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Contents

INTERROGATING GENDER PREFERENCE AND ITS IMPLICATIONS ON THE MENTAL HEALTH OF WOMEN AND GIRL-CHILDREN IN NIGERIA

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Abstract

Premium desire and attention is placed on male children in Nigeria; this being the patriarchal and socio-cultural inter-generational heritage. Through the growth and socialization process, the girl-child is treated inferiorly and made to believe less in her worth and abilities. From early childhood, it is ingrained in her that she always comes after the boy-child. The society also places loud demands on women to produce male children before they can be reckoned with in marriage hence, women risk health, personal growth and wellbeing to satisfy this societal craving. The girl-child inputs twice effort and work as the male child to produce the same or less result as her male counterpart whom society has naturally put on a higherpedestal. Adopting the doctrinal method, this paper examines the impact the pressure of these demands has produced in the mental well-being of women and girl-children. It found that over time, women and girl-children have developed anxiety, fear, frustration, and other harmful socialbehavior with resultant spiral negative effects including but not limited todepression, suicide and other mental health challenges. The paper contends that since the accomplishment of any individual stems from her/his mental well-being, this narrative must change. It concludes that gender should not be the bases for human value; life should reward everyone according to inputs and not gender; society should evolve to the extent that lineage continuity can be both matriarchal and patriarchal.

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1. Introduction

Directly, indirectly, or subtly, Nigerian society makes daily pronouncements that every home should have a son and that sons are preferred to daughters (Mordi, 2019). This can be seen in so many aspects of our lives individually and together as a nation based on the roles and functions that society has assigned to each gender. Often these roles and functions are predetermined even before the birth of the child (Makama, 2013, p. 117). These expectations has not only been entrenched in the home and family lives, but also in the political, career, social and industrial arena (Igbuzor, 2000, p. 17). A few years ago, one of the big players in the telecoms industry in Nigeria made an advertisement on the national TV station in which the herald of a son was given a town-wide jubilation and celebration (Egede, 2010). This drew the wrath of many Civil Societies and Non-governmental Organizations in Nigeria and subsequently, the content of the advert was substituted to heralding just the birth of an unspecified gender (Olaogun *et al* 2009, Pp. 193-197).

Daughters face discrimination and intimidation daily which cumulate into a lot of pressure, making her believe less in themselves, her worth, and abilities. The society places loud demands on women to have sons so as to fortify their positions in their marriages; and women will go to great lengths in achieving this regardless of the state of their health and mental wellbeing (). The girl-child inputs twice effort and work as the male-child to produce same or less result comparable to her male counterpart whom society has naturally put on a higher pedestal. Gender preference is a social inequality and social inequalities are major predisposing factors to developing mental health challenges. The entire pressure of gender preference has an overall effect on the mental health and wellness of women and girl-children in Nigeria.

To this end, this paper aims to unravel the forms of gender discrimination existing in Nigerian society and to discuss the implications of these several pressures on the mental health and wellbeing of women and girl-children. It shall start first, at discussing the concept of gender preferences, the several factors that instigate and contribute to gender preferences in Nigeria. It will also examine the various laws that bring about discriminatory practices that make gender preference pronounced in our society. After this, it will examine the effect of this on the mental health of women and girl-children in Nigeria. It concludes by making certain recommendations that will aid the resolution of this socio-cultural malady.

2. Gender Preferences and Its Predisposing Factors

According to the World Health Organization (WHO), Gender refers to the social construction given to women, men, girls, and boys as well as their relationship with each other (WHO, 2022). Gender is used to describe how people express the two sexes, masculinity, and famine (Hartman, (1997, p. 99). Preference is the act or principle of giving advantages or having a greater liking for one alternate over another or others. When the word preference is combined

with gender it simply means the liking of a particular sex of a child over and above the other. Generally, male children are preferred to female children in countries across Asia and Africa and Nigeria (Hesketh and Xing 2011, p. 1374-1377). Gender preference is a social malady that has been ongoing for a long time and has attracted a lot of research and attentions. Factors responsible for this are numerous and often embedded in sociocultural, religious and economic factors (Gnana *et al,* 2019). Sons are widely viewed as asset while daughters are perceived as liabilities, and are desired based on certain utilities and economic impetus. Underpinning male gender preference in Nigeria is what can be described as "male dominance and violence through the sociological aspects of patriarchal society" (Kavita, 2014, p. 96).

The result of research carried out in Delta State, Nigeria indicates that 62.9% of men preferred male children, 55.2% of the men's choice is based on psychological satisfaction in marriage, 53.8% prefer male children because to them, sons are easier to train and have better initiative; 70.6% prefer male children for security of family inheritance; while 99.3% prefer sons for continuity of family name (Nwamaka, 2021, p. 6-14).

The trajectory of male preference goes to pre-history periods where sons have more economic values, fulfill religious roles and where lineage and ancestors are traced through sons; and this has been referred to as a culture against women (Barbara, 1981, p. 59). A lot of socio-cultural practices such as wife inheritance, harmful widowhood practices, female genital mutilation, daughters' disinheritance, marginalization of women during the dissolution of customary law marriages, bride price regimes and many more of such, have all contributed to the perception of female as inferior to their male counterparts. This unfortunately has been translated into modernity and has continued thereafter. Gender preference is a product of societal macro-conditions family survival strategy, meaning the use of kin and children to satisfy personal interest (Nugent 1985, p. 93). Religion is also culpable in the relegations of women based on it several doctrines, teachings and roles. Interestingly, women are generally are not accorded leadership roles or headship in the scheme of worship; either traditional African religion, Christianity (although little liberal) or Islam.

According to Klaus, *et al,* (2007, Pp. 527-544) the factors underpinning gender preference is rooted in utilities; and they identified and enumerated them as: comfort; social esteem and affect. Under comfort, he states that the ability of parents to be able to obtain material benefits from their children serves as a kind of social insurance. Sons are breadwinners even when they leave home and therefore are able to extend this to the parents unlike the daughter who may be living at the mercy of the husband to whom she is married, therefore unable to provide for the old-age comfort of her parents, and as such, many parents prefer sons since their comfort in old age is seemingly secured with the existence of sons (Cain 1983, Pp. 688-702). In explaining social esteem, according to him, this is rooted in the patriarchal system wherein lineage is traced through male; the women finds her identity through the birth of sons who can perpetuate the family name unlike daughter who are unable to do same. Sons are means of reputational assets and also used to upgrade and secure the positions of mothers within the family set up. All

accolades, respects and appreciation a woman receives directly or indirectly is often tied to the existence of a male child. Women without sons in their marriages are often viewed and treated as second class within the social and family circle. 'Affect' is a third dimension stated by Lee in his postulation of utilities in child capital. He quoted Vlassoff that son preference are at times anchored on "emotional security and personal fulfillment (which are clearly related to co-residence with sons), are at least as important as economic security" (Vlassoff 1991, Pp. 529-535).

Male preference has unfortunately transited from ancient times to this modern age, and causes of same has equally increased maybe because some of the reasons conversed in ancient times are yet to be dissipated nor addressed. Take the issue of social security and welfare in old age as an example, a number of countries including Nigeria have no social security system or welfare support structure that caters for older members of its society, therefore parents seek all forms of methods to secure themselves in older age, including having sons whom they believe will take care of them when they are old and frail since the State has no such provision. In Nigeria, there is no functional national policy on the care and welfare of senior citizens, a country with the largest population in Africa and with a estimated elderly population growth rate of about 3.2%, a rate that has been projected will double by 2050 (Tanyi, André and Mbah 2018, Pp. 1-30). Besides, the government has failed in the seamless implementation of the existing pension scheme in the nation. The scheme is bedeviled with a number of problems ranging from delayed or nonpayment of pension entitlements, to the misappropriation of existing pension funds, too frequent verification of pensions which often lead to physical exhaustion and even death of pensioners, inadequate enforcement of pension regulation (Apere, 2015).

Gender preference is manifested in so many bias behavioural patterns; parents allocate scarce resources towards sons in education, healthcare, nutrition, and recreation. Sons get better opportunities and are given premium care since returns on them are presumed higher (Qadir, *et al* 2011). Daughters are given less and encapsulated into a stereotype in the areas of personality traits, domestic behavior, physical appearance and occupational choices.

3. Discriminatory Laws that Accentuate Male Preference in Nigeria

It is equally dismaying that a number of laws, government policies, and public rules create bias that upholds male superiority and supremacy; political attitude and poor implementation of laws keep the challenges unabated.[1] Society sees the relevance, importance and supremacy of the

[1] Nigeria operates a federal system of government wherein there are three tiers of government. The federal, State and Local Government. These tiers of governments have the powers to make laws and enforce them within their domain. The legislative power of the government of Nigeria is shared into two compartments but with a third as a fallout. Under the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, there is the Exclusive Legislative List (ELL) and Concurrent Legislative List (CLL) and there is a third regarded as residual matters. The

male gender through the several discriminatory provisions which directly or indirectly, consciously or unconsciously, creates the mindset of male preference.

Prior to 2009, the Nigerian Immigration Services (NIS) made it a requirement that married women must obtain written consent from their husbands before they can apply for and be issued an international passport. The turning point is the case of Dr Priye Iyalla-Amachi who challenged this position to the effect that it was discriminatory and unconstitutional and contrary to the fundamental human rights of married women as was held in *Dr Priye Iyalla-Amadi v. Comptroller- General, Nigerian Immigration Services and Another* (2008). It was argued that it was discrimination against the female gender since married men are not required to equally bring consent letters from their wives. The Federal High Court in its judgment on June 15, 2009, stated that the NIS policy was both archaic and unconstitutional; it equally violates the fundamental human rights of married women.

Another discriminatory law is section 55(1) of the Labour Act which debars women from being engaged on night work in a public or any agricultural undertaking except women in nursing profession and women in management positions engaged in manual labor (section 55(7). Eyongndi (2018, Pp. 1-25) has opined that the provision of the Labour Act above is patently discriminatory and should be amended considering the peculiarity of contemporary times. Section 56(1) of this Act prohibits women from engaging in any underground work in any mine. Also, by the draconic provision of section 34(1) thereof, women cannot also be accompanied by their spouses to their places of work whereas this provision is not applicable to men. This provision rightly limits women to only daytime work life, believing that women should be home at night and cannot pursue careers that will expose them to night work life. Similarly, in the same provision, certain forms of profession has been associated with the women, particularly nursing as the provision rightly singled it out.

The Police Regulation is another brazenly discriminatory legal framework against women and by extension, the girl child. Regulation 127 of the Nigeria Police Regulation made pursuant to the Police Establishment Act 2020 provides for the dismissal of any unmarried policewoman who gets pregnant. By this regulation, when an unmarried female police officer gets pregnant, she is liable to be dismissed from the force. Surprisingly, when an unmarried or married male police officers gets a woman other than his wife pregnant, he is not liable to be dismissed from

difference between them is that, the subject matter under the ELL can only be legislated upon by the Federal Government of Nigeria (FGN) while those under the CLL could be legislated upon by the FGN and the various federating States however, the State government under the doctrine of covering the field, cannot legislate contrary to what the FGN has legislated touching any item under the CLL. Any subject matter not expressly mentioned in either the ELL or the CLL, is a residual matter which only the State Government and Local Government can legislate upon. The laws made by the FGN are known as Act, those by the State is Law and that of the Local Government is Edit. By hierarchy, an Act is superior to a Law and a Law is superior to an Edit.

the force. This is the towering effect of misogyny which characterized not just the security force in Nigeria but the general attitude towards females.

Further, there are various degrees of discrimination in some of the provisions in the criminal laws operational across the nation. The three variants of criminal laws operational in Nigeria are the Criminal Code which is operational in the Southern part, the Sharia Penal Code operating in about 12 Northern States and the Penal Code which is operational in the non-Muslim States of the North[2] (Eghosa 2015, Pp. 285-296). The first on is the different punishment attending indecent assault to an accused male and female. A male accused of indecent assault gets a lighter punishment of two years while an accused female gets three years. Section 353 of the Criminal Code makes indecent assault against a male guilty of a felony while section 360 makes the same crime a misdemeanor if committed against a woman (Ashiru 2010, Pp. 90-110). Another discriminatory provision under the criminal law is Section 55 of the Penal Code which encourages domestic violence by permitting a husband to physically chastise his wife insofar as grievous bodily harm is not inflicted. According to Section 55(10), "Nothing is an offence which does not amount to the infliction of grievous harm upon a person which is done by a husband for the purpose of correcting his wife." Section 241 of the Penal Code trying to justify this same position describes what 'grievous bodily harm' is and it states that "grievous hurt includes emasculation, permanent loss of sight, ability to hear or speak, deprivation of any member or joint, destruction or permanent impairing of the powers of any member or joint, facial disfigurement, bone fracture or tooth dislocation". Similar provisions exist in the Sharia law. Whereas, the (Okafor 2021) United Nations describes domestic violence as:

> A pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner. Abuse is physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person. This includes any behavior that frightens, intimidates, terrorize, manipulates, hurts, humiliates, blames, injures, or wounds someone.

