerous green recovery policies post 2008 crisis needed a considerable amount of time to be implemented (Zenghelis & Rydge, 2020).

Further measures were announced by the government to encourage green skills by launching the Lifetime Skills Guarantee which intends to assist adults in gaining qualifications in areas such as engineering (Department for Work and Pension, 2020). There was also encouragement for private investment in offshore wind turbines that can eventually domesticate part of the energy supply chain (Allan, et al., 2020). The government provided over £95 million in support of the scheme for two years for short courses that will enable people to retrain for new career paths. It is argued that the availability of the scheme that is guaranteed for those without A-levels or equivalent qualifications excluded more than a million paid workers (Department for Work and Pension, 2020, April).

To maintain the lower emission standards experienced during the lockdown, the government took measure to support local authorities in installing Electric Vehicle (EV) infrastructure for On-Street Residential Charge points Scheme with the sum of £20 million (Marix, 2020). The government increased the amount of funding after concerns were raised over high grid connection cost for charging points. In comparison to other countries, the UK government offered minimum support to persuade people to transition to EVs. Even after setting high goals of phasing out petrol and diesel cars sale by 2030, the government is yet to set the road map in how to achieve the goal of delivering the infrastructure (House of Commons Committee of Public Accounts, 2021). It is argued that the government initial commitment of £2 billion for EVs and £27 billion for roads, strongly indicates that EVs are of less importance. The government investment in the low-carbon economy would generate employment and foster the UK government in attaining its legal commitments made in Paris Accord and equally encourage a sustainable economic recovery from the coronavirus pandemic crisis (Berry et al., 2020).

3.44. The Outcome of the Measures Adopted in the UK

From an environmental perspective, the outbreak of the coronavirus had a positive consequence in the UK, ascribed to limited mobility which helped to improve the air quality and reduction (Chavel, 2020). However, the UK government's policy also had negative

environmental consequences. Measures to curtail the spread of the virus has increased the volume of nonrecyclable waste and large-scale quantities of organic waste generated because of diminished agricultural export due to the lockdown measure (United Nations Conference on Trade and Development, 2020). Every household in the UK experienced extra heating costs during the lockdown. UK homes remained energy inefficient and draughty resulting in further costs as people stayed and work from home including children that were home schooled. For the UK government to meet its climate targets, improvement in insulation will help alleviate extra heating costs (Hepburn et al., 2020).

3.45. The Environmental Impact in the EU Member States

To contain the spread of the coronavirus, a series of unilateral and collective measures were implemented by governments in EU Member States ranging from travel restrictions to complete lockdown and temporary closure of educational institutions. These measures resulted in favourable outcomes on the environment with regards to pollution as streets were deserted, flights cancelled, and factories were closed (Meles et al., 2020). Greenhouse gas (GHG) emission dropped in proportion lower since World War II (Global Carbon Project, 2020). The lockdowns, quarantines, border closures and social distancing policies by governments played a major contributing factor to reductions in air pollution. As much as the changes might be temporary, the changes in our lifestyles had a positive effect on the environment.

The air pollution in EU Member States reduced drastically when the governments introduced the stay-at-home measures to contain the spread of the novel coronavirus. Industries and regular constant activities all ground to a halt. For example, there was a limited use of cars that contributed to greenhouse gas which led to reduction in Nitrogen Dioxide (NO_2) concentrations in countries such as France, Germany, Italy, and Spain (European Space Agency, 2020). However, the quarantine policies introduced in many countries created a new culture of greater demand for online shopping and home delivery. This resulted in more organic waste generation by households as food bought online is shipped packed (Zambrano-Monserrate et al., 2020). The generation of inorganic and organic waste created a wider environmental problem such as air and water pollution (Mourad et al., 2016).

The most effective way of preventing pollution, save energy and conserve natural resources is through recycling (Ma et al., 2019). EU Member States implemented waste management restriction in those countries that were most affected by the pandemic. For example, the Italian government prevented those residents infected by the coronavirus from sorting their waste. After the outbreak of the coronavirus, there was a steady increase in medical waste and PPE such as masks and gloves (Sarkodie & Owusu, 2020).

3.46. Measures Adopted in the EU Member States

A series of measures were undertaken by EU Member States to reduce pollution levels after the outbreak of the coronavirus. A recovery plan was extended from 2021 to 2027 which requires Member States to commit 30 per cent spending on the transition to net zero (European Commission, 2021). The German government pledged €11bn (0.32% GDP) reduction in its renewable energy levy and a further €7bn (0.2% GDP) for the country's hydrogen strategy.

The French government set aside €30bn (1.24% GDP) of the country's recovery plan for climate transition which includes provisions for retrofits and low-carbon transportation (French Government, 2020). Additionally, the French government attached environmental conditions in its support of €1.5bn (0.06% GDP to Air France to develop low-carbon aircraft. EU Member States also imposed restrictions in international travel to combat the spread of coronavirus. Regional quarantine and lockdown measures were introduced in several parts of EU Member States.

3.47. The Outcome of the Measures Adopted in the EU Member States

Restrictive measures to prevent the spread of the coronavirus by EU Member States on transportation, businesses and closing of industries contributed immensely to reduction in GHG emissions compared to pre coronavirus outbreak years (Shehzad et al., 2020). In the first quarter of 2020, the International Energy Agency (IEA) recorded 25 per cent decline in energy demand in countries with full lockdown and an average of 18 per cent in countries with partial lockdown (International Energy Agency, 2020). The lockdown from coronavirus also improved water quality notwithstanding the huge medical waste inappropriately disposed in the environment. The Copernicus Sentinel-5P satellite showed a reduction in NO_2 concentrations over Rome, Madrid and Paris: the first cities in the EU that introduced strict lockdown measures (Zambrano-Monserrate et al., 2020).

The social distancing and quarantine measures substantially reduced commuting for employees as many jobs shifted to working from home. The restrictions in travel also led to decreases in the use and demand for oil and its by-products which resulted in reduction of smoke and waste due to less consumption. The National Aeronautics and Space Administration (NASA) and European Space Agency (ESA) reported significant reduction in nitrogen dioxide air pollution as a result of community quarantine and lockdown (El Zowalaty et al., 2020). Beaches in the EU Member States became cleaner as less waste was generated by tourists because of social distancing measures introduced by the governments. Noise levels fell significantly in most countries due to the reduction in the use of private and public transportation as well as commercial activities (Zambrano-Monserrate et al., 2020).

3.48. The Environmental Impact in the US

There was improvement in air quality and a reduction in water pollution in part of US cities caused by restriction of movements imposed (Rupani et al., 2020). For example, closing of companies brought a sudden drop of greenhouse gases (GHGs) emissions which reduced the level of air pollution in New York by 50 per cent due to lockdown measured adopted to control the virus. However, like every part of the globe, a growing amount of domestic waste is confirmed in every part of the US due to lockdown imposed by the government, causing concern to the United States Environmental Protection Agency (USEPA). The quarantine regulations influenced a pattern of shopping behaviour which drastically changed from traditional to online shopping leading to increased amount of waste that were not properly dispose (Sharma & Jhamb, 2020). The use of face masks, hand gloves and other PPE for protection from viral infection has increased the amount of healthcare waste in the US (Calma,

2020). The improper disposal of PPE in open places and in some cases with household waste created clogging in water ways and worsened environmental pollution (Rahman et al., 2020).

3.49. Measures Adopted in the US

The lockdowns measure enforced by the US government inhibited movement, prevented international and local travel, closed schools, colleges and universities (Wilder-Smith & Freedman, 2020). International travel bans cut the number of flights that lower the consumption of fossil fuels which in turn lessened GHGs emission that helped to combat pollution (Rupani et al., 2020).

3.50. The Outcome of the Measures Adopted in the US

There were increased volumes of medical waste in the US while the focus on plastic restrictions and pollution regulations has changed towards controlling and preventing the spread of coronavirus (Yu et al., 2020). Several states ceased their recycling programmes, as authorities were concerned about the risk of spreading the virus in recycling centres thus prioritising incineration and landfilling. Such precautionary measures resulted in inappropriate waste management as PPE were discarded with empty bottles of hand sanitisers and organic solid waste (Ma et al., 2019).

3.51. The Legal Impact

The "L" in the PESTEL represent legal factors that involves regulations which control business activities (Anderson et al., 2019). The legal aspect of business is centred on compliance and enforcement of legislation, such as antitrust law, patent infringement, employment regulations, employee safety and health regulations, that set the parameters according to which businesses operates. Legal measures played an important role in containing and preventing the spread of coronavirus globally. Governments resorted to reviving their healthcare legislations or promulgated new legislations to restrict the movement of their population in order to halt the spread of the coronavirus. The measures taken by governments in response to the coronavirus highlighted the difficulties that involved trade-offs between civil liberties and the need to protect the general public (Orzechowski et al., 2021). During the outbreak of the coronavirus, most governments decided on using technology for mass surveillance as a primary mean of controlling the citizens (Kitchin, 2020). Arguably, the severity of the virus demanded that public health trumps civil liberties.