The provisions of the Penal Code and the Sharia law clearly violate the standard description of what domestic violence is and put women at a disadvantaged position of risk and danger of being trampled upon by their respective husbands. These provisions also clearly contravene the provision of the 1999 Constitution which in Section 34 (1) protects the individual's respect for dignity.

[2] In Nigeria, the substantive criminal laws are divided into two; that applicable in the South and Northern parts of Nigeria. The Criminal Code applies in the South while the Penal Code is applicable in the North and the Sharia Penal Code law is applicable in some States in the Northern part of Nigeria where sharia has been adopted such as Zamfara State. These penal systems applies in these areas. As for sharia, only persons who are Muslims are subject to sharia law and could be tried and punished in accordance with its dictates.

One other area that vividly portrays the discriminatory laws that place the male gender above the female is the issue of gaining Nigerian citizenship status for foreign husbands of Nigerian women. Section 26 of the 1999 Constitution empowers the President to confer Nigerian citizenship on foreign women married to Nigerian men, whereas this is not extended to foreign husbands married to Nigerian women. This is based on the patrilineal system of the society from which the law takes its root. The option available to such a foreign husband is by way of naturalization which is a longer route.

Some of the other labour and employment laws and policies clearly discriminate and place the male gender above the female. Section 127 of the Police Act prevents married women from enlisting into the Nigerian Police. Section 127 states that an unmarried policewoman who becomes pregnant shall be discharged from the police force, she can only be reabsorbed on the approval of Inspector General of the Police. Other discriminatory rules is Regulation 124, of the Police Act which states that a policewoman who wishes to get married must apply in writing to the Commissioner of Police for approval, she must give the name and details of her intended husband. However, this provision was successfully challenged in the court in *WELA v. Attorney-General of the Federation* (2010). The court held that this provision is unconstitutional and contradicts the provision of the African Charter on Human and People's Rights (Eghosa 2013, Pp. 8-9).

The National Drug Law Enforcement Agency (NDLEA) has a similar discriminatory provision is Article 5(1), which provides that all female applicants shall be unmarried at the point of entry, and shall upon enlistment remain unmarried for a period of not less than two years." Likewise, in its Article 5(2), the Act provides that "all female unmarried members of staff that wish to marry shall apply in writing to the Chairman/Chief Executive, asking for permission stating details of the intended husband. It is worthy to note that there is no such similar provision as regards men who wish to get married or who seek enlistment into both the Nigerian Police Force and the NDLEA.

There are so many other laws, rules and policies that clearly accentuate the male preference and dominance on women in Nigeria such as Rule 03303 of Kano and Kaduna State Civil Service Rule which state that any woman in the civil service who is about to undertake a course of training not more than six months shall be required to enter into an agreement to refund the whole of part of the course cost if such course is interrupted on the ground of pregnancy (Imasogie 2013, Pp. 11-18). Section 18 of the Marriage Act provides that any party to a marriage who is below the age of 21 shall be required to obtain the father's written consent unless the father is dead, of unsound mind or absent from Nigeria that the mother's consent can suffice. This makes the mother a second fiddle in the order of priority and preference (Falana, 2013).

Several other laws and practices are clearly discriminatory against woman and all these are factors that accentuate the dominance and preference of the male gender above the female.

Noteworthy is the fact that laws are generally made in males! Documentation and official processes perhaps have contributed largely to this son's preference because the wordings of laws and official documents are often in masculine and when feminine is included, it always comes in the second place – 'his and her, he and she, male and female.'

Other areas are laws that are not codified because they are customary laws and practices but are highly discriminatory against women and girls. In many Nigerian customs, women can only access land through male relations (Ikoni, 2009, p. 59). There are other harmful traditional practices and abuses such as harmful widowhood practices, and female genital mutilation/cutting (FGM/C) where Nigeria currently has the third highest number of women and girls who have been genitally mutilated. Annexed to this is child-bride practice whereby girls at early age are married off making them to miss out a lot in terms of education; in Africa, Nigeria has the largest number of Child brides. According to UNICEF, Nigeria accounts for more than one in five out-of-school children globally, though primary education has been declared officially free and compulsory, only about 7 percent of children attend primary schools.

4. Implications of Gender Preferences on Mental Health and its Nuances

Describing health, the World Health Organization (WHO) describes it as "a state of complete, mental and social well-being and not merely the absence of disease or infirmity". It can therefore be inferred from this definition that mental health is an integral and essential component of health. WHO goes further to describe mental health it is "a state of well-being in which an individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively, and is able to make contribution to his or her community;" invariably, mental health is not just the absence of mental disorders or disabilities, it is also not the antithesis to mental disorder. Some severe forms of mental disorder include anxiety, alcohol, depression, drug dependency, and schizophrenia. A number of determinants give rise to mental health issues ranging from social to psychological, environmental and biological factors. Social factors comprise societal pressure and expectations, discrimination (particularly gender discrimination), social exclusion, human rights violations, unhealthy lifestyles, rapid social change. Some sets of groups within the society are equally at higher risk of mental un-wellness because of their vulnerability and exposure to adverse circumstances interrelated with gender. Studies have shown also that women are more vulnerable to mental health challenges than men; they are twice more likely to be affected by Generalized Anxiety Disorder (GAD), their exposure to violence makes women three or four times more susceptible to depression; they may more likely experience post-traumatic stress (PTSD) and are most likely to be ten times affected by eating disorder.

The importance of good mental health and wellbeing cannot be overemphasized both for individuals and the entire society, particularly for the woman/girl child. The state of mental health

will translate into how an individual makes choices, conduct her or his affairs. Mental wellness is the springboard from which any individual can realize her or his potential and function appropriately. Mental health can either positively or negatively impact on the educational outcome of any individual, the ability to acquire skills, the performance and productivity at work (Kolappa, Henderson and Kishore 2013, Pp. 48). Further, mental health has a direct correlation with relational communication and relationship, and most importantly with crime rate. Positive mental health equally allows persons to cope with the stresses of life, and make meaningful contributions to both the family and the community. To thrive and achieve life's goals and vision, to have a meaningful and enhances life quality, then individual's mental wellbeing must be intact because psychological and emotional wellbeing cannot be separated from physical health (Ryff and Singer 1998, Pp. 1-28). The important role mental health plays is equally illustrated by its inclusion in the Sustainable Development Goals (SDGs).

Gender preference through various societal overt conducts and/or omissions has over time and in different ways produced several mental outputs in women and girls resulting in various mental indications that are discussed hereunder.

4.1 Fear, insecurity, and anxiety manifesting in continuous birth until sons are born in spite of health risk

The desire for sons influences reproductive choices and fertility behavior of women even to the detriment of their physical health (Chaudhuri, 2012, Pp. 178-186). There is usually a very burning yearning by women to give birth to as many sons as possible and this is driven by fear and anxiety and a wish to 'secure their lots in their husbands' family' since it is a patriarchal society and the number of sons a woman has determines her status, esteem and power in her matrimony. The fear and insecurity of not having sons (or enough sons) influence continuous procreation (Clark 2000, Pp. 95-108). Usually, a certain quantum of fear, nervousness and anxiety are normal phenomena for every person, however, it becomes a mental health concern and becomes an anxiety disorder when fear and anxiety interfere with the ability to function appropriately or to control and respond to situations suitably. In circumstances where the reproductive health circumstances of a woman dictate that there should be a closure to childbearing, yet she is unable to take the rational decision to follow her physiological commands, she is willing and perhaps eager to puts herself in grave physical (health) danger by continuing bearing children because of the fear and anxiety of not producing sons. When this occurs, it clearly has migrated from normal fears to mental un-wellness (Jensen and Oster 2009, Pp. 1057–1094). This fear and anxiety is nourished by pressure from the husbands, his extended family members and the society who place sons above daughters. It is clearly a mental un-wellness borne out of fear, anxiety and insecurity for a woman to continue having children so as to have sons in spite of her poor gynecological health that dictates that she should stop having children.

4.2 Lower productivity, confidence, and self-esteem

Daughters (women/girls) need to do more in order to achieve in equal measure what their male counterparts have achieved with lesser input and to do extraordinary to prove their worth. Society has impressed it upon women/girl-children right from childhood of their second placement within the social strata. Women face a lot of discriminations that limit their opportunities to develop their full potential' (Makama, 2013, Pp. 98), they do not enjoy equal rights in almost all spheres of life basically because of their lower level of education, poverty, domestic burdens etc. (Jackson, 1999, p. 69) Even when they have equal qualifications with their male counterparts, they are still discriminated upon just because of their female anatomy. The society keeps giving them the vibes that they are second fiddle right from girlhood; and having experienced prolonged discrimination they grow less confident and lack audaciousness (Mind. 2017). Anyone who has been subjected to prolonged abuse, intimidation, bullying, prolonged financial hardship and traumatic events can develop low confidence and low self-esteem. When anyone is subjected to prolonged mental un-wellness, there is a high tendency for such an individual to also develop suicidal behavior (Alejo 2014, P. 49).

4.3 Perinatal depression

Globally, depression is a recurring challenge for women of childbearing age and Nigeria is not excluded (Bennett, *et al* 2004, Pp. 45-67). Perinatal depression is a form of depression that occurs during and after pregnancy (postpartum) and it is a real medical illness that affects women regardless of age, culture, income or educational attainment. Causes of perinatal depression could be multiple and can include genetic and environmental factors. According to the study carried out by researchers, perinatal depression is 'both a state of psychobiological distress and the consequence of social suffering' (Adewuya, Ola, Aloba, and Dada, 2007, Pp. 15-21). Some of the symptoms include persistent sadness, feelings of anxiety, irritation, and/or guilt, worthlessness, hopelessness or helplessness, fatigue, restlessness, abnormal appetites, weight change, inability or trouble getting emotionally connected with the new baby. Other more severe ones are the thought of death, suicide or harming the new baby or oneself. Adeponle et al while reiterating several other research findings state further that one of the several causes of perinatal depression is linked to the culture of male children preference, which is, "having a female child while wanting a male child" (Adeponle, Groleau, and Kola, 2017, Pp. 11-27). A woman has been socialized to desire male children first and failure to have the first sets of children as male often triggers depression with fear, uncertainty and anxiety deeply seated in between.

4.4 Defeatist Mindset which Undermines Professional and Educational Attainments

Because society is highly masculine indexed, there exists a very strong delineation in the socialization of female and male children. Girls and women have over time internalized the low value accorded to them by society, irrespective of their ambitions or how they might have learned to be ambitious, the male has presented the opportunities to develop and achieve his aims and ambitions whereas the opportunities presented to the female are limited. Further, female are married off or are expected to get married at an earlier age to equally start the reproductive circle. Failure to adhere to societal expectations produces an irritation against such female who is perceived as a deviant or a social misfit. Any female who deviate from this societal expectation will have to live with the stigma attached to her perceived anti-societal norms (Wittkowski, Gardner, Bunton, and Edge, 2014, Pp. 115-124). These affect the women/girls' commitment to overall performance, academic excellence and professional attainments. Women refuse to take up challenging professions regardless of their mental abilities; they will rather confine to or migrate to less 'masculine' professions which aid the opportunities to fulfill their sacrosanct reproductive roles effectively.

4.5 Shame, disappointment and Failure

Having children irrespective of sex ought to be a joyful event for every mother or indeed every household; the birth of a newborn ordinarily should be heralded with a lot of delights and celebrations; however, when a woman has had several female children and the expectation of having a son is very high at the next birth, the coming of yet another girl-child becomes an anticlimax for the woman and the household. The feeling of failure and shame then set in and takes over in the subconsciousness of the woman. She has feelings of failure and shame because she has been unable to break the "chain of having only female children", she is unable to properly fortify herself and her stay in matrimony since male children are used to rate a successful "wife and mother." A lot of women in this category who have had multiple female children earlier are so nervous and fearful of having a scan test to forecast the sex of the unborn child they are carrying.

5. Conclusion and Recommendations

Preference for male children is a pronounced desire by families in Nigeria and this is based on the socio-cultural patriarchal nature of the society where male children are accorded the place of first options in most endeavors. The process of socialization has instilled in female children the fact that their male counterpart is preferred and of more importance than her. This male gender preference which manifests in the daily activities and choices of the society has actively translated into mental health issues for the women and female children. Women and

female children have developed a number of negative mentalities that have hindered and limited their progress and achievements. This social menace is unacceptable, particularly in this twenty-first century in which personal abilities, competence and potential should be the deciding factors for positions and appointments. There is a need for both individuals and society to move from this parochial mindset to a progressive one in which rights of all persons are respected and protected. Women and girl-children should be accorded equal opportunities, protection, and rights.

To achieve the above, there is a need for women to be empowered. The empowerment suggested herein is in two folds; the first is by way of information, education and enlightenment. Women need to be empowered with adequate information about their physiology and the reproduction process of how children's sex is achieved in pregnancy. The woman is not the determinant of sex in pregnancy, rather, the sex of a child is produced through the male's y or x chromosomes. Additionally, women need to realize the harmful effect of some of these practices to them and society and to equally appreciate their distinctiveness as persons, their function and their strength. This form of enlightenment and education allow for a shift in mindsets and behavior from the devaluation of women/girl children and broaden their attitudes from the exclusive focus of women to their reproductive roles. Secondly, there is need for economic empowerment which eliminates control and manipulations from the society. Economic empowerment is essential to realizing women's right and gender equality. Women and girl-children need to develop the ability to participate equally in existing markets, to have access and control over productive resources and decent work. Women need to be empowered to have a voice at all levels to make meaningful decisions and participate in economic decisions at all levels starting from the family to national and international level. When women are able to attain economic liberty, there is an inclusive growth which creates both financial strength and emotional stability (UN, 2019). Girl-children should be educated to the highest educational point that their abilities can propel them to.

Further, there is a very urgent need to make new laws, to bridge the gaps in some existing laws and policies that over the years have accentuated this harmful practice of preferring sons to daughters. The Nigerian government needs to eliminate a number of these provisions and create laws that are equal and equitable for all; this is the only way that women and female children can be adequately protected. Enforcement should also go along with legislative interventions.

Some of the factors making the utilities for sons crucial in society by parents can be addressed through an adequate social welfare system by the government. The government should create innovative programs specifically targeted at meeting the various needs and issues associated with old age and aging. When society is assured of adequate care at old age, less emphasis will be placed on having male children based on the perceived economic utilities that come with it. Alongside this is the need to speak out against the continuing operation of patriarchy in our culture. Patriarchy underpins structural violence against women and it is a vehicle used to enhance discrimination and limitation on women. Patriarchy is used as a societal method of

excluding women from accessing resources, it perpetuates and boosts continuing male dominance and imbalanced power ratio, it instigates power superiority against women. There is, therefore, a need to challenge this existing framework and find wholesome alternatives to the current power structure. There is a need to push for diverse communities, to appreciate and accommodate persons for who they are and not their gender; to equitably disburse and allot opportunities and tasks not based on gender but based on abilities, education, suitability and relevance. Everyone should be given the opportunity to make a choice as to the surname she or he intends to bear, the father's name or the father's family name should not be thrust on any person.

Creating a functional psychosocial and mental health support, counseling and interventions structure during the antenatal and postnatal period is also an effective approach in attending to this social menace. Currently in most health facilities in Nigeria, the antenatal and postnatal care for women consists mostly only physical care leaving behind the essential emotional and mental health care. There is, therefore, a need for the introduction of mental and psychosocial care for women during and after pregnancy. When there is a structured mental and psychosocial support and care system, women are able to find the needed strength to stand and uphold any decision that will aid their physical and mental health.

Finally, there should also be consistent and continuous affirmative actions that will mainstream women into programs and structures within society.

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THE QUAGMIRE OF THE NATIONAL INDUSTRIAL COURT OF NIGERIA'S EXCLUSIVE JURISDICTION OVER TORTIOUS LIABILITY EXAMINED

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Abstract

The National Industrial Court of Nigeria (NICN), under section 254C of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN, 1999) has and exercises exclusive original civil jurisdiction over labor, employment, and ancillary matters pertaining to, arising from or relating to the employment. The Court of Appeal (CA) in Nigeria, whose determination on civil appeals from the NICN is final, has in one breath held that the NICN has jurisdiction over tortious liability arising, relating or pertaining to labour and employment and in another breath held that it does not. This has left that law on the issue in a state of flux. This paper, adopts desk-based method in interrogating whether or not the NICN has exclusive jurisdiction over tortious liability pursuant to section 254C (a) of the CFRN, 1999. While explicating the history of the NICN, this paper examines the impact of the subsisting contradictory judgments by the CA on the issue on Nigeria's labour jurisprudence. The paper argues that based on the clear and unambiguous provisions of the CFRN, 1999, the exclusiveness of the NICN jurisdiction over tortious liability is unmistakably clear thus, the contradictions by the CA, is unwarranted and capable of undermining the effectiveness and efficiency of the NICN. It calls on the NICN to side with the position of the CA that upholds its exclusive jurisdiction while discountenancing the discordant position in the interest of the predictability of adjudicatory outcomes.

Keywords: Court of Appeal, Defamation, Jurisdiction, National Industrial Court of Nigeria, Tortious liability

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1. Introduction

In employer-employee relations, there is bound to be conflict as the interests of the employer are not unlikely to conflict with those of the employees (Eyongndi and Oyagiri, 2019, Pp. 37-42). When such conflict occurs, it becomes inevitable to resolve them so that harmonious industrial relations can be fostered (Agomo, 2011, p. 318). The National Industrial Court of Nigeria (NICN) was created as a formalized avenue for the settlement of labor and employment disputes although, its evolutionary exodus, has been a tumultuous and cacophonous one (Nwagbogu, 2013, Pp. 21-34). Thus, section 254C (a) of the Constitution of the Federal Republic of Nigeria, 1999, in a wider scope than the provision of section 7 of the National Industrial Court Act, 2006 (NICA 2006), confers exclusive original civil jurisdiction on the NICN over labor and employment matters and ancillary matters arising from, relating to or pertaining to employment, labor or in related subjects. The implication of this is that any dispute that arises from a labor and employment relationship or contingent on it, irrespective of its nature, parties, or claim, the aforementioned section of the Constitution, requires that only the NICN, at first instance, can adjudicate over it (Akintayo and Eyongndi, 2018, p. 112).

However, with regards to tortious liability, particularly cases of defamation of character arising from and pertaining to employment, while the NICN has to a large extent, maintained that it has and exercises exclusive original civil jurisdiction, appeals on this to the CA, have had discordant outcomes. This is so as the CA, in one breath, has upheld the exclusive jurisdiction of the NICN while in others, discountenanced it. This state of affairs has made the position of the law on the matter to be in a state of flux. This undesirable situation is exacerbated by the fact that the CA is the final court on all civil appeals from the NICN (Oji and Amuceazi, 2015, pp. 254-255). This can place and has regrettably, placed the NICN in the undesirable position of picking and choosing which of the two conflicting positions to follow at the time. Thus, litigants and legal practitioners who approach the NICN to litigate do not know their fate nor can advise their clients; accordingly, since no one is sure of what position both the NICN and CA may tilt to at any given time. This situation seems to encourage adjudicatory gambling which is otiose to the cherished doctrine of judicial precedent that enhances predictability of adjudicatory processes.

The paper argues that based on the clear and unambiguous provisions of the CFRN, 1999, the exclusiveness of the NICN jurisdiction over tortious liability is unmistakably clear thus, the contradictions by the CA is unwarranted and capable of undermining the effectiveness and efficiency of the NICN. Thus, there is no justification for the simultaneous adoption of restrictive and expansive interpretation posture by the CA. It calls on the NICN to side with the position of the CA that upholds it exclusive jurisdiction while discountenancing the discordant position in the interest of predictability of adjudicatory outcomes.

The paper is divided into seven parts. Part one contains the introduction. Part two is a chronicle of the structure of Nigerian courts. Part three is a synopsized history of the development of the NICN, its jurisdiction, practice, and procedure. Part four focuses on

examining contradictory decisions of the CA touching on the exclusivity of the jurisdiction of the NICN over tortious liability. Part five contains matters arising from the CA's impasse on the NICN jurisdiction over tortious liability while part six contains the recommendations and part seven contains the conclusion.

The article adopted a desk-based method relying on primary data such as the Constitution of the Federal Republic of Nigeria, 1999, National Industrial Court Act, 2006, case law, and secondary data like articles in learned journals, standard labor law textbooks, internet materials which are subjected to content and jurisprudential exegesis.

2. The Structure of the Nigerian Court System Synthesised

Nigeria operates a federal system of government in which the principle of separation of power is deeply entrenched and practiced as contained in sections 4, 5, and 6 of the CFRN, 1999. The judicial power of the Federal Republic of Nigeria is resident in the court under section 6, CFRN, 1999. Structurally, courts in Nigeria are classified into superior and inferior courts. Section 6(5) of the Constitution contains a comprehensive list of courts operational in Nigeria. These courts are hierarchically arranged in descending order as the Supreme Court, Court of Appeal, Federal High Court, State High Court, High Court of the Federal Capital Territory, Abuja, National Industrial Court of Nigeria, Customary Court of Appeal of the State, Customary Court of the Federal Capital Territory, Abuja, Sharia Court of Appeal of the State, Sharia Court of Appeal of the Federal Capital Territory, Abuja. These courts are the Superior Court of Record (SCR). It must be noted that the Federal High Court, State High Court, High Court of the Federal Capital Territory, Abuja, and the National Industrial Court of Nigeria are courts of coordinated jurisdiction. Meaning that they rank the same on the hierarchy of courts (Taiwo, 2015, p. 16). These courts, except for the Federal High Court (FHC), have and exercise original and appellate jurisdictions. For instance, the State High Court exercises appellate jurisdiction over the decision of the Magistrate/District Courts.

The Magistrates' courts, Districts Courts; Sharia courts; Area Courts; Customary Courts are known as inferior courts and courts of summary jurisdiction. According to Sofekun and Njoku (2016, Pp. 4-6) these are courts at the grassroots level meant to dispense justice speedily.

By the foregoing, the Supreme Court is the highest and final court in Nigeria. Thus, its decision is binding on all other courts. It has and exercises original and appellate jurisdiction over the decisions of the Court of Appeal. The Court of Appeal is next to the Supreme Court with appellate jurisdiction over decisions the Federal High Court, State High Court, High Court of the Federal Capital Territory, Abuja, National Industrial Court of Nigeria, Customary Court of Appeal of the State, Customary Court of the Federal Capital Territory, Abuja, Sharia Court of Appeal of the State, Sharia Court of Appeal of the Federal Capital Territory, Abuja. The FHC and NICN are specialised courts which means they have and exercise special jurisdiction that is exclusive to them only. Sections 251 and 254C of the CFRN, 1999 respectively provide

matters which are under the exclusive original civil jurisdiction of both courts. For instance, with regards to the NICN, any dispute relating to, pertaining to or arising from labor or employment, can only be litigated at the NICN, Erugo (2007, Pp. 57-72). The hierarchy of the Nigerian courts is premised on the operationalization of the principle of judicial precedent which requires inferior courts to be bound by the decision (s) of the superior courts. In this context, it means in the judicial organogram, the court that is beneath is bound to follow the decision of the one above. Thus, the Court of Appeal and all other courts in Nigeria, are obligated to follow and abide by the decision of the Supreme Court in determining any issue being litigated before them. Also, all the courts beneath the Court of Appeal, are bound to follow its decisions on any question before them so long as the decision is in accordance with that of the Supreme Court if it exists. However, none of the High Courts (i.e. courts of coordinate jurisdiction), are bound by the decision of one another since they are equal in status and stature Okonkwo, (1980, p. 49).