3.52. The Legal Impact in the UK

The Coronavirus Acts 2020 contributed to the UK government enforcing policies that were aimed to reduces the spread of coronavirus, minimised the running cost of public bodies and reduced the labour shortfall required to deliver the essential public services (Coronavirus Act 2020, s 2 – 8). The Secretary of State for Health and Social Care is compelled by the Act to report every few months on how the entrusted power is exercised. In March 2022, some of the provisions expired automatically and other provisions requires parliamentary review every

six months (Coronavirus Act 2020, s 89-92). The Coronavirus Acts 2020 has empowered the Scottish government and Northern Ireland Executive to make 'lockdown' regulations to reduce the spread of the coronavirus (Coronavirus Act 2020, s 48-49). The Act also gave authority to the Treasury to formulate the financial schemes such as the furlough. The Act went further to empower the electoral commission to postpone elections for police and crime commissioners, mayor and local government elections that ought to have been held from May 2020 to May 2021 (Coronavirus Act 2020, s 75).

3.53. Measures Adopted in the UK

The Act transformed the legislative paradigm through technology in allowing witnesses at court proceedings to be shown by live link rather than in person. The coronavirus pandemic has expedited the digitisation process that courts in England and Wales has been seeking since 2016 (Coronavirus Act 2020, s 53-57). Ministers, including the devolved administrators are empowered by the Act (Coronavirus Act 2020, s 52) to limit or prohibit gatherings or events, as well as restrict access or close down premises.

Retired pensionable NHS employees were permitted to return to work and help alleviate the labour shortage as a result of the Act that was promulgated. The government's intention was to encourage retired health professionals to return and assist with their impeccable skills (Coronavirus Act 2020, s 45-47). In addition, the Act permits the registration of medical students nearing the completion of their training, social care professionals and those who recently left their profession. The number of hours normally restricted to work by return of NHS staff was abolished and the Act also facilitates emergency volunteering (Coronavirus Act 2020, s 2 – 9). Ministers can use the Act to temporary close schools or registered childcare providers.

3.54. The Outcome of the Measures Adopted in the UK

Concerns were raised in the UK about the emergency measures taken by the government in promulgating the Coronavirus Act 2020 since it creates room for potential clash between freedom, privacy and public health measures. The authorities are empowered by the Act to detain individuals they suspect to be infectious and within the power to take sample of their saliva by force. Individuals changed pattern of their movement when they became aware of the surveillance and tracking efforts by the government with the purpose of trying to curtail the spread of the virus.

On a positive note, the lockdown measures introduced by the UK government encouraged local tourism as it created domestic travel called staycation. The coronavirus pandemic has caused financial challenges for many people due to job losses. International travel restrictions with added complexity of documentations and the requirement for testing prior to travelling discouraged many except when it was necessary However, staycation is very expense compared to travelling to another holiday destination (Moon & Chan, 2021). Even the local restriction measures such as social distancing of 2 meters and the likelihood of getting infected by the coronavirus locally did not encourage staycation.

3.55. The Legal Impact in the EU Member States

Four types of legislative measures (constitutional states of emergency, statutory regimes, measures adopted under special legislative powers and measures adopted almost exclusively under ordinary legislation) were implemented by the 27 EU Member States to mitigate the spread of the coronavirus pandemic (European Parliament, 2020). The constitutional state of emergency was adopted by 10 Member States, while the statutory regime was used by four Member States and five Member States resorted to special legislative powers to prevent the spread of the virus. For example, Portugal used the state of emergency provided by the constitution, statutory regimes and ordinary legislation. On the While on the other hand, Austria, Cyprus, Denmark, Netherland Ireland, and Sweden adopted ordinary legislation to prevent the spread of the virus. Where a constitutional state of emergency could not be declared in Member States, the executive resulted to special legislative powers (Italy) to mitigate the spread of the virus. Also, there were Member States (Crego & Kotanidis, 2020) that created enabling laws that either pre-existed or were formulated *ad hoc* to mitigate the pandemic (Germany and Slovenia).

3.56. Measures Adopted in the EU Member States

The Parliaments in all Member States played a prominent role in the process of managing the coronavirus crisis by promulgating legislation based on policy directives from their governments. Many countries had to pass new legislation or amend existing laws to enable governments to adopt measures required to contain the spread of virus. Temporary measures were adopted in some cases such as quarantine or lockdowns in areas where the virus was evolving rapidly which provided needed powers to the governments for decisive decision making. Promulgated coronavirus legislations made it easier to expend resources to procure equipment and PPE in mitigating the spread of the coronavirus (European Parliament, 2020).

Member States closed their borders, quarantined citizens and non-citizen in their territories and non-EU citizens were not allowed to the Schengen area and other countries applied the same restrictions to combat the coronavirus (Turanjanin & Radulovic, 2021). However, many refused to abide by the restrictions, and this resulted in further infections. For example, a patient in a hospital in Bosnia and Herzegovina declined to tell others of their returned journey from Italy and infected the whole hospital.

3.57. The Outcome of the Measures Adopted in the EU Member States

Some of the lockdown measures created resentment amongst the population as many were economically disadvantaged. Many members of the society believed the lockdown to be scientifically unsupported and the restrictions were unjust. People felt strongly about the violations of their civil liberties such as the freedom of peaceful assembly (Article 20 of the Universal Declaration of Human Rights). In contrast, some Member States deemed that the early lifting of the restrictions was at the expense of human life in pursuit of reopening business activities (Alder et al., 2020). In general, the restriction of movement could be accounted as one of the best measures to control the spread of the virus, however, it was also used to prevent

mass gatherings and supress political opposition as witnessed in Spain (Amnesty International, 2019).

3.58. The Legal Impact in the US

Between March 2020 and April 2020, the US government enacted four pieces of legislations that granted a total of US$3 trillion on spending and tax cuts. This legislation supported coronavirus relief packages as a measure for social intervention to fund healthcare, research, services, and education (Moos, 2021). Legislations was used in enforcing the restriction of movement to contain and prevent the spread of coronavirus in the US. The Federal Public Health Services Act empowered the Centre for Disease and Control (CDC) to detain, medically examine, and quarantine persons traveling between states or into the US if there were suspicious of infected with transmissible diseases (42USC§6A 2016). Under the legislation, CDC agents can hold a coronavirus infected person for up to 72 hours, offer medical testing and consensual treatment at the government expense.

3.59. Measures Adopted in the US

The Coronavirus Preparedness and Response Supplementary Appropriations Act (Public Law 116–123) signed March 2020 was the first bill passed by the Congress as a measure to give financial support by the Federal Reserve to actions aimed to mitigate the coronavirus. The financial allocation was to increase domestic discretionary spending of $8 billion funds to support the development of vaccines and other epidemiological requirements (Amnesty International, 2019). In March 2020, the Families First Coronavirus Response Act (Public Law 116–127) was signed by the President, for approximately $192 billion as a further measure to mitigate on financial needs resulting from the coronavirus pandemic. The bill included spending on unemployment benefits with the federal government covering the total cost rather than the normal 50 per cent. The legislation relaxed the need to receive the Supplemental Nutrition Assistance Program (SNAP) (food stamp) benefits but created alternative ways for the states to supply meals to children impacted by school closures (Congressional Budget Office, 2020).

In March 2020, President Trump signed the Coronavirus Aid, Relief and Economic Security (CARES) Act (Public Law 116–136). It was the most extensive legislative measure taken by Congress to mitigate the coronavirus expenditures. The estimated spending of $1.7 trillion was to cover a period of 10 years with most of the spending to occur in the first two years. The financial assistance was intended to alleviate the economic burden experienced by individuals, businesses and governments. Small businesses were allocated a total of $377 billion for Paycheck Protection Program (PPP), a total of $170 billion in funding for medical care responses and a refundable tax credit of $1,200 per qualifying adult and $500 per dependent child (Philip & Prabowo, 2020). The Paycheck Protection and Health Care Enhancement Act (Public Law 116–139) was the fourth bill passed by the Congress and signed by the President in April 2020. The bill is narrow in scope with discretionary expenditure under $500 billion, one-third available to be spent when necessary and two-thirds for increasing direct spending. A sum of $75 billion was provided to reimburse healthcare providers for lost revenues, and $25 billion was allocated for several nutritional and rural programs. Further sum

of $62 billion was provided for salaries and expenses, and a total loan of $377 billion was made available for Small Business Administration (Philip & Prabowo, 2020).