3. Evolutionary Journey and Jurisdiction of the NICN

Eyongndi, Onu, and Ebiye (2022, pp. 337-354) have opined that Jurisdiction is the power of the court to entertain a matter presented before it by litigants and decide that is binding and enforceable by the parties who had presented the matter. Jurisdiction is to the court what blood is to the heart; while by wisdom, kings' rule and decree justice, by jurisdiction judges/justices exercise judicial power to determine causes and matters presented by litigants (*Barclays Bank Ltd. v. Central Bank of Nigeria* (1976). The development of the NICN is out of necessity. Thus, Oji and Amucheazi (2015, 254-255) have opined that the advent of colonialism in Nigeria in the 19th century led to the rapid industrialization of the economy leading to the establishment of British-owned businesses and this led to the recognition of the need to establish a framework for dealing with impending workers agitations. To meet this need, the British colonial government's promulgation of the 1941 Trade Dispute (Arbitration and Inquiry) Ordinance meant to settle disputes within Lagos and its environs. According to (Eyongndi and Sipe-Dawodu, 2022, Pp. 183-197) this Ordinance was defective in that its application was restricted to Lagos and there was no permanent structure tribunal for the settlement of trade disputes save *ad hoc* bodies which were set up whenever a dispute occurred. Thus, (Amucheazi and Abba, 2013, P. 45) have opined that despite this shortcoming of the ordinance continued with the British non-interventionism posture wherein unless the disputants invite the government, it could not intervene by apprehending a trade dispute. Thus, in 1957, the colonial government promulgated another Ordinance known as Trade Disputes (Arbitration and Inquiry) Federal Application Ordinance. Thus, (Akeredolu and Eyongndi, 2019, Pp. 1-16) have stated that upon gaining political independence, Nigeria would soon be submerged in a civil war which after ending, the hitherto non-interventionism precolonial posture of industrial relations, became unfeasible. This is so as the Federal Military Government enacted two Decrees the

Trade Disputes (Emergency Provisions) Decree and the Trade Disputes (Emergency Provisions) Amendment Decree. These decrees prohibited strikes and lockout, and required disputants to report the occurrence of a trade dispute to the Inspector General of Police within fourteen days of its occurrence. According to (Eyongndi and Ilesanmi, 2021, Pp. 162-177). The decrees also set up a permanent structure for settlement of trade disputes known as the Industrial Arbitration Panel (IAP).

Realizing the inadequacies in the IAP and the need to further strengthen the framework for trade dispute resolution, the FMG, thus, promulgated the Trade Disputes Decree No. 7 of 1976 which Decree (which subsequently became the Trade Disputes Act, (TDA), and established the National Industrial Court. Section 20 of the TDA provided as follows:

> There shall be a National Industrial Court for Nigeria (in this part of this Act referred to as 'the court') which shall have such jurisdiction and powers as are conferred on it by this or any other Act concerning the settlement of trade disputes, the interpretation of collective agreements and matter connected therewith.

Unfortunately, when the 1979 Constitution was enacted and courts were being listed, the NICN was omitted. Thus, its constitutionality and jurisdiction became a serious subject of controversy, especially, when the fact that section 20 of the TDA that creates it, confers exclusive original civil jurisdiction on it. The issue then was whether the said exclusive jurisdiction of the NICN is not an unconstitutional sequestration of the unlimited jurisdiction conferred on the State High Court under the Constitution. To remedy this defect, the Trade Disputes (Amendment) Decree No. 47 of 1992 was promulgated which elevated the NICN to the Status of a Superior Court of Record (SCR), with exclusive original civil jurisdiction over labor and employment disputes. Thus, the impasse was deemed settled until the ghost of the 1979 Constitution, resurfaced when the 1999 Constitution was enacted and the NICN was once again, omitted. Thus, matters ordinarily reserved for the NICN, found their way in the dockets of the SHC as in the instant of *Kalango & Ors. v. Dokubo & Ors.* (1987).

To address this quagmire, the National Assembly (NA) enacted the National Industrial Court Act, 2006. Sections 7 and 20 granted the NICN exclusive original civil jurisdiction over labor and employment matters. However, this attempt was rendered futile as it became apparent that it was impracticable to use an ordinary Act of the NA to amend the Constitution (Izang, 2014, Pp. 17-18).

Thus, eventually, in 2010, the NA sought a permanent solution to this quagmire. Thus, the Constitution of the Federal Republic of Nigeria, 1999 (Third Alteration) Act, 2010 was enacted. Section 254A (1) thereof, established the NICN as a SCR which is on the same judicial pedestal as the SHC and FHC. Section 254C gives the NICN exclusive original civil jurisdiction over expanded themes of issues on labor and employment law (Atilola, Adetunji & Dungeri, 2012, Pp. 5-9). Since the enactment of the Third Alteration Act, all the challenges that had trailed the NICN, are now settled. The Court has and exercises both original and appellate

jurisdiction and civil appeals from the court lie to the Court of Appeal whose determination is final as was held in *Skye Bank Plc. v Victor Anaemem Iwu* [2017].

Sequel to the constitutional enhancement and fortification of the jurisdiction of the NICN in 2010, it has delivered radical landmark judgments that are commendable paradigm shifts in Nigeria's labor jurisprudence. For instance, the common law position is that an employer in a master-servant employment relationship is at liberty to terminate the employment of an employee for any reason (good or bad) or for no reason at all as was held in *Benson v. Onitiri (*1960). However, the NICN in *Ebere Onyekachi Aloysius v. Diamond Bank Plc.* (2015) held that it is no longer fashionable, to follow international best practices as well as international labor standards to so do. This is under section 254C (1) (f) and (h) of the CFRN, 1999 which gave the NICN the power to apply international best practices and international labor standards in determining any suit before it. Also, where an employee established that his termination was wrongful, the common law provides that the amount of damages the employee is entitled is what would have been ordinarily given if the period of notice to be given for the termination had been adhered to. Thus, where the employment contract permits either party to terminate it by the issuance of three months' notice or salary in lieu, in the event of wrongful termination, the only damages awarded is the amount for the three months as was decided in *Obanye v. UBN Plc.* [2017]. However, the NICN has held that this position has become otiose and archaic, and as such, in deserving cases, an employee would be awarded damages over and above the period of notice contingent on the Supreme Court decision in *Isheno v Julius Berger Nig. Plc.* [2012]. This was the position of the court which was affirmed by the CA in *Sahara Energy Resources Ltd. v. Mrs. Olawunmi Oyebola* (2020) Thus, where an employer terminates an employee's employment in a way and manner that impacts his/her reputation causing damage beyond mere job loss, the employee would recover more damages than usual. According to (Akpabio, 2023, Pp.1221-1226), by its innovative and pacesetting adjudicatory voyage particularly from 2010 when the CFRN, 1999 (Third Alteration) Act solidified and amplified its constitutionality and jurisdiction, the NICN has left no one in doubt that, it is truly a specialised court which shuns technicalities in dispensing justice. Indeed, one can safely conclude that it is a new dawn in labour and employment adjudication in Nigeria.

It is apposite to state that the NICN has been engaged in evolving a somewhat employee protectionist jurisprudence, at deliberate attempt at balancing the tides between capital and labour. One way to ensure that this evolving jurisprudence of the court is sustained is to elevate judges of the NICN to the CA who aside from having special knowledge in this area, are the pathfinders in this adjudicatory evolution. It is curious to note that the composition of the Court of Appeal takes cognizance of customary and Islamic law which in comparison to labor and employment disputes, feature less as appeals to be decided by the CA. Given the volume of appeals from the NICN to the CA, it has become imperative for the composition of the CA to mandatorily include justices who are experts in labor and employment matters preferably, elevated from the NICN bench.

4. The CA Impasse on NICN Jurisdiction over Tortious Liability

The CA as already stated, is the court vested with final adjudicatory powers over civil appeals from the NICN according to section 243 of the CFRN, 1999 as well as the Supreme Court of Nigeria determination in *Skye Bank v. Iwu* (2017). This section of the paper, clinically appraises the decisions of the CA wherein contradictory positions have been taken in interpreting the extent of the exclusivity of the NICN jurisdiction over tortious liability arising from, pertaining to and relating to labor and employment (Otuturu, 2015, P. 35). This is done with a view to deciphering matters arising in order to foreground an equilibrium. It should be noted that as far as labor and employment disputes adjudication are concerned, the determination of the CA is profound with far-reaching effect as the CA, amongst other things, is a policy-making court hence, interrogation of its decision, is germane to set sail and on course, Nigeria's labor jurisprudence. The first decision to interrogate is *Medical and Health Workers Union of Nigeria v. Dr. Alfred Ehigiegba* (2017) in this case, the Respondent was the Chief Medical Director of the University of Benin Teaching Hospital while the Respondent is a registered trade union. In the course of a grievance, the appellant wrote a letter through their counsel to the Head of Civil Service of Federation in which they indicted the respondent grievously touching on his lack of independence from his successor who was dismissed from service, lack of employment transparency, competence, and financial impropriety. The respondent considered the publication of the appellants defamatory and filed a suit at the Edo State High Court claiming damages. The Appellant filed a preliminary objection to the suit challenging the jurisdiction of the trial court to entertain the action. Their objection was on the basis that there was no proper service of the originating processes and more importantly, only the NICN could entertain the action since it arose out of labour and employment relations same being a fall-out from trade union activities. The trial court dismissed the objection and proceeded to hear the matter.

Being dissatisfied with the ruling of the trial court, the Appellants, appealed to the CA contending that the trial court erred in law when it held that it had jurisdiction to hear the suit as constituted. In determining the appeal, the CA appraised the provisions of section 254C (1) (a) of the CFRN, 1999 dealing with the exclusive original civil jurisdiction of the NICN. It has been noted that it is now a settled principle of statutory interpretation that the lawmaker does not use any word in vain and the repetitive use of the words "connected with" "related to" "arising from" "incidental thereto" or "connected therewith" used in section 254C (1) (a) of the CFRN, 1999 about the labor and employment matters which the NICN would have exclusive jurisdiction, is without prejudice to the nature of the claim before the court. The CA had reasoned that a careful examination of the factual situation culminating to the claim of the respondent against the appellant shows that the cause of action (libel), occurred in the workplace as envisaged by section 254C(1) (a) of the CFRN, 1999 hence, the logical and legal conclusion is that since the act complaint about arose from the workplace (labor and employment), and the NICN is constitutionally empowered to be seised of such dispute, the

failure of the respondent in litigating same at the Edo State High, was fatal. According to the court, if the case is not conclusively, an alleged defamatory claim arising from purely a labor and employment dispute as envisaged by section 254C (1) (a) of the CFRN, 1999, then, it will be difficult for the court to say what else would.

The above liberal interpretative posture has been adopted in several other cases. In *Nwagbo & Ors. v. National Intelligence Agency* (2018) the appellant had applied for the death benefits of their deceased father who was an employee of the respondent. The NICN declined jurisdiction over the case on the basis that it was for the determination of the priority of rights of the deceased beneficiaries whereas, the NICN, only deals with the parties to an employment contract while alive. The appellants appealed against this decision to the CA contending that by section 254C (1) (a) of the CFRN, 1999, the NICN has exclusive original civil jurisdiction over the case as it arose from and is connected with employment. In determining whether or not the NICN has jurisdiction over the suit as constituted, the CA found that the words relating to or connected with, used to delineate the exclusive original jurisdiction of the NICN, are clear in both intent and meaning and therefore, ought to be ascribed their ordinary grammatical connotation when being interpreted. To this end, the court held that the jurisdiction state in the aforementioned constitutional provision is not restricted to purely labor and employment matters but disputes relating to, connected with or arising from labor and employment or ancillary to. The foregoing position was reached by the CA in *Omang v. Nsa* (2021). The purport and import of the above position taken by the CA is that, the exclusive jurisdiction of the NICN is not by any stretch of the imagination, limited to core labor and employment disputes, but disputes ancillary or arising from, connected with, relating to or pertaining to labor and employment. Once any of these conditions are present, the cause of action or claim is inconsequential as it does not remove the dispute from the exclusive jurisdiction of the NICN.

Conversely, the CA has adopted a rather narrow or restricted posture in some other cases in its interpretation of section 254C (a) (1) of the CFRN, 1999. In *Akpan v. University of Calabar & Ors* (2016) the appellant was an employee of the 1st respondent and a senior lecturer at the material time. The 1st respondent through the 2nd respondent, called for legible staff to apply for promotion wherein the appellant applied to be promoted to the rank of Associate Professor. For due diligence, the 1st and 2nd respondents, set up a verification committee to verify all the publications submitted by eligible staff of the 1st respondent for promotion. Certain including fake publications and irregularities were observed in the publications of the appellant by the 1st respondent's verification committee but he was not invited but the matter was escalated to the University Senate which approved it and directed the 1st respondent's management to implement the same. The appellant was consequently demoted from the position of Senior Lecturer to Lecturer 1. Being dissatisfied with the action of the respondents, the appellant filed a case at the NICN, Calabar division seeking a declaration that his demotion was unlawful and also claimed damages for defamation. On the claim concerning defamation, the NICN declined jurisdiction.