3.60. The Outcome of the Measures adopted in the US

An expansive financial leverage was given by the CARES and Families First Acts mainly the low-earning population. The Acts allowed for two weeks' job-protected sick days pay, (strictly for coronavirus related absence) of approximately 65 million private-sector and 22 million public-sector workers. In many cases the money would have been used for childcare purposes (National Partnership for Women and Families, 2020). Prior to the coronavirus outbreak, the US government rarely considered any expansion of job protection or paid leave. However, the outbreak of the coronavirus has made the US government to consider it a measure to mitigate as a financial cushioning for the population (Brian, et al., 2020). In precluding firms with more than 500 employees from the paid leave in the provisions, 59 million workers were automatically denied protections, and a disproportionate number of whom were women of colour.

4. Discussion

The SWOT acronym derives its name from the words strengths (S), weaknesses (W), opportunities (O), and threats (T). The S and W acronym are related to internal factors, while the O and T represent environment influences. Opportunities are external factors that have a positive interaction with the system, while the negative effects to the system environment represent Threats to the system. The result of the SWOT analysis can be used for selecting appropriate criteria for mitigating the spread of the coronavirus pandemic. In critically analysing the external influencing factors (PESTLE) identified by the spread of the coronavirus, the SWOT analysis seeks solutions from the internal strengths and weaknesses by evaluating how the government policies functioned in mitigating the virus. Additionally, it examines the threats and opportunities as well as, the external factors created by the pandemic.

5. Strengths

The UK government is endowed with a labour force that is ready to be trained and re-trained which is shown with the level of unemployment after the outbreak of the coronavirus pandemic. These employees that were made redundant after the furlough scheme as businesses went into liquidation can be retrained in other sectors. Also, the younger population can be trained in apprentices' scheme to boost the UK labour force after the completion of their training.

Fiscal stimuli provided by EU Member States in critical time of the coronavirus pandemic clearly manifested the strength of the European Union. The buffer fund set aside when the Member States were experiencing trading surplus enabled this swift response. The coronavirus pandemic also provided an opportunity for the EU Member States to build on their strength in innovation and to reboot their economies by creating employment in green sectors. With commitment from all Member States, they have economies and manpower resources to support climate action (European Commission, 2020).

The US government has the financial and human resources strength to refocus on developing all the sectors of the economy. The outbreak of the coronavirus precipitates the prerequisite for the US government to transform the sectors in order to maintain its global dominance. It is necessary for the US government to separate production and consumption activities between 'physically interactive' and 'physically disjointed' as they appear to be a growing discrepancy between growing demand in the latter sectors and a complete decline in demand in the former. While companies such as Amazon or Netflix are flourishing and seeking for more people to employ, other sectors such as hospitality and travelling, are making workers redundant. The government needs to play a dominant role in transforming the labour force (Snower, 2020).

6. Weaknesses

The coronavirus revealed the UK government's weakness in the structure of the welfare system which is contributing to a high level of financial constraint on the poorer members of the society. The financial difficulties are extended to the housing sector, as increase in the precarious low-paid work makes rental payments unaffordable. With the loss of income encountered by some groups and the failure of the welfare state, many are therefore dependent on the government for financial support with Universal Credit (UC). The UK government has long under-taxed certain parts of the population (Berry et al., 2020) and thereby hindering the proper funding of the welfare system with financial resources.

Cross-border cooperation to share data and coordination was difficult amongst some EU Member States due to differences in national legislations. Regardless of this there is a need for private and public cooperation in order to build and provide rigorous ways to utilise data and maintain individual liberties, privacy and security.

The US government's health care policies limit its responsibility and allows the sector to market forces to determine the health care provision of the population. The health care providers such as Medicare, Medicaid and others were heavily impacted by the outbreak of the coronavirus pandemic as they were unable to meet the demand. The government could not determine on how those healthcare providers were running services to cater for their insured members of the population. The US government's direct investment in the healthcare sector would have given it a part control in coordinating the resources to mitigate the pandemic.

7. Opportunities

The UK government can take the opportunity from the coronavirus pandemic and build on its human resources by investing in apprenticeships schemes to train unemployed youth and low-paid workers. This strategy will help in rebuilding the economy in supporting the unemployed and low-income employees as a direct intervention to expedite economic recovery and reducing their dependence on the government. In the absence of government investment, the skills inequalities will exacerbate as corporations continue to direct resources away from development and training (Boeren, 2020).

EU Member States can formulate a better coordination in periods of crisis to avoid the duplication of relief efforts as coronavirus has exposed lapses. Resources such as medical supplies, equipment and medical personnel were not coordinated to the requirement of Member States. The efficacy for proper coordination of resources needs continuous cooperation and

solidarity (Sovig, 2020) EU Member States has a greater opportunity to learn and improve in planning for all infectious disease outbreaks. Also, there is scope for smarter use of technology that already exists, as artificial intelligence was used for diagnosis and modelling the spread of the coronavirus (McCall, 2020).

Opportunities to improve health care policy have been created by the coronavirus for the US government to prevent the differences occurring with the marginalised groups that had higher mortality rates (Golden, 2020). A new health care policy can deal with the causes of significant socio-economic and health problems that impact the marginalised in the US society (Hostinar & Miller, 2020). Failure by the US government to take this opportunity and improve the healthcare sector now will lead to continuous reactive measures as opposed to been proactive ones, ahead of a future health crisis.

The UK government, the US and EU Member States can move towards decarbonisation after the positive outcomes on the environment as a result of the measures adopted. The governments need to pursue a green industrial policy and avoid environmentally destructive economic practices. Contracts awarded to firm and industry by the governments must incorporate an element of sustainability which will maintain the level of pollution at the extent experienced during the period of the lockdowns (Berry et al., 2020). The governments must not lose focus on intensifying on green stimulus projects in order to ensure sustainable recovery rather than embarking on short-lived and non-environmental programmes.

8. Threats

Those seeking to enter the labour market have been facing stagnation and diminished vacancies prior and during the coronavirus pandemic. Part of the problem is the UK government's inadequacies in formulating industrialisation policies that can create job opportunities. This is evident during the pandemic as the UK failed to produce ventilators, testing kits, protective gear for healthcare sector. The government became over-dependent on international supply chains to meet short-term demands. while the initiative for long-term plans for local production is still lacking (Foster & Pooler, 2020).

Since the outbreak of the coronavirus, EU Member States are facing further wave of Euroscepticism and nationalism. This obvious threat necessitates further consolidation of the Member States as the coronavirus has exacted a heavy human toll across national borders. The coronavirus pandemic requires Member States to consider decentralising councils at local and regional levels in preparation for future crisis. During emergency situations, citizens at the local council level can be involved in the decision-making process.

The US government overly exposed itself by relying heavily on foreign supply for essential commodities such as medical equipment and PPE during the outbreak of the coronavirus. To circumvent the predicament, the US government needs to look at various ways to incentivise local companies to produce essential products especially in the times of crisis. Local production can reduce reliance on international suppliers. Although, some goods produce locally might be more expensive because of higher labour cost opposed to cheaper imports.

9. Contribution

This paper has contributed immensely by using the PESTEL model to aggregate the impact of coronavirus to all stakeholders. It has given opportunity to stakeholders to address their future set objectives after reflecting on those identified problems. The paper went further to expose the significant difference in the socio-economic systems in all the jurisdictions examined.

Whistleblowers in the UK, the US and EU Member States were not accorded the necessary legal protection when they reported misconducts during the outbreak of the Coronavirus. Efficacy of this research helped identify loopholes in the existing whistleblowing legislation that should be amended for effective protection of whistleblowers. Also, the findings from the research exposed the cost implications of COVID-19 related malpractices and highlights the consequences of retaliation against whistleblowers. This paper also looks at relevant provisions in the mentioned jurisdictions that can be used to protect and compensate COVID-19 whistleblowers.

10. Concluding Remarks

Global efforts have been made to slow down the spread of the coronavirus with measures ranging from testing and treating patients, contact tracing, travel ban, quarantining, cancellation of large gatherings in sporting events, concerts and schools. Some countries were fast in effectively containing the spread of the virus, while others were slower due to various reasons. The most effective measure implemented since the outbreak of the coronavirus that significantly slowed or reversed the spread was immediate isolation when individuals became infected. Testing and contact tracing, social distancing and continued washing of hands also reduced infections (Bueno, 2020).

Proactive policy measures to upgrade the healthcare sector need to be implemented by governments globally in order to avert future health crisis. It is evident that most governments underfunded their healthcare systems, thereby impeding them from actively managing the coronavirus pandemic due to shortages in material and human resources. The disparity in the mortality rates from the coronavirus pandemic gave a clear indication to the governments around the globe to shift from the current paradigms that disenfranchise some members of their population. Governments need to implement economic policies that will emancipate the marginalised in the society as pervasive structural and systemic issues have impacted on the wellbeing of the disadvantaged (Belgrave & Abrams, 2016).

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DETERMINING THE NECESSITY OF LAW OF NATIONS IN NATION-BUILDING: ADDRESSING THE PECULIARITIES OF THE EMERGING NATIONS

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Abstract

The growing significance of the law of nations in nation building and the compelling need to address the peculiarities of emerging societies have led to rigorous efforts aimed at regulating institutions of international relations. This paper explores some of the challenges arising from different ratification of treaties, divergent interpretations of shared obligations and the recent wave of globalization and its impact on all aspects of global existence. It is against the backdrop driven by the desire to create stability in nation-building that law of nations system evolved. In this light, it becomes imperative that law of nations should be seen as a major driver in nation-building process. This is an important starting, point from which to reiterate the fact that nation-building cannot be guaranteed if the future of the law of nations are not taken into cognizance. It is argued that, the continued neglect of law of nations in nation-building process remained a clog in the development cooperation treaties. The paper adopted analytical and qualitative approach on current literatures, legislations and policies on the law of nations which is achieved by a synthesizing of ideas. Nevertheless, the paper concludes that in order to achieve nation-building agenda and the right to development through a legally-binding instruments.

Keywords: Law of Nations, Nation-Building, Necessity, Right to Development, Peculiarities

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1. Introduction

The above topic has been a source of concern to the writers since the concept of nation building centres on how indigenous peoples can pull together and implement the rules processes, and structures of governance needed to building future they desire. In this paper, among other things, the paper will examined the linkages between law of nations and nation building process. It argued that a more coherent law of nations frameworks is based on historical principles of liberalism, and a better form of promoting nation building prosperity and security.

However, it observed that law of nations has its roots in antiquity as ancient tribes struggled to come to agreement concerning the creation of territories and distribution resources (Schwabach, A and Cockfield, A.J :2009). Furthermore, in examining a complex interplay between nation- building and citizenship education , we need to draw a comparative and global discourses on other cultures (Stromquist, N and Monkman, K: 2000). Notwithstanding that a "nations conceptualized a "community of culture," to that where members are attached by emotional bond" (Kloskowska, A :1996, 70). It follows that global governance institutions, though created and sustained through treaties made by States are increasingly taking charge of the functions law making (Buchanan, A: 2010, 95). Thus, this argument was reinforced and sustained by the principal challenges to the legitimacy of the law of nations in nation -building such as the belief that the United Nations Security Council is primarily concerned about the security of the global community**.** It may be argued within the context of this research that comparative and global discourse surrounding other cultures in nation building oftentimes made us to identify and question the beliefs and assumptions that surrounds the questions on the "universality" of the law of nations.

In the same vein, it appears however, that there is no problem of incompatibility in principle, if states can, subject themselves to the principles of law of nations by following processes that accord with their constitutional principles. Basically, one way of accomplishing this is by creating new constitutions or amending an old one so that it recognizes the supremacy of international Law, or some types of international Law, such as human rights law. Moreso, in nation building, it a democratic state ratites a treaty and incorporates the relevant Laws into its domestic legal system through a process that statistics constitutional requirements them presumably it will be true to say that the State has a substantial content independent moral reason to comply and that the citizens of the democracy have a substantial-content independent reason to support their state's compliance because the law in question became the law of the land through constitutionally-sanctioned process. In light of the focus of this paper, it is worth mentioning that this paper is structured into three parts. Part one provides an overview the view point of nation-building a as well examines the basic concepts and terminologies relevance in this discourse. Part two justifies the role of the Law of nations in nation building process through the demonstration of the relationship of the right to development to existing substantive treaty regimes. The third section applies to multi-stakeholders agreement on the right to development and further describe how to achieve the right to development through a legally binding instrument. In the end, the paper concludes.

1.2. Understanding Law of Nations

The political conception of the law of nations is committed to understanding the distinctive nature of the law of nations strictly in light of it's role in contemporary international political practices and relations. The thematic focus of law of nations is wide and all-encompassing. The scope of law of nations to a large extent represents a distinctive inter-relationship between the government and the public sector which must be regulated as the case may be. However, the scope and definitional content of law of nations can be derived from such regulatory frameworks. Basically, law of nations as a concept is a complex term. Importantly, in order to gain a full understanding of the concept of law of nations, five elements should be examined, namely (1) sovereignty, (2) recognition which allows a country to honour the claims of another, (3) consent which allows for modifications in international agreements in the the customs of a Country, (4) freedom of the high seas, and (5) self-defense which ensures that measures should be made in protecting the territorial boundaries of such State against external aggression. However , such an extensive conceptual approach to the understanding of law of nations contributes to the value of collective perception in clarifying the details on law of nations (Sellers, M.N.S: 2000). In this context, the concept law of nations is briefly summarized as follows:

> *It is an aspect of law that supports a community of free and independent States that comes together for the promotion of social justice and global governance through a regulatory framework. In this case, the nature and moral independence of States requires a well-established set of laws to govern their community, just as human nature requires certain laws to regulates human society. The end product of both is attainment of global justice (Wheaton, H: 1836).*

This paper posits that in order to have a better appreciation of the concept of law of nations , it is instructive to view it from definitive components, which according to Oppenheim (Oppenheim, L.F.L: 1906, 2) law of nations is construed as:

> *A body of customary laws and conventional rules that are considered as binding rules on civilized states in their intercourse with one another.*

It is noteworthy from the above definition that law of nations maybe considered as treaties, set of rules and agreements existing amongst countries of common interests for which the law have a binding effects on them. Apparently, law of nations governs the operations, and conduct the nation States as they interact with other. In whichever way law of nations and nation building are conceived and understood, they are currently very significant questions in the quest for global peace and security as at today. In this regard, the question worth asking is when does the issue of regulation of jurisdiction arises as people trade among different States? In this sense, the main purpose of law of nations is to promote justice, peace and common interest. It is also for this reason that the United Nations has been pursuing global peace, justice and security from a regional approach.

Again, the need for international rules to protect individuals from inhuman and degrading treatment by States admittedly gave rise to the emergence of law of nations. Drawing on the basis of acceptability of the law of nations, it may be argued that while the extent to which the rules that have developed to constitutes customary international law is recognized and acceptable by all States, it is however, still open to question as to its application in practice (Ibid). In other words, the present scope of the rules of the law of nations which serves to

protect individuals from ill-treatment that violates their basic human rights are as well addressed through another aspects of law of nations. While these and other arguments are undoubtedly compelling and deserves serious considerations, the conventional definitional approach, to the development of law of nations is one of the primary goals of the United Nations (Charter of the United Nations, 1945).

In a similar situation, it is clear that within the context and circumstances surrounding the conventional definitional approach to law of nations, and to the scope of this law as well as treaty law, has continued to expand making it difficult for regional practitioners of law to ignore its existence (Interpretation Statutes, 2016). This position suggests that States must respect law of nations at all times. This choice was made notwithstanding several requests regarding an enduring process that the law of nations may offer. Bearing in mind that all sovereign States are equal in rights as well as in their corresponding duties to respect the rights of other sovereign States (Montevideo Convention on Rights and Duties of States, 1993), it therefore holds that if a sovereign State violates, fails or it's unwilling to fulfill its obligations under the law of nations, it should be held accountable for such breaches. While the above statement of the law seems straight forward on its face, it is posited that it States have the duty to respect law of nations as well as examined how National Courts interprets this body of law. In this sense, the question on how to resolve the controversies above is centered on advancing further arguments on the operations of the National Courts as it affects the applications of the law of nations which primarily focused on mapping the existing practice rather than on the normative legal and moral principles that must or should guide it. Pursuant to the judicial interpretations on law of nations, it is submitted that National Courts in their interpretations of law of nations, tends to accomplished national, and global responsibilities (Roberts, A: 2011, 68).

1.3. The Concept of Nation-Building

Under the law of nations, the concept of nation- building is fast becoming the basis for determining the economic, social and developmental objective. However, the development of States through law of nations regulations has been construed as part of the movement for global economic liberalization agenda (Mccrudden, C and Gross, C. G : 2006,153). In this line of thought, the fundamental question is how to the standard of living of certain population from a state of hopelessness to one of self-sustainance, self-governance; sustainable growth, and viable participations amongst global community**.** In this context , Michael Reisman, (Reisman, W. M : 1998, 249) has asked a question on what should be the strategies available for the emerging communities in an ongoing process of development, and what should be the role of the law of nations as a major driver in the process of nation building?. The paper however, revealed that nation-building is a process that gives rise to the emergence of nation States through which a citizen have a sense of belongings amongst it's members with commonalities of interests, goals; preferences and aspirations that will bind them together as one entity without any desire to separate from one another (Alesina, A: 2015, 3).