Being dissatisfied, the appellant appealed to the CA. In determining the appeal, the CA held that a careful examination of section 254C (1) (a) of the CFRN, 1999, shows that the jurisdiction of the NICN does not extend to entertaining a claim in tort at all. A claim in tort cannot be considered as being ancillary to a claim for wrongful dismissal when brought before a court with limited jurisdiction. The CA therefore concluded that the learned trial judge was right in declining jurisdiction.

In the same vein, the CA in *United Bank of Africa & Ors. v. Oladejo* (2021) in which the court was urged to determine whether or not a claim for malicious prosecution was within the exclusive original jurisdiction of the NICN. The Respondent had instituted a claim for malicious prosecution at the State High Court (SHC) and got a judgment against the respondents who were dissatisfied with the decision of the trial court. They appealed the decision to the CA contending that by virtue of section 254C (1) (1) of the CFRN, 1999, the NICN as opposed to the SHC, had jurisdiction over the claim since it arose in the course of employment. The CA without hesitation, rejected this argument and held as follows:

> A painstaking perusal of the provisions of section 254C (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria, seems to me that the provisions confer on the National Industrial Court jurisdiction over trade union, and labour matters, employment law rules. It does not pertain to criminal matters or tort…. Section 254C (1) (a) of the Constitution does not pertain to malicious prosecution, assault, detinue or any liability in tort. The infringement of the right of a person in his workplace is not enough to confer jurisdiction on the National Industrial Court except where there is employment issue. The case of the respondent's being one of malicious prosecution, has nothing to do with respondent's condition of employment or contract of employment. The High Court of a State is the appropriate forum seised with the jurisdiction to entertain the action.

The CA's position above is the same as that in *Olushola & Anor. v. Andrew* (2021) where the court held that the NICN jurisdiction under section 254C (1) (a) of the CFRN1999, does not cover malicious prosecution or any time for that matter. We take the liberty to state that the aspect of the court finds that the NICN jurisdiction does not pertain to criminal matters. This is not correct, as the NICN has and exercises concurrent criminal jurisdiction with the Federal High Court, State High Court and the High Court of the Federal Capital Territory over all the matters under its civil jurisdiction. A clinical combing of section 254C (5) of the CFRN, 1999 makes this point bare. In fact, it is advisable that any criminal matter arising from the civil jurisdiction of the NICN, be adjudicated over by the NICN given is peculiarities and the fact that it could be less cumbersome as being a specialised court, it criminal docket is likely to be less congested compare to other courts.

This restrictive posture of CA is *in tandem* with a few earlier decisions of the NICN itself. For instance, in *Dr. E. G. Ayo Akinyemi v. Crawford University* (2011) the claimant had an allegation of sexual harassment levelled against him by a female student of the defendant.

The Vice Chancellor of the defendant directed a panel of investigation to investigate the allegation. The claimant was invited to appear before the panel but go the notice late hence, he sought a reschedule which he further asked for an extension of time to enable him to gather evidence to defend himself. The Investigation panel refused his plea, concluded their work, and submitted its report in which he was indicted. As a result of the report, the claimant's employment was terminated, and he was aggrieved. Aggrieved by the defendant's action, he filed a suit at the NICN seeking damages for defamation and wrongful termination of his employment. The defendant entered an appearance under protest by filing an objection to the competence of the NICN to be seised of the matter as the subject matter of the suit was outside the jurisdiction of the trial court.

In its ruling over the preliminary objection, the NICN per Kanyip J, held that the NICN has no jurisdiction over matters relating to liberty although it arose from the course of employment. According to the court "the NICN has no jurisdiction over matters relating to libel. Nowhere in section 7 of the NIC Act will anything be found relating to or associated with libel, slander or defamation." The same conclusion was reached by the NICN in *Okeke v. Union Bank of Nigeria Plc.* (2011) and *MTS Ltd. v. Akinwunmi* (2011). While the reason for the rather restrictive approach adopted by the NICN in this case can be easily justified, the reason being that the jurisdiction of the NICN under section 7 of the NIC Act, 2006 is restricted when compared to what it is under 254C (5) of the CFRN, 1999.

From the above, it is trite that the CA's approbating and reprobating attitude on the correct interpretation of 254C (5) of the CFRN, 1999 with regard to the extent of the exclusivity of the jurisdiction of the NICN, has left the law in Nigeria in a state of flux. What is the impact of this on labor adjudication in Nigeria? Is the contradictory quagmire foist on litigants and legal practitioners justifiable? What is the way forward? What is the impact of this divergence on the doctrine of *stare decisis?* These issues are dealt with in the subsequent portion of this paper.

5. Matters Arising

While the contradictory position by the CA's determination may cause anxiety of "which way now" as to whether the NICN being inferior to the CA, can cherry pick which of these positions to follow. The danger in this anxiety is: can litigants and their legal practitioners foretell, based on the facts and the law, the probable outcome of a dispute anchored on 254C (5) of the CFRN, 1999 bearing in mind the subsisting contradictory position by the CA? While this concern may seems legitimate and probable, the truth is that it is a settled one as was held in *Okoniji v Mudiaga Odge* (1985). The law is trite that where there are contradictory decisions from a court, the later in time is what inferior courts are bound to follow and not the earlier decision as was decided in *Oji v. Ndukwe* [2019]. The reason is that by the doctrine of necessary implication, the later decision is a review or repeal of the earlier decision since it is deemed that the later decision when made, the earlier one was contemplated as was decided in *Osakue v*

Federal College of Education (Technical) Asaba [2008]. Based on the foregoing, we can safely conclude, although undesirably, that the position of the law is that the NICN neither has nor exercises original civil jurisdiction over section 254C (5) of the CFRN, 1999.

The above notwithstanding, it is undesirable to have divergent pronouncements from a policy court on a seemingly straightforward issue. *Stare decisis* which requires that decisions of superior courts (subject to have been reached *per incuriam* or distinguishable) are binding on inferior court so that cases having similar facts have predictable outcomes based on precedents is a cornerstone of Nigeria's adversarial adjudicatory system. Anything that is capable of obstructing or impugning this cherished justice administration heritage must be prevented. The state of affairs foisted on Nigeria's labor and employment jurisprudence by the hardly reconcilable contradictory position of the CA is not only needless (as will be subsequently demonstrated), but unjustifiable. Akpabio and Bada (2023, p. 76) have cautioned that the effect of the decisions of courts transcends the parties before the court to the general unborn hence, courts should be circumspect. A superior court, especially a policy-making one like the Court of Appeal should not deliberately or by inadvertence, place a court like the NICN in a tempting position to choose and pick which decision to follow especially on a germane subject like jurisdiction. The need to avoid this becomes apparent when the fact that the subject matters upon which the NICN has adjudicatory power over, is extremely important and volatile.

Section 254C (1) (a) of the CFRN, 1999 by any stretch of the imagination, is straightforward and simple. The golden rule of interpretation requires that the provision of statute or a contract that are simple and straightforward should be given their ordinary grammatical meaning unless doing so will lead to absurdity as was held in *Dickson v. Sylva* (2016). The said section provides that the exclusive original civil jurisdiction of the NICN shall extend to labor and employment matters or disputes pertaining to, arising from, relating to or connected with any labor or employment dispute. The only reasonable conclusion to be drawn from the foregoing provision is that any cause of action (tortious, contractual, or fundamental right enforcement, etc.) arising from, pertaining to, relating to or connected with employment or labor, falls within the original exclusive jurisdiction of the NICN. Thus, there is no justification for the CA to have laid down a contradictory position regarding the import and purport of Section 254C (1) (a) of the CFRN, 1999 regarding the jurisdiction of the NICN. Besides, one may wish to ask, what is special or unique about tortious liability adjudication that a judge of the NICN cannot or lacks the competence to adjudicate upon?

Ordinarily, one would have expected the CA to rather seek to interpret or give strictures for determining when a cause of action could be said to have arisen from, pertains to, relating to, or connected with labor and employment dispute than handing down contradictory judgment with their far-reaching negative impact. One can safely argue that the only interpretation to be given to these words, what the draftsmen intended is that any subject matter or cause of action that arises in the course of employment, or is an offshoot of a labour dispute, irrespective of its nature or claims/reliefs being sought, the NICN is the court that has adjudicatory power over

such. This conclusion is irresistible when the opening phraseology of section 254C (1) (a) is examined. It is therefore submitted, with respect that the controversy engendered by the bipolar interpretation by the CA is not only needless but unjustifiable and therefore legally unsustainable.

The point must be made that the subsisting contradictory position foisted on the populace by the Court of Appeal is undesirable and somewhat undue interference with the right to access to court which is recognized and protected under the CFRN, 1999 and under international and regional human rights instruments. Section 36 of the CFRN, 1999 guarantees access to the court of all Nigerians to have their causes determined. Article 7 of the African Charter on Human and Peoples Rights, 1981 also guarantees this right. Contributively, Article 14 of the International Covenant on Civil and Political Rights (ICCPR), 1961 bequeaths these rights to all persons. These legal instruments contemplate a situation where having a cause determined, should be without hassles such as the one created by contradictory decision of an appellate court like the one being discussed. Where a litigant is placed in a dilemma of where to litigate by the subsistence of a contradictory decision of a superior court, it runs afoul of his right of access to court. The laying down of contradictory positions on the import and purport of section 254C (1) (a) of the CFRN, 1999, by the CA, to say the least, is most undesirable and chaotic.

6. Recommendations

Based on the findings above, it is recommended that the CA as the final arbiter over civil appeals from the NICN and a policy-making court as such should harmonize its subsisting contradictory judgment on the right interpretation of the provisions of section 254C (a) (1) of the CFRN, 1999 about the nature of the jurisdiction of the NICN. To ensure that the settled jurisdiction of the NICN is not unsettled, particularly considering the *sui generis* nature and mandate of the NICN, the harmonization should be to the effect that, any cause of action, irrespective of the nature of the claim, once it arises, pertains or relates to labor and employment, falls within the exclusive original civil jurisdiction of the NICN.

Furthermore, considering the evolving jurisprudence of the NICN as a specialized court and the importance of the disputes it deals with, coupled with the ever-increasing quantum of appeals cascading to the Court of Appeal, the constitutional composition of the Court of Appeal provided for under the Constitution as well as the Court of Appeal Act, should be amended to the effect that at least, in each division of the CA, there shall be a judge who is an expert in labor and employment law. Also, there is a need for more judges of the NICN, to be elevated to the CA bench as at the time of writing this article, since 2010 after the enhancement of the jurisdiction and stature of the NICNM, only two judges of the court, have been elevated to the CA.

7. Conclusion

Extrapolating from the above analysis, it is trite that the NICN is a specialized court that has and exercises exclusive original civil jurisdiction over labor and employment disputes. The history and development of the NICN were shrouded in controversies as the court was submerged in protracted jurisdictional and constitutional challenges however, several remedial statutory steps were taken culminating with the enactment of the Constitution of the Federal Republic of Nigeria, 1999 (Third Alteration) Act, 2010 which made the NICN a SCR, elevated it to the same status with the SHC and FHC. Section 254C laid down the exclusive original civil jurisdiction of the NICN. The CA, interpreting this exclusive jurisdiction, particularly regarding causes of action that are not purely labor and employment but arising from, connected with, or relating to labor and employment, have delivered contradictory judgments which have left the law on the issue in a state of flux despite its undesirability. While this quagmire can be resolved by the principle of law that where there are contradictory decisions of the court, the latter supersedes the former, this state of affair is undesirable and unjustifiable despite the fact that the provisions of the law are clear and precise warranting their simple grammatical meaning to be ascribed to them.

This subsisting state of the law on the import of section 254C (1) (a) of the CFRN, 1999 regarding the exclusivity of the NICN jurisdiction runs afoul of the express intendment of both the CFRN, 1999, the ICCPR per Article 14 and Article 7 of the African Charter on Human and Peoples Rights that requires securing the right of access to court by removing any form of obstruction to accessing the court for the determination of rights and obligations by all and sundry. This situation must be urgently addressed by the Court of Appeal so that the NICN is properly guided and not left in a state of flux with its concomitant negative impact on citizens whose rights might be breached requiring redress.