Also, it has been observed in this paper that the term "nation-building" has remained a controversial and contested concept. In most of the policy document and research papers, its meaning also remained diversified rather than a definite interpretations. Also, the term "nation-building" can be used interchangeably with "state-building". What may be interesting to note is that as the two concepts are closely related "state-building" and "nation-building" are distinct

processes (Dinner, S :2006). Moreso, it is important to recall for the purposes of this paper that the whole essence of nation- building is to ensure that resources of the nation States are properly harnessed and managed by its citizens and as well utilized for the sustainable economic and political developments of the nation States. Also, to enable its people to live in harmony and to guarantee peaceful co-existence amongst them and other nations that shared boundaries with them (Oyewole, T. G and Adegoke, J. A : 2018: 25-34).

In addition, it may be argued that the two principal objectives of nation-building centered on establishing a representative government and setting conditions that will guarantee economic growth and the prosperity of the individuals within the nation states (Ibid: 26). Given the above analysis, it is posited that nation-building process will be more successful if the State has had an experience in self-governance that creates stable and viable economic growth and development (Ibid, p. 33). In a different context, the process of nation-building involves interventionist approach on States that have suffered from internal violence or armed conflict situations and for the purposes of rehabilitations and reconstructions of the failed government (Ibraheem, A. A :2018). In the views of the authors, under the law of nations as it stands today, the issues here bothers on what ought to be the correct usage of the concept of nation -building in relevant disciplines. The question raised in this respect specifically centered on matters of language, pedantry or robust academic discourse.

In other words, it would not be far-fetched, however, to imagine that such a situation could arise. That said, it is obvious that scholars associated with theories of nation-building have made attempt either to ignore the questions of ethnic diversity or to address the issues of ethnic identity loosely as merely a very minor issues in achieving a strong and effective State integration desired (Connor, W:1972, 319-355). While there is no mathematical formula for pin-pointing the exact definition of nation- building, it has been revealed that in an attempt to achieve nation- building agenda, several efforts are made to address issues multi -ethnicity and cultural differences existing amongst individuals within such regions considering the dual demands of social cohesion and diversity (Weinstock, O :2004, 51-68). In a similar vein , it seems, however, that nation- building is a process of socio-political development which allows closely knitted communities to be integrated as a common society having the attributes of a nation- state (Hippler, J: 2005). In light of the above definition, it can be argued that nation-building connotes the different perspectives through which diverse segments of the society is fused into a functional whole which has within it economic, integration, cultural integration; political centralization; bureaucratic control; democratization and establishment of common citizenship (Ibid). From these different dynamics and discussions, it must be emphasized that the focus here is not on “nation- building” in the literal sense of building a shared sense of community, rather it is about regime change on democratization as well as reconstruction of States that have colasped or been seriously weakened as a result of internal conflict, as in the cases of Afghanistan, Iraq and Southern Sudan. Therefore, and in accordance with the law of nations provisions, scholars on this version of nation-building suggests that nation-building can be organized from outside through global compliance with the principal strategic objectives that will enhanced regional (Ottaway, M: 2002, 16-24) and global security.

2. Law of Nations: A Driver in Nation-Building

The nature of law of nations is one that should be of enormous concern to both States and international organizations in their international relations with one another, and with private individuals, minority groups and transnational companies. Be that as it may, the key language in this regard is that it is therefore useful to examined different perspectives of nation–building. However, it is interesting to note that in international relations, the term nation is a common concept which suggests that, there is no international agreement that unilaterally provided a definition of the concept. Conversely, definition of the concept "State" does exist and is provided in the Montevideo Convention on the Rights and Duties of the States (Montevideo Convention on the Rights and Duties of States, 1993). In this sense, Article 1 of the Convention provides that:

> *The State as a person of the law of nations must possessed a permanent population, a definite territory; government; and capacity to enter into relations with other States (Ibid, Article 1).*

On the other hand, it should be pointed out that sovereignty is pivotal in nation- building project and without this a nation has no existential legitimacy which the theory of nation – building must state by putting people at centre stage. Also, the interactions between sovereignty and law of nations in nation-building project appears to be mutually advantageous. Indeed, it is important to note that the unifying force mostly aligned with law of nations in nation-building process is multi-talented, encompassing and are designed to encourage economic development, governance in education, infrastructural growth; an improved environment ; human rights protection and strict adherence to rule of law (See The Report of the Secretary-General of March, 2005: 25-73).

Accordingly, the paper revealed that the issue of nation- building through the process of law of nations may appear simple on the face of it, but can be a very complex phenomenon in practice. In furtherance of this, the paper however, argued that to the extent that law of nations is construed as a complex phenomenon, it has remained a major driver in nation-building projects. In this sense, law of nations, with its unique structure and binding languages represents the the fulcrum upon which the process of nation-building revolves.

It may also be pointed out that nation-building activities guided by law of nations would strongly provide a better platform for economic development and growth for the emerging nations. Also, it may likewise be argued that at the conceptual level, the engagement of the law of nations appears to be a story of legal principles, economics, politics and social theories. Oftentimes, it has been difficult to separate these concepts completely. Over the years, there has been a significant commitment on the part of global community in establishing primary rules to guide nation-building projects. However, it must be stressed that in recent past, specific intellectual and programmatic movements in the form of "new international economic order" (NIEO) were made which was framed largely in terms of the relationship between developed States and those emerging from decolonization or otherwise categorized as "undeveloped" or "developing" nations.

In advancing this efforts, it should be noted that the United Nations held a Conference on Human Environment in Stockholm in 1972, (United Nations Conference on Human Environment, 1972) which this interactions focused largely on the concept of sustainable

development, with law of nations serving as the main source of the principles of inter-generational equity, communalism and differentiated responsibilities and precaution, among others. Moreso, this discourse shitted slightly to incorporate a specific right to development in 1980 which reflected in the Genereal Assembly's declarations on the right to development bordering on nation- building project (See General Assembly Resolution 41/28 1986). Progressively, it should be noted that attention has now been shifted to the relationship between the rule of law both at the national and global levels of nation- building projects (See General Assembly Resolution 67/1 2012). It can be said that these interactions have contributed to the emergence of what may be considered an evolving global shift on development law in nation-building (Sakar, R : 2009).

Due to growing global concern in nation- building and development, it is thus important in the United Nations context to understand that the test for the law of nations has continued to be identified and leveraged on an enduring structured nation-building projects. Accordingly, law of nations remained a major driver in nation-building project which necessarily involves engagement on projects, programmes and investments that necessitates trans-national movement of financial and other resources as well as the establishment of institutions and other bodies capable of assisting the developing economies. However, law of nations achieved all these through international trade, investment; financial and monetary laws and policies in which a corpus of rules are provided to guide such actions in nation building. Law of nations also provides mechanisms to assist in the settlement of disputes through various institutions such as World Bank, World Health Organization; United Nations Development Programmes and the United Nations Children Fund. T0 be fair, one should recognize that, in principle at least, law of nations as a driver in nation building is capable of fortifying the world's resilience to disasters and emergencies, such as armed conflicts and other acts of terrorism that has remained an intractable problem around the globe today.

Evidently, despite the relatively conservative language used in the interpretations of the concept "nation-building, it must be emphasized that the relationship between nation–building and law of nations has rarely been clear and simple (Friedman, W : 1966, 1). Regardless of this and other arguments, law of nations in it's significant role in nation-building through Charter of the United Nations is essential a starting point on the examination of the Post- World war II global legal order which attached an integral importance to nation building by requiring the Organizations (Charter of the United Nations 1945, Article 55) in its Article 55 to promote high standards of living, full enjoyment; and conditions for economic and social progress. It also encourage development as a vital solutions to global economic, health problems; inter national cultural and educational co-operation.

In addition, Article 56 of the Charter (Ibid, Article 56) also emphasized on social developmen where member States are obliged to "pledge themselves in taken joint and separate actions in co-operating with the Organizations for the achievement of the purposes set forth in Article 55. Following the precedents set by this Charter, some advocates and academic writers have likewise been supportive of this and have confirmed that the recent declarations on the rule of law at the regional and national levels, adopted by the General Assembly, also represents a notable example of the interactions between law of nations and nation-building development. At a deeper level, the declaration provides that "rule of law and nation building development are strongly inter-related and mutually reinforcing. In this case, the advancement of the rule of law at the national and global levels is essential for a sustainable and all inclusive economic

growth, development as well as on the eradication of poverty, hunger; full realization of all human rights; fundamental freedoms, and the right to development (Ibid, para. 7). Furthermore, law of nations through the activities of the international organizations have also propelled the development agendas in line with the bilateral and regional arrangements that evolved as a result of this.

Interestingly, some Regional Development Banks such as African Development Bank, Asian Development Bank; European Bank for Reconstruction and Development; and the Inter-American Development Bank have been particularly active in financing development projects in areas of health, education; infrastructures; public administration; agriculture; environmental and natural resources management, among others. It is therefore clear that law of nations would contributes to ensuring that nation-building commitments are fulfilled by establishing institutions with mandates to assess compliance with the basic principles and generally accepted standard (See General Assembly Resolution 60/251 2006). In this respect, law of nations could operate from the general, technical and to the operational standard in the fulfillment of the objectives in nation- building agenda. This however, will represents a level of growth and development opportunities in global development law. It is the view of the authors that the issue of developing nations subscribing to several global framework either on monetary or human rights policies is hinged on the level of control that the developed economics exercise over these governments.

2.1. Challenges of Nation-Building

The idea of addressing the peculiarities of the emerging nations in nation-building project has often be construed as a big task in global development law. The focus here is not on "nation-building" in the literal sense of building a shared sense of community, but about the challenges arising from democratization, as examplified in Afghanistan, lraq and Southern Sudan in the reconstructions of States that have collapsed or been seriously weakened as a result of internal conflict, as in the case of Timor-Leste or Solomon Islands. Taking into cognizance the challenges that may arise in the review of several global instruments that dictates the process of nation –building, it may be argued that the peculiar needs of emerging nations needs be treated as soft laws. This is advanced on the basis that soft law offers several of the advantages of hard law, and avoids some of the costs of hard law as well as having a distinct advantage on it's own (About, K. W and Snidal, D: 2000, 423). Thus, it is hard to find any references that addresses the practicalities of external assistance to the building of national identities . This is largely because nation- building in this sense, has not been a major focus in development assistance.

Furthermore, where it has arisen, it has often been implicit or otherwise subsumed within broader state-building programs. Despite its newly acquired prominence in contemporary law of nations and politics, the practice of nation-building has a lengthy history. In the same vein, it can be said that in the process of nation- building, internal divisions and conflict sometimes threatened the national integrity of newly independent Countries, such as the attempt made by Biafra, a secessionist group to secede from Nigerian government in recent years. The division of Pakistan into Pakistan and Bangladesh is another example, where ethnic and religious differences, aided by geographic distance gave rise to disintegration. Also, the absence of commercial law which is a component of the legal architecture of nation- building

(Stepek, M. J: 2008, 487) has led to failed and post- conflict States reconstructions. That said, there is a dire need for legal standards to hold public institutions accountable. This accountability is a very vital instrument in economic growth and development of any emerging nations through a well-structured legal institutions that will enhanced the engagement of commercial partners in a more viable transactions (Ibid, p. 494).

Another notable challenge is lack of healthy banking system. It should be noted that the component of the legal architecture of nation- building is critical because a healthy banking system does not only helps in building a nation, but it helps in building such a nation in the areas it is in dire need (Douglas, J. L: 2008, 513). Another challenge is on the issue of capacity –building. It has been observed that most nation-builder lacked the basic capacity as the paper posits that capacity building recognized the fact that people should have the latent capabilities needed for a certain development. However, those latent capabilities need to be nurtured and brought to fruition if the desire of the people in attaining their expected goals, aspirations, or promises is to be achieved (McGill, L. D: 2008,538). Generally speaking, the dire need to ensure the inclusion of peculiar perspectives of emerging nations is capable of addressing the challenges faced by them. This is advanced on the basis that the horrible experience of the vast majority of third world Countries on the existence of the law of nations informed their perceptions of law of nations as universal law for the developed nations in the last six decades, and these has compelled a new generation of scholars to revisit the history of law of nations in a bid to find a siutable answer.

This dominant view suggests that the question of universalism of law of nations doctrines to a large extent still takes into cognizance the interest of the already developed economies. It is paramount therefore, that there must be a shift from this believe or practice which primarily centered on the sentiment on the so-called sovereign super powers which does not accommodate the peculiarities of the emerging nations (Chimni, B. S: 2007). In the same vein, according to Mutua (Mutual, M.W: , 340), the essence of bringing the peculiar perspectives of developing economies like the African region is to reconceptualized or take into cognizance their inadequacies in nation-building agendas. He further argued that the introduction of a well narrowed concept of western ideologies into the governance structure of the developing economies cannot adequately addressed the demands; the historical reality and the political and social needs of the region of Africa (Burke-White, W and Slaughter, A. M: 2006, 2). It is widely accepted that the emerging nations are desirous in participating actively in the development and growth of the global society. In this context, it must be emphasized that the developing economies upon its emergence as an independent States always strived to established a Foreign Affairs Ministry and a diplomatic service in compliance with international relations and law of nations guidelines.

Furthermore, it is worth mentioning that the emerging nations on their own part have acknowledged the efforts made in the improvement of their knowledge of law of nations. For instance, as a complimentary effort, the United Nations inaugurated several programmes aimed at improving the teaching of law of nations at national, regional and global levels (United Nations General Assembly Resolution 1816 (XVII), 1962). Therefore, it is clear that there are many reasons on the emphasis that the emerging nations are so much bothered on their state-building agenda under the law of nations. One may argue that while parliamentary diplomacy has evolved to become more sensitive to emerging nations concerns, especially in the

expressions of their views on global issues, it is highly questionable as to whether their opinions or views would be acceptable by the developed nations of the world.

Be that as it may, the development of the law of nations co-operation (Friedman, W: 1959, 460-461) has made such participations a rewarding one in several perspectives. Indeed, it worth noting that non- participation or exclusion in global activities today by any sovereign State attracts sanctions aimed at ensuring compliance by member States in order to enforced the standards and rules made by global institutions (Friedman, W: 1963, 747-753). In light of the above, it must be emphasized that the global Perspectives of States have become far more important, rationally as well as emotionally, as it has been before (Castneda: 1961, 38-40). While it would indeed be advantageous to emphasized that Western States are no doubt aware that the right to development under nation-building agenda should be seen as one of the universal fundamental human rights, it should be noted that the Western States are reluctant in allowing poor developing Countries to practically exercise these rights which includes the right of assertion in any form such as through the platform of New International Economic Order. That said, it should be noted that the concept of sustainable development in this regard which evolved from the built-up tension between the developed and developing Countries in the areas economic growth and development (Al-Nauimi, N and Meese, R : 1995), has become a convenient tool for the developed economies to undermined the aspirations of developing economies primarily on demands for the right to free development, as conceptualized by the principles of the New International Economic Order and the United Nations Declaration on the Right to Development. It is further argued that the Western Countries have severally used or worked through the auspices of sustainable development to further frustrate the emerging nations efforts towards achieving free economic growth and development within their respective regions (Mancebo, F and Ignacy, S: 2015). In order to meet the requirements of the emerging nations in nation-building agenda, it may be argued that there must be some relevant fundamental principles or rules of the law of nations connecting global development with its underlying assumptions and actions. This position is realizable if they are based on the common consent of virtually all the States involved around the globe.

Drawing from the above, one might be tempted to ask why nation-building under the law of nations? Recognizing the transparent inequalities existing between the developed nations and the emerging nations as a result of unabated exploitations and injustice by the developed nations through the encouragement of increased foreign borrowing and heavy taxation. That said, it is important to take into account the activities of the Western States through the so-called liberal economic global policies that has contributed to the alarming debt crisis found in Third World States which has adversely increased the resources and development gaps in those respective regions (Ikejiaku, B. V: 2008, 4). In addition, this view which holds that the activities of global financial institutions guided by the norms of liberal economic internationalization seems not to enhanced development activities in the emerging nations and these ugly situations have led to a denial of their right to development (Okafor, C :2004).

3. Conclusion

In light of what has been discussed above, it is hoped that this article will contribute to clarifying an essential aspect of nation-building under the law of nations. The authors are aware

of the several challenges that confronted the present discourse of the law of nations in adapting to the peculiarities of emerging nations particularly with regards to institutions and funding. However, this article proposed an examination into the changing trends in the scope of the law of nations that necessitated the incorporation of hitherto perspectives. It is argued that this central aspect of the law of nations is relevant and provides the sole basis of understanding that the process of nation-building starts with appreciating the primary purpose of a nation.

The article also emphasized that sovereignty is pivotal in nation-building process and without it a nation has no existential legitimacy. It also argued that in nation-building process, the imposition of the western ideologies into the governance structure of the emerging nations cannot be said to be adequate in responding to the historical reality, political and social needs of the emerging nations. Finally, the article has shown how this practical challenges can be addressed.

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PENDING INTERDISCIPLINARY AGENDA OF CONTEMPORARY ENVIRONMENTAL LAW

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Abstract

The global environmental scenario is in a very worrying state. This is a matter of urgent, profound, and unpostponable attention. Therefore, it obliges the States to carry out urgent policies, which represent the adoption of great and essential challenges. The challenges in environmental matters should not be assumed only from the world of law. This is because environmental issues and problems do not begin and are not agitated in the validity of the Law.

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Consequently, an interdisciplinary analysis is necessary. In the present work, the authors assume this commitment. Thus, they raise and develop the corresponding challenges that must be considered as a pending agenda.