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INTERNATIONAL LAW IN INDIA: ANALYZING THE LEGAL AND POLICY FRAMEWORK THROUGH INTERNATIONAL HUMANITARIAN AND REFUGEE LAWS

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Abstract

The Paper explores the role of municipal law and policy in the implementation of international laws at the domestic level. International Law has remained on a special turf since its inception especially owing to the absence of any global sovereign conventionally associated with law, to ensure compliance. Despite this, international law has played a major normative role in determining the conduct of States as well as international Organizations. However, effective implementation of international law depends not only on the existence of legal principles but also willingness of the State to conduct itself in line with the obligations. This Paper argues that this requires adequate policy mechanisms and not mere adoption of law into the books – that is, implementation of international law at domestic level is a point of intersection of law and policy. Predominant academic attention is focused on international law as a legal discipline, while political analysts focus on domestic and foreign policy. This Paper looks at international law in this duality – focusing on its legal as well as policy aspects simultaneously, in the Indian context. It examines India's approach to international law from the legal as well as policy perspectives, looking at how law informs policy and the other way round. The Paper uses specific examples in international humanitarian and refugee laws to draw out this crucial interface.

Keywords: India, International Law, Humanitarian Law

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1. Introduction

International law has, since its inception, held a special position in jurisprudence as it does not fit into the pigeonholes meant for domestic legal principles emanating from the State's sovereign authority as the all-powerful entity. Lacking a formal sovereign to legislate or implement these laws (though the latter part may be attributed to the International Courts and Tribunals), the actual effect of international law as 'law' is often challenged in principle. However, it has been accepted across legal systems and jurisprudence now, that may as it be in terms of actual implementation, international law is 'law' and States are obligated to obey and follow the mandates laid down.[3] Effectively, international law requires States' willingness and cooperation to implement and respect its mandates without impinging on their sovereignty. States implement international law based on the system they follow, with monist countries considering international law as a part of domestic law; and dualist countries requiring that the State has to translate international law into its domestic system for it to become a part of the domestic system. Dualist States thus require an express adoption of the law into the municipal system, while Monist States do not.[4] The mechanism by which international law is incorporated into domestic law is per the State's prerogative, through its Constitutional scheme, Parliamentary process and judicial system. Customary and Treaty obligations are often seen to play out differently in their implementation at domestic level. States cannot per se ignore Treaty obligations without incurring the consequences envisaged in the Treaty for violations, especially not without facing challenge in the concerned international tribunal or Court. However, as Stateshall see in the later part of the Paper, customary obligations are often circumscribed using State policies befitting domestic interests. As noted by (Sehrawat, 2019), States implementation of international law is contingent on its policy objectives and values. These values, in turn, are often reflected in the Constitution, and are further concretized by Courts in deciding cases premised on these values.

This Paper seeks to explore the relevance of domestic policy in the actual implementation of international law in the State's operation. That is, it argues that mere agreement to international law by a State does not guarantee compliance per se. Despite the possibility that the international community may hold the State accountable *politically,* rights or duties under international law do

[3] It can be seen in the conduct of States in being part of organizations such as the United Nations, International Labour Organization, etc. and in their cooperation in the Resolutions, Treaties, and other initiatives of such Organizations. For theoretical analysis, see, for instance, Philip Allott, International Law as True Law: A New Approach to a Perennial Problem, *EJIL: Talk!* Jan. 12, 2022 at <https://www.ejiltalk.org/international-law-as-true-law-a-new-approach-to-a-perennial-problem/>

[4] Monism and dualism are two theoretical approaches to the relationship between domestic law and international law. Though States cannot be places into these categories like pigeonholes, it is generally perceived that monism perceives domestic and international law as parts of the same universal system of law, while dualism holds domestic and international laws as separate and the letter requiring the former's adoption in order for it to be applicable. For more, see Madelaine Chiam, Monism and Dualism in International Law at <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0168.xml>

not automatically become justiciable in Courts by way of individual petitions or cases. Hence, this Paper holds that no amount of international principles would suffice to ensure compliance unless the State adopts domestic policies towards implementation of these laws, depicting their political will beyond building international optics and image. This argument is built specifically through the example of India, examining its political and legal landscape as regards compliance with international legal obligations.

The next part of the Paper will outline the Constitutional framework, legislative history, and the Supreme Court's jurisprudence around India's stance on international law. The subsequent part will look at the instances of international humanitarian law (IHL) and international refugee law (IRL) to depict that international obligations normatively agreed upon, could be flouted by States using their domestic law and policy measures unless these international obligations themselves reflect in domestic law and policy adequately. The last part of the Paper will highlight the importance of domestic policy decisions specifically in the field of international law, urging the international community to insist that State parties agreeing to international obligations through Treaties and Conventions be required, post-ratification, to enact domestic policy frameworks to ensure that the obligations are reflected under municipal law as well. Especially in obligations that lay down international human rights framework, it must be ensured that the corresponding domestic laws are made justiciable.

2. India and International Law: The Path Traversed

The basic values of the Constitution of India were settled by the Supreme Court of India through several cases that arose out of State actions that violated Fundamental Rights envisaged in the Constitution. Within dualism, there are different approaches through which an international legal principle becomes a part of municipal law, the most common one being the specific adoption or transformation theory. Sovereignty requires that the ultimate authority to determine the application of legal obligations on the State remains with the State itself (Mendez, 2013). Domestic adoption of international law will ensure that the State could retain its sovereignty while still complying with international obligations, since it is now voluntarily abiding to undertake these obligations, without eroding its sovereignty. In addition to the philosophical aspect of demonstrating sovereignty, States also need to exercise caution in ensuring that their domestic interests are not prejudiced in implementing international obligations. This often means that States' actual response to international obligations reflects more foreign policy concerns than international legal concerns. In deciding on the implementation of international principles, States may be seen to take more into account their foreign and domestic policy considerations than their obligations under international law. This is more so with respect of matters concerning national security, such as cross-border movement of people (such as refugee laws or laws on asylum and migration) or international humanitarian law.

India requires international law to be adopted into the municipal system, and domestic Acts are passed to implement international obligations that the State agrees to. Respect for international law is a part of India's law and policy, envisaged in the Constitution by its makers from the inception of the State as an independent sovereign.

The State took upon itself the obligation to respect international law and to maintain good international relations, in keeping international peace and security. In addition, the Parliament is vested with the power to legislate for the Nation to implement any international obligation. (Constitution of India) International law is not get automatically regarded as binding principles, but needs to be brought into the domestic realm by the Parliament. In the interaction of domestic (municipal) law with international law, this means that the two categories of law are regarded as distinct and separate. Courts in India have, however, sometimes taken a different approach by applying international legal principles to cases, at times invoking them even in the absence of any domestic legislation or rule on the matter.[5] This marks a shift in the judiciary's perception and treatment of how international legal principles must guide their jurisprudence, though it does not change the nature of India's relationship with international norms per se. It is, rather, the Court perceiving that if India has agreed to certain principles and obligations at the international level, then the ensuing duties may indeed be placed on the State.

2.1 International Law and the Indian Constitution

India's position on international law was determined in the Constituent Assembly on what India's international interaction should be like – that is, what foreign policy India is to follow, and what relationship it would maintain with the international community. In the same proceedings, the question of international peace and India's policy on war were also discussed to some extent.

The Constituent Assembly debates give us some insight into what was intended when the makers drafted the Constitution. Art. 51 reads,

> *"Promotion of international peace and security.*
> *The State shall endeavour to:*
> *(a) promote international peace and security;*
> *(b) maintain just and honorable relations between nations;*
> *(c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and encourage settlement of international disputes by arbitration"*

[5] Though India does not directly implement international law, the Supreme Court of India referred to international obligations while deciding *Visakha v State of Rajasthan* AIR 1997 SC 3011. Read the full text of the decision at <https://main.sci.gov.in/jonew/judis/13856.pdf>

The original text of the Draft Constitution read so:

> *"The State shall promote international peace and security* ***by the prescription of open,*** *just and honorable relations between nations,* ***by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and respect for treaty obligations*** *in the dealings of organized people with one another".* (art. 40, Draft Constitution of India)

Several amendments were moved by different members of the Assembly, including Dr. Ambedkar, whose proposed substitution is very similar to the text as it stands today. Dr. Ambedkar moved the amendment to replace the Draft article with: *"The State shall - (a) promote international peace and security; (b) seek to maintain just and honorable relations between nations; and (c) endeavor to sustain respect for international law and treaty obligations in the dealings of organized people with one another.*" Similar amendments were also moved by other members such as Mr. Kamath, which sought only a structural change in the language while the essence was the same as that moved by Dr. Ambedkar. The amendment moved by Mr. Kamath would make the provision read as such: *"The State shall endeavor to (a) promote international peace and security; (b) maintain just and honorable relations between nations; and (c) sustain respect for international law and treaty obligations in the dealings of organized people with one another."* The change in language seems merely technical, but a crucial difference can be noted in terms of how in the original art 40, *"international peace and security"* was related *to "just and honorable relations between nations"* and *"maintenance of justice and respect for treaty obligations"* using the conjecture ***"by"***. If the provision had stood so, international peace and security would have been a function of the relationship between nations, international law, and respect for treaty obligations; rather than each of these being separate obligations of the State. No discussions were made on this particular aspect regarding how the new format would alter the inter-relationship between the three clauses.

Though not with respect to this aspect, one of the members pointed out that any change in language, however superficial the difference might seem, embodies a difference of approach, outlook and even that of intention. Prof. K T Shah, a member of the Constituent Assembly, moved his own amendment altering the Draft art. 40 to this: *"The Federal Republican Secular State in India shall be pledged to maintain international peace and security and shall to that end adopt every means to promote amicable relations among nations. In particular, the State in India shall endeavor to secure the fullest respect for international law and agreement between States and to maintain justice, respect for treaty rights and obligations in regard to dealings of organized peoples amongst themselves."* He emphasized that India must *pledge* to maintain international peace and security, placing the duty more vehemently on the State. One might hold the same true for the change in language in the Draft, the amendments proposed, and the final provision as it exists today.

The discussions went on about what foreign policy must be adopted by India, with a particular focus on armaments and war as well. The Hon'ble members exchanged views on how they purported to achieve international peace, in the context of the international political situation then. The UN Security Council had been in a deadlock on disarmament during the time the Constituent Assembly was assessing India's position, which clearly influenced the thought process. (Debates C. A.) Several members mentioned the UN and the international security ecosystem while speaking of their concerns on what stance India must adopt. (Constituent Assembly of India Debates (Proceedings), Vol. VII). Despite the efforts of the UN and its failed predecessor League of Nations, the arms race was prevalent in the West and imperialism had not ended as yet.[6] UN peacekeeping forces had been sent to the Middle East, South Asia, Africa, and Central America that year (1948), (Moritan) and the Security Council was in a deadlock on disarmament. (Beghhoefer).

This political context must have influenced the Assembly Members' perceptions on India's position on international peace, extending to a discussion on war and military strength. While some maintained that the State must stick to the ideals of peace and eschew violence at all costs (See statements by Prof. KT Shah, Shri. BM Gupte, Shri. M Ananthasayanam Ayyangar, etc. which invoked Gandhi and the ideals of peace.), Shri. Mahavir Tyagi made a statement in favor of being willing to display military strength if the need arises. He broadly supported the motions made by other Members towards peace, but made his reservations clear by invoking the need for power and armed forces (extending to war) to achieve the stated objective of peace and harmony. Opposing perspectives were put forth in the discussions, given that the international political atmosphere was volatile, and India was much weaker in its position relative to other states.

The United Nations had only recently come into existence, and efforts at securing any big power (US or the USSR) to initiate disarmament had not been fruitful. Nuclear weapons were also in existence, and the world was divided in blocs.[7] India had categorically maintained its distance from any blocs, which was morally the right position to assume, but rendered India vulnerable as a newly independent State. Some members wished India would take its position on international

[6] The League of Nations was disbanded in 1946, transferring its powers and functions to the United Nations in 1945, after the former was unable to prevent the Second World War from breaking out. Many attribute this failure to the conduct of member States that did not abide by the rules of the League in their own conduct, especially in their attitude towards aggressor States. For instance, Winston Churchill said, "[T]he League did not fail because of its principles or conceptions. It failed because those principles were deserted by those states which brought it into being, because the governments of those states feared to face the facts and act while time remained." See League of Nations: Transition to the United Nations at <https://www.ungeneva.org/en/about/league-of-nations/transition> Alongside, the Cold War began in the late 1940s, creating yet another international tension and apprehensions on sustainable peace.

[7] Blocs were the polarized coalitions of socialist and capitalist States that opposed each other in the aftermath of the Korean War and then the Cold War. The capitalist bloc supporting the United States of America, and the socialist bloc supporting the Soviets parted most of the World into two. Amidst this, India was a part of the Non-Aligned Movement (NAM), which professed its neutrality from either bloc.

peace more proactively, leading by example and not acquiring arms and by not militarizing prominently.

There already was skepticism on the World's intention to implement their own international promises. This reflects in India's Constituent Assembly Debates as well. Prof. Shah made very poignant points in this regard: *"…the powerful nations of the world do not really intend to disarm. They do not desire peace and security for peoples, but only for their friends and associates, and of course, for themselves."*

He addressed the permanent distrust between States, and concerns on national security that prevent them from initiating disarmament on their domestic end. However, he suggested that India could follow the lessons of non-violence not only at the individual but also at the national level. He also reminded the Assembly that Gandhi in the Second Round Table Conference had indicated that if *Swaraj*[8] is attained and Congress leads it, the State would strive to disband the army and the Police. However, of course, he did not insist on the action given the current circumstances. It seems clear that the speaker did not expect that the State would disband its army and Police; but this was only invoked only to put across a point that the peace process has to have a beginning at some point, at a practical level rather than in mere rhetoric. His emphasis was on the nascent stage that India was in, where had the opportunity to shape India's foreign relations policy on peace, along with parallel practical steps to assure the international community that the commitment to peace is indeed real.

Shri Biswanath Das was in support of Dr. Ambedkar since his proposal accounted for flexibility in approach as needed, since the State could not predict all of India's predicaments that could arise in the future. Shri. BM Gupte and Shri MA Ayyangar moved for the addition of arbitration into the provision, for the purpose of resolution of disputes. The discussion depicts how peace cannot be achieved in isolation but is contextualized in the surroundings; for peace to really prevail, neighboring States must also be secure socially and economically as well. Since India was not in a position to take on the world's imperialist powers to secure freedom for all people of the world, as desirable as that would be ideally, the State resorted to adopting peaceful methods of resolution of disputes. The motion to add *"to encourage the settlement of international disputes by arbitration"* was thus moved and accepted without much issue. The only opposition came from Shri Tyagi as discussed before, pointing out the need for wars in some circumstances.

It is important to mention his views to fully understand what transcribed in the Assembly on the subject of peace, international relations, and war. Despite valuing the ideal behind the other Members' proposals towards peace, he held that war is preferable in some cases, particularly since finding honest arbitrators to resolve international disputes was already difficult. His statement

[8] *Swaraj* was a concept propagated by Mahatma Gandhi (Father of India) as part of the Indian independence movement. The term stands for 'self-governance' or 'self-rule'.

reveals a fear (which might have been shared by many, within and without the Assembly) of how India would survive if it took a passive stance, rooting for peace, when clearly the world around was getting armed to the teeth. Interestingly (and perhaps ironically), his view was that India needed to assert power and be armed if it needed to achieve the objectives of peace and good international relations. To quote, the words used were: *"…if we want to maintain peace and seek to maintain just and honourable relations between nations, then I say it is not possible if we remain weak and remain merely a meadow of green grass for bulls to come and graze freely."*

Ultimately, though the Assembly stuck to its preference of peace and arbitration to drive its foreign policy, India did, in the following decades, build a strong army and arsenal despite its commitment to peace (Ganguly, 2015).[9] Or perhaps, from another perspective, this was perfectly in consonance with its commitment to peace. International relations have, since the very inception of Nation-States, followed the view that a potential for violence is the foundation for peace and security. As ironic as it is, it is unsurprising given the political context of different States, domestically as well as with the international community. To that extent, though the Assembly seems to have not engaged with Shri Tyagi's perspective, that is what State practically followed, albeit to a limited extent.

Per the Indian model, international law could be applied to India only after it is made a part of the domestic system by the Parliament. The Constitution gives the Parliament the power to make laws binding on all of India to implement any international obligation. (Constitution of India, art. 253). However, there is no obligation that the State must do so, but only a power that enables the Centre to exercise legislative jurisdiction over any matter across the Country to give effect to an international obligation.

The provision as it stands today is more or less similar to the one included in the Draft Constitution,[10] and not much debate happened in the Constituent Assembly on its adoption. The only Amendment moved was to substitute the phrase *'for any State or part thereof'* with *'for the whole or any part of the territory of India'*, which did not alter the essence much. (Debates C. A.).

A general concern for maintaining States' autonomy within the system is clear in the deliberations and the final acceptance of provisions by the Assembly. But when it came to the power of Parliament to legislate in respect of international obligations, discussion was scarce, possibly indicating a general understanding that maintaining international relations would mean

[9] India built a conventional military force in the years following independence, though the first Prime Minister Shri Jawaharlal Nehru had a dislike for arms and arming. It is considered that the eventual arming occurred in response to the threats perceived in the neighbourhood, changing geopolitical landscape, and national security concerns. The Global Firepower Index report lists India as the fourth most-powerful military. See https://www.globalfirepower.com/countries-listing.php

[10] It was art. 230 in the Draft Constitution, and read so: "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for any State or part thereof for implementing any treaty, agreement or convention with any other country or countries.")

that Parliament essentially would get jurisdiction over all States even in matters that are otherwise outside its purview. The Constituent Assembly was thus mindful that a neonatal democracy like India has to ensure from its inception as a political entity, it has to have good relations with the international order. While there is respect for international law, there also is adequate power with the Centre to decide how international obligations are to be implemented in and on the State.

2.2 Indian Courts on International Law

Indian Courts have taken an innovative approach to international law, though the application of these principles to the State. What is often referred to as 'judicial activism' is sometimes a necessary proactive role assumed by the Courts to ensure justice to people rather than the mere application of the letter of law.

Indian Courts have evolved in their take on international law, and the Courts often attempt to read principles of international law along with similar provisions under the Constitution, provided there is no inconsistency between the two, even in the case of a gap in domestic legislation. In one of the most landmark cases, the Supreme Court took recourse to the role of International Conventions to give effect to women's rights at workplaces. (Vishaka and Ors. v State of Rajasthan, 1997) However, in case of a conflict between domestic and international law, domestic law will have precedence in the Indian Courts (National Legal Services v. Union of India, 2013). International law has been used by Indian Courts for the construction of domestic law in cases especially pertaining to human rights.

However, in some cases, the Court could be seen to have followed the letter of law – domestic – completely ignoring the existence of customary international law. As opposed to treaty obligations, customary law leaves an unsaid scope of being pushed under the carpet, as would be seen in the case of refugee laws in India (Mohammad Salimullah v Union of India, 2021). Though *non-refoulement* is recognized widely as a principle of customary international law, the Indian Govt. claimed in the Supreme Court that India is not bound by the principle as India is not a party to the Refugee Convention (Convention relating to the Status of Refugees , 1951). The Supreme Court subsequently read the rights of refugees under the Constitution of India (particularly the Right to Life under Art. 21) without examining the customary law angle of the principle. The silence of the State regarding the bindingness of *non-refoulement* despite India not being party to the Convention (which also carries the same principle in Art. 33) speaks loudly in itself. It is here that State need to examine the role of policy – both domestic as well as international – in the State's actual approach to international law.

3. Role of Policy in the Implementation of International Law

Having looked at International Law in general, we now take the specific examples of International Humanitarian Law (hereinafter: IHL) and International Refugee Law to examine the role of policy in the implementation of international law. It is impossible to separate politics from law, especially in the field of international law, and all the more so in international humanitarian law and refugee law. IHL has accepted a 'compromise' – in the 'tension between humanitarian and political requirements'. (Sandoz, 1987).

This "compromise" aspect is visible throughout the principles of IHL as well, such as "necessity" and "proportionality". Though the underlying philosophy is humanitarian, regulation of military action carries obvious and unavoidable implications on state sovereignty and security. Apart from other branches of international law such as international trade or international environmental law, IHL carries a direct implication of the State's sovereignty not only rhetorically but in real terms, making it all the more difficult for international institutions to insist it on States, since they are also bound to respect sovereignty. Hence, the actual implementation of IHL by States exists on a tricky terrain where States are required to abide by international norms at a potential cost to security concerns. This gamble, the law requires them to take; but caution often stops them from doing so. Speaking of actual implementation of IHL at domestic level requires us to integrate policy into the narratives of law.

Currently, they tend to exist on separate plains and as part of separate conversations. Academic focus on international law looks at the theories and legal aspect of implementation – in terms of domestic legislations, monistic/dualistic nature of the State, interpretation, Court decisions, etc.; while policy is primarily analyzed from a political or security perspective. For instance, in India, military strategy and analysis, including that of IHL, is primarily done by organizations such as IDSA, USI, ORF India, CLAWS, etc. The research culture and tendency of such organizations lean towards a practical perspective concerning geopolitics, military strength, statistics, etc.; and the space afforded for law is whatever is allowed within this scope. One of the major reasons, the researcher feels, is the psyche of the author that is set in a particular narrative die to factors such as previous association, perspective bias, etc. Most of the writers looking at the policy aspect of IHL in the aforementioned Institutions are retired defense personnel, security analysts, etc. who, obviously, look at the matter from the lens of national security and defense. On the contrary, most academic analyses look primarily at aspects such as the provision for reservation in Treaties, interpretation of provisions, jurisprudence and philosophy, etc. The disconnect arises when the two aspects function as if they exist on separate islands, and fail to speak to each other. On some occasions though, academicians have realized the need to adapt IHL into military strategy, noting that the practical application of law means its effect on battlefield conduct. (Morrow, 2014)

IHL is only as effective as the actual *policy* is, irrespective of how strong the *law* might be, since the mandate of international law is rather easily surpassed by the sovereignty of States

when it so wills. Black's Law Dictionary (year) defines "Policy" as *"The general principles by which a government is guided in its management of public affairs, or the legislature in its measures. This term, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed to the welfare or prosperity of the state or community."* Law is defined as *"That which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. That which must be obeyed and followed by citizens, subject to sanctions or legal consequences, is a "law."* (Ref. Koenig v. Flynn) An effective protection of civilians would require that these concepts are defined not only in law but also in policy-implementation levels, particularly national military manuals and rules of engagement. While laws and regulations are always publicly known and are open to popular scrutiny, intricate operational aspects of armed confrontation would not be (and cannot be reasonably expected to be) made public, at least not prior to their execution. However, the inclusion of principles into rules can be revealed without prejudicing operational safety, by making the military manual public, and having a national committee on IHL to look at the implementation of the law. Implementation in the battlefield would need to go one step further, limiting the violence in each act of soldiers, and controlling behavior in the field. This further boils down to limiting violence in different circumstances – deliberate violations, opportunistic violations for short-term military advantage, and self-interested interpretation of law. This is noted as one of the difficult aspects of the implementation of IHL (Morrow, 2014). This research argues that this separation of effects also must be analyzed from the level of combat addressed – one, at the individual action on combatant level; and second, at the wider-scale action on the command-level. The former, per this view, is what transpires in operations involving inter-personal confrontation, use of small arms, and operational decision-making happens at individual level. The latter, on the contrary, happens at a wider level, where the higher command's decision is carried out without (or with only limited) scope for modification during the actual action; such as aerial bombing of a pre-decided military target, without individual-level combat action.

Similar is the state of refugees in India, since they have no specific recognition under the municipal law and are regarded as foreigners who have entered the State illegally under the Foreigners Act and Passport Rules. In the case of *Mohd. Salimullah* (Mohammad Salimullah v Union of India, 2021), the Hon'ble SC stated that they cannot be deported unless the procedure under law is followed. This procedure under law is none specific to refugees, but a general process of deportation followed by the State for all persons who enter w/o requisite documentation. The case of *Ibrahim Ali v UoI W.P.*(C) 3959/2021 mentions that the deportation process is contained in an MHA Office Memorandum 25022/19/2014-FI dated 24-04-2014. The Ministry submitted the Office Memo to the Court in a sealed cover, since the process followed is still a part of confidential policy.

Broadly speaking, it involves verification of nationality from the origin State and deportation to that State through their authorities. The law governing refugees comes under the 1951 Convention, which expressly prohibits refoulement. Then again, India has been deporting

Rohingyan refugees to Myanmar, citing in the SC that the State is not paty to the 1951 Convention and hence is not bound by the principle. However, the principle is also a part of CIL and is binding on us irrespective of its presence in the Convention, and us not being Party to it is actually inconsequential as far as refoulement goes. But India is able to follow this narrative since its *policy* takes a different route than its international obligation.

So, in fact, India could technically, legally, deport foreign nationals, including refugees, provided the procedure of deportation is followed. This procedure is contained in an Office Memorandum, which is not public. This takes us to the question of 'procedure' under art.21 of the Indian Constitution that guarantees a 'Right to Life and Liberty' to all people – is it enough that there exists some semblance of a procedure as was laid down in AK Gopalan[11] (*A K Gopalan v State of Madras* AIR 1950 SC 27) that or do we test the procedure on its post-Maneka[12] constitutionality? We do not know, because the procedure is confidential. It is merely a part of Govt. policy and has not been formalized into a statute. So, speaking of international obligations, the law remains, but State does what State does.