Keywords: Environment, Interdisciplinarity, Environmental challenges, Pending environmental agenda

1. Introduction

The protection of the environment is a point of utmost importance, given the worsening of threats and new threats, as recorded. While it is true that we acknowledge the receipt of new technologies, upcoming technologies, and smarter technologies, it is worrying that the great progress of technologies has not contributed decisively to counteract in a significant way the serious environmental situation of the world. In this issue, we unravel and develop, through its various aspects, the challenges that must be assumed to ensure a healthy environment, as well as the realization of the corresponding fundamental rights.

2. By Way of Situational Diagnosis

There is the end of certainty, the existence of a strong relationship between science and law, the creation of disruptive technologies, the influence of social networks, the emergence of new subjects of law, the emergence of health, environmental and economic crises, and the challenges of the post-agreement environmental issues. (Soto Rincón, 2021).

The challenge of achieving a fully inclusive and environmentally sustainable development model obliges us to take an in-depth look at development styles in the light of the reality of the 21st century. In this new scenario, growing inequality and increasing pressures on the environment and natural resources coexist with the emergence of new economic poles and powers, the explosion of new technologies, rapid urbanization and the greater importance of regional integration spaces, among other signs. In the face of this scenario and with a view to shaping a better future for all, policies and actions based on the holistic vision implied by sustainable development are needed. (Bárcena, 2015, p.7).

2.1. Consumerism

It seriously threatens the environment, since it imposes a way of behavior aimed at consuming products that are harmful to the environment. However, it is also detrimental to the economy of consumers, since, basically, it is also a matter of systematic, uncontrollable and unnecessary purchases.

2.2. Protection of new subjects of law.

This, in the understanding that the legal and mainly constitutional recognition of new subjects of Law is not enough (mother earth, nature, among others). Therefore, we aim at the materialization of the effective protection and safeguarding of new subjects of law. (Soto Rincón, 2021).

2.3. Transfer of environmental matters to the courts.

We cannot lose sight of the fact that not infrequently, the environmental administrative intervention, either through prevention or sanction, is not enough to achieve the forcefulness, efficiency and efficacy that environmental care requires. In this sense, it is urgent that the respective cases be brought to the attention of the judiciary. (Soto Rincón, 2021).

2.4. Principle of greater celerity

However, the observance of a correct environmental protection policy also involves considering the principle of celerity as scarce. Since it is a question of taking actions much more than speedy, due to the very important need that this entails, the principle of greater speed must be recognized in administrative and judicial courts.

2.5. Legal innovations

2.5.1. Legal design

Legal design is a human-centered approach that serves to facilitate legal problem-solving and promote innovation in this sector. It combines the legal expertise of the lawyer with the mindset and methodologies of the designer and the technological potential to create legal systems, services, processes, education, and environments that are more useful, usable, understandable and attractive to all. It could be argued that legal design is an approach that seeks to understand where the crucial flaws exist in the system at the moment, to help make the creative leap, defining what a better system could be. (Benedet, 2020). For digital transformation and environment, we present easy-filling fields to avoid unnecessary printing, physical signatures, waste of time, paper and resources. We create 100% digital documents with all the legal validity you need to make them enforceable. (Acosta, 2021);

2.5.2. Green nudge

The terms nudge and strategic use are the most common, although the latter may also have other definitions, although when applied to environmental matters in procurement it means using public contracts to pursue environmentally desirable objectives, which makes it a genuine promotional activity or nudge. Transversality, however, is a concept, obviously directly related, but with a different meaning. Rather, it refers to the fact that the environmental issue cannot be limited to the mere object of the contract or to the fulfillment of certain requirements by the bidders, but, on the contrary, it must be present throughout the entire process and all the steps of the contracting process. (Terrón Santos, 2019).

2.6. New environmental principles according to Osses Garrido, 2019

The contemporary maelstrom, typical of the vicissitudes of new technologies and scientific and technological development, also brings the corresponding aggiornamento in the various disciplines and sciences of human knowledge. In addition, the current legal system, not only regional, is characterized by registering the Political Constitution as a new order of values, at the apex of the legal system, that is, the Constitutional State of Law. In addition, it should

also be considered that the Law, in general, is going through a stage of greater reflection and compromise, since we speak of principles, as opposed to previous times when rights were commonplace. On the other hand, it is no secret that the environment is in an increasingly worrying situation. Therefore, the commitment and challenge of environmental justice become equally acute as a spectator.

The fact is that contemporary environmental law is not sufficient or sufficient to meet the new demands of the current situation. Therefore, the challenge of achieving a fully inclusive and environmentally sustainable development model obliges us to examine in depth the styles of development in light of the reality of the 21st century. In this new scenario, growing inequality and increasing pressures on the environment and natural resources coexist with the emergence of new economic poles and powers, the explosion of new technologies, rapid urbanization, and the greater importance of regional integration spaces, among other signs. In the face of this scenario and with a view to shaping a better future for all, policies and actions based on the holistic vision implied by sustainable development are needed. (DE Miguel Y Tavares, 2015, p. 7).

Therefore, we are of the opinion that it is imperative, very urgent, and unavoidable; the recognition of the principles, which we propose below.

2.7. Inclusion of additional rights

The constitutional development of environmental protection has meant the consecration of other environmental rights, among which the rights of access to information, participation, and justice in environmental matters stand out. In this matter, the Escazú Agreement provides certain guidelines and standards that must be present in the constitutional debate. (Osses Garrido, 2019).

3. New Principles

In the first place, we have the principle that we have called the environment as a higher purpose. This is characterized by prevailing over penalties, and determination of responsibilities, whether of public or private officials. Thus, although it is true that what is indicated in the second term is important, it is even more important to pay attention to what is specifically related to environmental preservation and care in the specific case.

Also, there is the preventive principle. This principle is characterized by advanced intuitiveness, that is to say, to anticipate what could become complicated or even irreparable in the environmental venue.

Next, the precautionary principle must be considered. This is based on granting environmental protection in the face of eventual scenarios which have not yet been scientifically proven to generate environmental damage. The rationale is that when in doubt it is better to take safeguard actions, as a sort of presumption juris tantum, in favor of the protection of the environment.

Next, we bring up the principle of sustainable development. In the present case, it must be understood that cultural progress in general cannot mean environmental impairment or affectation. Therefore, development should be understood jointly.

Then, the principle of intergenerational equity. This principle establishes the obligation to take as a premise that the decisions taken must be focused on safeguarding the future. This is because the right to a healthy environment does not only belong to the current generation.

Likewise, it is necessary to take into consideration the principle of environmental justice. And what must be considered in this respect, is at the same time, the principle of specialization. This is inasmuch as in principle the creation and sufficient establishment of environmental courts are indispensable. But, furthermore, to consider that otherwise, that is, to have courts specialized in different matters also hear environmental law conflicts is not only not technical, but also violates the fundamental rights of the parties to have a specialized judiciary and to a natural judge.

In addition, the principle of progressivity holds that State policies must be oriented in a systematic manner, in a continuous, sustained, and gradual advance, of protection and safeguarding of the environment, until the maximum levels are reached. To this end, inter-institutional political will is essential.

Finally, the principle of non-regression, through which a minimum and non-negotiable level of environmental protection and safeguarding is recognized. But, at the same time, it maintains that there can be no regression in any way in the recognition of environmental regulations. This can also be understood in the light of the principle of prohibition of reform for the worse. It is not only a matter of ensuring environmental protection, but also of guaranteeing the legal certainty of not returning to a lower or inferior level of protection than that in force.

4. Essential Interdisciplinary Scenario

4.1. Artificial intelligence

Artificial intelligence is an effective technological system for the application of sustainability in companies and for the fulfillment of some of the sustainable development objectives. Secondly, the tool with the greatest potential for the application of this artificial intelligence is data science, since it does not accumulate a large amount of data for analysis, but with little data, it is possible to make predictions and solutions to sustainability problems. Some companies such as IBM, Accenture, Ecopetrol, Coca Cola, which are in the market already make use of some artificial intelligence tools to contribute to sustainability and this has generated economic, political, and social benefits for the organizations that apply it. It can be said that the influence of the expansion of artificial intelligence in companies for the fulfillment of sustainability is of high impact since, according to the theories reviewed, the application of machine learning and data analysis tools allow sustainability to become more tangible in organizations. Likewise, this application of AI allows not only to obtain social and environmental benefits but also economic benefits for the company, and this is evidenced in the analysis of companies that have already applied AI in their processes. (Castañeda Murillo, 2020, p. 35).

5. Codification

It is also essential to consider the approval of an International Environmental Code. This, with the objective of strengthening the protection and safeguarding of the environment. We are talking about a specialized legal system, which does not only register constitutional recognition.

6. Governance

This point becomes a first-order budget because in order to have first-hand knowledge of the place of the facts, it is necessary to consult with the population living in the affected area or the area to be affected. This will provide valuable information to understand and address their specific environmental problems.

7. Better right to a healthy environment

Although it is true that there is a well-known constitutional recognition of the fundamental right to a healthy environment, we consider that it is also essential to recognize the constitutional recognition of the best right to a healthy environment. This, inasmuch as the analysis and public policies must be approached from the primacy of said right, above the other fundamental rights.

8. Training and awareness

That is, the implementation of State policies aimed at including in the different levels of education a subject on the importance and transcendence of environmental law.

9. Environmental displaced persons

The displacement of people due to climate change and the subsequent threat or violation of the human rights of the displaced population imposes very important challenges for environmental law and for jurists. For environmental law, there is a need to transform itself and advance in the forging of complex legal forms that combine different levels, scales, and institutes. It means then to resignify the current legal forms based on individual rights and to build legal forms that contain the rights and aspirations of all (at the national-international, generational-intergenerational, human species-interspecies level), where life is the a priori of protection. For jurists, the challenge means proposing legal institutes that respond to the new realities, from ethical stances towards life, based on a change of values that promote solidarity with all forms of life, cooperation and interdependence. It also means promoting spaces for inter- and transdisciplinary encounters to seek solutions to the problem of the environmentally displaced. The challenge for policy and government agencies is to generate the necessary policies and mechanisms so that people at risk or in a situation of environmental displacement due to climate change are attended to in the first instance by government agencies and that they have sufficient legal mechanisms for access to environmental justice, such as access to information, participation in decisions and access to administrative or judicial instances. (Valencia Hernández, 2015).

10. Environmental justice

In order to achieve environmental justice, a political system capable of offering full and effective democratic participation must be guaranteed, not only to ensure the benefits and rights of the parties but also to decide on the processes, whose costs and benefits will then be experienced and distributed, this means that within the concept of environmental justice lies the distributive dimension of the incentives and disadvantages, which brings the interaction in environmental issues, between different individuals and groups. The dialogue between different disciplines and actors that work hard to generate this type of change, should focus or have as a challenge to define, in the different situations that arise and are related to environmental injustices, what should be understood by equity and justice, not only for the consequences that fall on those affected, but also for those who directly or indirectly use the natural resources, besides pondering the mechanisms that the countries or scenarios in which these cases occur, have to stimulate economic, political and citizen participation. In other words, to study which is the best way towards a fair outcome, which preserves and protects the fundamental rights of people, and the environment in the long term and at the same time encourages sustainable development and legal, economic, and political innovation, which is essential to address these new challenges. (Valencia Hernández, 2015).

11. Interdisciplinarity

In this item, we consider that environmental issues should not be seen only from the world of Law. This is because it does not originate or culminate in juridical quarries. Therefore, it deserves to be seen also from disciplines and sciences other than Law, such as sociology, sociology, economics, and philosophy, among others.

12. Interinstitutionality

Likewise, the state and private vision is transcendental. But, it must be assumed as dialoguing, cooperating, between them. This will result in the best possible way for the expected effective effects.

13. Reversing climate change

It is necessary to establish: i) An International Court with jurisdiction also in climate change, ii) The conversion of Public International Law into International Environmental Law, iii) The introduction of institutions that have not yet been considered, or that imply the consecration of new and better Universal Environmental principles. (PIGRETTI, 2013, pp. 128- 131).

14. Hazardous polluting waste

In this regard, we bring up the case of damages caused by the export of hazardous waste from the United States to Mexico and for the purpose of holding the exporting company liable, it is feasible to apply the Comprehensive Environmental Response Compensation and

Liability Act of 1980 (CERCLA) retroactively and objectively, since it was the generator of the hazardous substances and because the conditions under which the export took place allowed the realization of potential damage that directly affects the territory, the atmosphere and the consumers of the exporting State. (PIGRETTI, 2013, p. 132).

15. Forest loss in the Amazon

It is important that the State maintains the strategy of ensuring the protection of large areas of forests, mainly in indigenous territories under the mechanism of Conditional Direct Transfers (CDT), a payment system for indigenous peoples for their commitment to the conservation of their forests. But he also believes that there is a need to move towards more sustainable agriculture. Planning has to be aimed at this. We cannot continue to lose forests instead of having more productive agriculture in the same areas that are already dedicated to this activity. There are two problems of deforestation in Peru: illegal logging and the change of land use to convert forests into farmland, a conversion that is often also surrounded by illegality. (SIERRA PRAELI, 2021).

16. Artisanal mining

The proposal to formalize artisanal mining has been delayed for at least eight years. On December 29, two days before the end of 2020, the Ministry of Energy and Mines (Minem) issued a Supreme Decree that again modified the deadlines for submitting the Environmental Management Instrument for the Formalization of Small Mining and Artisanal Mining Activities (IGAFOM), an indispensable requirement to advance in the formalization process. According to the Minem decree, the deadline for the presentation of the IGAFOM was extended in some cases until April 30, 2021 and in others until July 31, 2021. This is an environmental management instrument, therefore, it must have the opinion of the Ministry of the Environment. When these deadlines are met, those who approved this extension will no longer be in place. We will have new authorities. And so, possibly, it will be extended to infinity", says Ipenza about this process initiated in 2012. Ipenza adds that we should not reach the bicentenary with informal mining in perpetuity. (SIERRA PRAELI, 2021).

17. Urgent ratification of the Escazú Agreement

Six environmentalists were murdered in 2020 in Peru. The last of them was Jorge Muñoz Saavedra, who had disappeared on Saturday, December 19 after leaving home to go to the forest when he heard a chainsaw. Three days later, on December 22, his body was found in a trail in the Batán Grande sector, in Lambayeque. (Sierra Praeli, 2021). Muñoz Saavedra had received threats from mafias dedicated to the trafficking of forest species and the depredation of archeological heritage. In the previous months, three indigenous leaders, a park ranger, and an environmental defender had been murdered. Despite this situation, Peru did not ratify the Escazú Agreement, a regional treaty that promotes access to information, public participation, and environmental justice in Latin America and the Caribbean. The document includes an article dedicated to human rights defenders in environmental matters. The Congress of La Republica shelved the agreement, even though Peru had been one of the first countries to sign it in September 2018. The Escazú Agreement must be insisted upon. It needs to be debated

again in the new Congress. The Congress that is installed this year should address the Escazú Agreement and ratify it so that it becomes part of our internal policy. This is an important issue that should be addressed by the political parties in the electoral debate. Peru was one of the countries that promoted the Escazu Agreement to be binding. What remains is to continue raising awareness about the importance of the agreement. The greatest rejection was on the issue of environmental defenders and that is why we must disseminate more information. (Sierra Praeli, 2021).

18. Marine conservation

By 2020, Peru should achieve the protection of 10% of its marine area according to the commitment adopted by the Convention on Biological Diversity, also known as the Aichi Targets. This commitment also requires ensuring the representativeness of all Peruvian marine ecosystems, taking into account the proposal to create marine areas of ecological or biological importance. However, this is probably one of the most complex challenges for Peru. The country has so far not exceeded 0.5% protection of its ocean, while the creation of new marine protected areas has been waiting for several years. The proposal for the Mar Tropical de Grau National Reserve and the Dorsal de Nasca National Reserve is the most advanced, but so far they have not materialized. A Ministerial Resolution issued by the Ministry of Environment on December 29, 2020, extended by two months the term of the multi-sectoral working group responsible for compiling, analyzing, and systematizing the information for the establishment of the Nasca Ridge National Reserve. We have a debt with coastal marine protection, both the Grau Sea and the Nasca Ridge. What happened with the creation of these marine areas? In the conservation of marine ecosystems, we are doing very badly. We have not complied with the Aichi Targets and research for the conservation of coastal marine areas is still a priority.

This topic goes beyond the conservation and management of Peruvian marine resources. We must start thinking about the Ministry of Fisheries, which we lost in 2004. Why does agriculture have a ministry but fisheries does not? Marine management cannot continue to be a sub-chapter of the Ministry of Production, there is an absence of fisheries policy. What we have de facto is to produce fish for export. A holistic vision of the sector is required. The fight against illegal activities is also a pending issue for 2021. There is a huge illegal fishing traffic in the country. (SIERRA PRAELI, 2021).

19. Concluding Remarks

The very urgent legal recognition of the environmental principles mentioned (preferably in the corresponding Code, since in some cases its jurisprudential recognition is not enough), also implies objective, concrete, and timely actions, both at administrative and judicial levels. This, inasmuch as it would be of no value the materialization of the same when in practice they simply do not turn out to be applied. Consequently, we consider that more than a legislative modification or the aggravation of penalties for crimes against the environment, it is necessary to recognize new environmental legal principles, such as, for example, those developed in this paper. It also merits the training and awareness of the actors in the administration of environmental justice.

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