4.Conclusion

Both the instances above - application of IHL as well as Refugee Laws – evidence that their effectiveness depends on creating and implementing a policy that is in line with international obligations. But when the State academically speaks of IHL and Refugee law, state of the law, State teaches and learns the law; policy is often left to political analysts. Considering how IHL and refugee laws carry tremendous direct implications on human rights and even human existence, the law must be regarded not merely as a rhetoric that needs to exist in textbooks but also with respect of its actual ground-level effects. Maybe also teach it that way, in applied law. There, theory – the law – intersects policy in a way that cannot be separated.

One of the major limitations of successfully applying IHL to domestic law, as is with any international law to the domestic sphere, is that of sovereign political will. It is impossible to separate politics from law especially in the field of international law, and all the more so in IHL and IRL. Though the underlying philosophy of both are humanitarian, regulation of military action or non-stringent laws on asylum carry obvious and unavoidable implications on state sovereignty and security.

[11] A case decided by the Supreme Court, that has since been overturned, that ruled that deprivation of liberty and life only needed to follow a 'procedure' that was *established* by law, and *due process of law* was not a standard to be applied.

[12] *Maneka Gandhi v Union of India* 1978 AIR 597. A case where art. 21 was interpreted to imply that the 'procedure' that deprives one of life and liberty must be just, fair and reasonable and not any random procedure that law has established. This is the standard currently followed to examine the constitutional validity of laws that infringe on the life and liberty of persons, to examine whether it breaches art. 21.

Hence, actual implementation of IHL and IRL by States exists on a tricky terrain where States are required to abide by international norms at a potential cost to security concerns. This gamble, the law requires them to take; but caution often stops them from doing so. Speaking of actual implementation of these laws at the domestic level requires us to integrate policy into the narratives of law.

Currently, they tend to exist on separate plains and as part of separate conversations. Academic focus on international law looks at the theories and legal aspect of implementation – in terms of domestic legislation, monistic/dualistic nature of the State, interpretation, Court decisions, etc.; while policy is primarily analyzed from a political or security perspective.[13] The research culture and tendency of such organizations lean towards a practical perspective concerning geopolitics, military strength, statistics, etc.; and the space afforded for law is whatever is allowed within this scope.[14]

On the contrary, most academic analyses look primarily at aspects such as the provision for reservation in Treaties, interpretation of provisions, jurisprudence and philosophy, etc. The disconnect arises when the two aspects function as if they exist on separate islands, and fail to speak to each other. IHL and IRL are only as effective as the actual *policy* is, irrespective of how strong the *law* might be, since the mandate of international law is rather easily surpassed by the sovereignty of States when it so wills. Apart from other branches of international law such as international trade or international environmental law, IHL carries a direct implication of the State's sovereignty not only rhetorically but in real terms, making it all the more difficult for international institutions to insist it on States, since they are also bound to respect sovereignty. IRL, on the other hand, comes with implications on the State's resources to provide adequately in cases of mass influx, in addition to the national security opposition and the fear of changing demography expressed by citizens of the host State.

Though States may be keen to sign and even ratify international instruments, not all obligations in fact translate into domestic law. Ratification comprises the legal documentation concerning the political will to abide by international law, but that does not necessarily mean the State practices compliance. International law may be incorporated into the domestic ambit in different ways, depending on the model the State chooses to follow (monist or dualist). But in terms of real implications, the application of international principles may be throttled by resorting to domestic policy decisions, as is often the practice of States.

[13] For instance, in India, military strategy and analysis, including that of IHL, is primarily done by organizations such as IDSA, USI, ORF India, CLAWS, etc.

[14] One of the major reasons, the researcher feels, is the psyche of the author that is set in a particular narrative die to factors such as previous association, perspective bias, etc. Most of the writers looking at the policy aspect of IHL in the aforementioned Institutions are retired defense personnel, security analysts, etc. who, obviously, look at the matter from the lens of national security and defense.

The realm of policy is often kept as a separate doctrinal inquiry, distinct from the analysis of law, leaving policy to be scrutinized by political scientists alone. This Paper submits that the scholarship of international law cannot be separated from a study of domestic policy measures, considering the inevitable overlap between the two. For international law to be implemented in spirit, adequate policy measures need to be adopted by the State at the domestic and international levels.

Numerous instances reveal that the State takes up legal obligations at the international front, and desists drawing up parallel policy measures to bring these obligations into practice; effectively stalling the desired effect of the legal obligations. Analysis of law and policy being conducted separately, however, divides the scholarship into two and treats as if the subjects exist on two separate islands. The lack of inclusion of policy into the study of international law negatively impacts the perspectives taken on it. In IHL, for instance, India's domestic enactment of Geneva Conventions Act of 1960,[15] or the signing of the Geneva Conventions, or the participation in international discussions on humanitarian law does not reveal the full picture of how India abides by its obligations.

The absence of corresponding policy changes in matters of defense and security is where the lacuna in implementation actually rests – a sphere the study of international law does not per se analyze. Here, we need a change in perspective and practice, integrating political science and law into the same enquiry – how to persuade States to not only ratify but also apply and implement international obligations?

[15] In compliance with its obligations under the Geneva Conventions, 1949.

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Explanation. (bez datuma). For instance, the basic values of the Constitution of India were settled by the Supreme Court of India through several cases that arose out of State actions that violated Fundamental Rights envisaged in the Constitution.

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DECLARATORY LAWSUIT IN CIVIL LAW PROCEDURE IN BOSNIA AND HERZEGOVINA

Harun Halilović*

Abstract

The focus of this article is the position of declaratory lawsuits in Civil law procedure in the legislation of Bosnia and Herzegovina. Compared to other types of lawsuits (condemnatory and constitutive), a declaratory lawsuit is primarily aimed at obtaining a declaration by a court of the existence or non-existence of certain legal relationships or rights and the declaration of authenticity of some private or public legal document as well as the determination of a violation of personal rights. Further uses of declarative lawsuit can be, as foreseen by specific legal provisions, a declaration of the existence or non-existence of certain facts on which the fulfilment of other rights may depend. The existence of legal interest is one of the procedural elements of a declaratory lawsuit. The use of declaratory lawsuits has proven itself to be a more adequate way of legal protection in certain cases, especially when the use of other types of lawsuits is unavailable for legal or factual reasons. Even though the use of declaratory lawsuits has expanded, the removal of certain restrictions on the right use of declaratory lawsuits could be recommended *de lege ferenda* in order to facilitate the maximization of the potential of the declaratory lawsuit in civil legal proceedings.

Keywords: Civil Law, Lawsuit, Declaratory Lawsuit, Civil Procedure

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1. Introduction

The lawsuit in general represents a means for the protection of one's legal rights, aimed usually against the unlawful actions of the opposing side. The right to submit a lawsuit and have its claims examined before the court is one of the fundamental human rights of every citizen (natural and legal persons alike) as a part of the right to access to court (Rainey, Wicks, Ovey, 2014, p. 242). A lawsuit, within the meaning of the rules of civil procedure, represents a document that is considered as a means of initiation of a procedure of legal dispute (litigation). Lawsuits can be used both in civil law and administrative law as a means of initiation of legal proceedings. In administrative law, the lawsuit is usually aimed at annulling or possibly amending the decision adopted by certain administrative authorities, dealing with one's rights or obligations. However, in this article, we will focus on the use of a lawsuit and its specific type, the declaratory lawsuit, in civil law proceedings, which can be used in a wide scope of subject matters. In the comparative context, certain conceptual differences exist in the context of common law and civil law traditions, especially in the extent of the elements of the adversarial system. On the other hand, harmonization and approximation of legal solutions in different legal systems is evident and the trend is the emergence of the "mixed systems" Kramer, Van Rhee, 2012, p. 39). The scope of the research of this article is on the current civil procedure legislation applicable in Bosnia and Herzegovina.

The submission of a lawsuit or more precisely, the delivery of the lawsuit to the opposing side (the defendant or defendants) is considered as a moment of the commencement of the legal dispute between the parties, i.e. the commencement of the so-called *litispendentio*. The existence of a legal dispute between parties has certain procedural repercussions, such as the beginning of counting of the deadlines for certain procedural activities, calculation of penalties, and interests, and the prohibition of initiation of a new legal dispute between the parties on the same subject matter, until the dispute is concluded. The court is *ex officio* allowed to decide on the existence of a legal dispute between the parties on the same subject matter throughout the proceedings, and the parties are allowed to submit a complaint claiming the existence of an ongoing dispute (Law on Civil Procedure of Federation of B&H, Article 67).

In the legal system applicable in the territory of Bosnia and Herzegovina, in its legally formalised manner, the concept of lawsuit was introduced by the legal reforms brought in during the rule of the Austro-Hungarian Empire, although it existed in previous periods in various forms. The initial introduction was under significant influence of the solutions originating in the Austrian Civil Code (Račić, 2013, p. 18), while its later development was determined by the social, political and legal changes happening throughout the territory of Bosnia and Herzegovina and the whole wider region of Western Balkans. The latest major reform of the civil law rules, and primarily, civil procedure, was conducted in 2003, with the introduction of new Laws on civil procedure in both entities of Bosnia and Herzegovina, followed by the subsequent adoption of Law on civil procedure in Brcko District and Law on civil procedure before the Court of Bosnia and Herzegovina at the state level. The changes were aimed at modernisation of the civil legal procedure, making a turn from previous solutions applicable in the period of former socialist

Yugoslavia, as well as incorporating strong elements of an adversarial system, deemed as to bring more efficiency, together with ensuring the equality between the parties in the dispute (Jolowicz, 2000, 175).

New Laws on civil procedure have regulated the elements of lawsuits, defining different types of lawsuits and their legal consequences together with a procedural pathway and other related issues. Currently, in the legal system of Bosnia and Herzegovina, applicable laws concerning civil law procedure and dispute resolution are the Law on Civil Procedure of the Federation of BiH, the Law on Civil Procedure of the Republic of Srpska. If the dispute is within the competency of the Court of Bosnia and Herzegovina the Law on Civil Procedure in front of the Court of B&H is applicable or, if it is within the competency of the courts in Brcko District, the Law on Civil Procedure of Brcko District. As mentioned, the legal reform of civil procedure codes was conducted in 2003, by the means of initial adoption of practically identical civil code procedures in both entities, with the later adoption of the law on the state level and in Brcko District. The legal reform itself is not the main topic of this article, so the solutions found in the legislation are taken as the starting point. Due to the similarity in the legislation, the focus of the article in the content analysis of the legislation is on the legal solutions in the entity of the Federation of Bosnia and Herzegovina.

Regarding types of lawsuits, certain changes have been introduced, as compared with the solutions existing in the legal system of the former Yugoslavia. The new Law on civil procedure foresees three types of lawsuits: condemnatory, declaratory and constitutive lawsuits, with certain changes being introduced concerning declaratory lawsuits. There are significant theoretical and practical differences visible in the three different types of legal actions. So for example: with declaratory lawsuits, the plaintiff usually requests from the court to establish the existence or non-existence of certain rights or legal relationships or the truth or falsity of any document, as well as other uses, explained further in the article. An example is a lawsuit regarding the authenticity of a document. Constitutive lawsuits, on the other hand, seek the establishment, change or termination of existing legal relations. An example is a lawsuit for divorce. Finally, with condemnatory actions, the plaintiff asks the court to order the defendant to do, suffer or omit certain activity. An example is a lawsuit in which the plaintiff, as a lender, requests that the court order the defendant, a borrower, to pay an overdue monetary claim (Matić, 2021, p. 157).

In the legal practice of the competent courts in Bosnia and Herzegovina, the rules of the Law on civil procedure, specifically those related to different types of legal actions, including the declaratory lawsuit have been put to the test in real-life settings in its application to the disputes being adjudicated by the courts. The practice has shown a wide variety of types of disputes in which the declaratory lawsuit can be used, including the actions aimed at the declaration of the existence of discrimination, revealing its potential. (Trnavci, Bešlagić, 2015, p. 299). The practice has generally shown that the introduction of changes related to declaratory lawsuits was well-founded but has also shown that certain further changes might be recommended in order to fully facilitate the potential of the foreseen legal action. The room for improvement primarily lies in the

rules related to the standing in the legal proceedings (i.e. the rules related to the right to appear as a party in the proceedings) closely connected with the necessary proof of legal interest.

This article aims to give an overview of the main legal rules related to lawsuits in general, different types of lawsuits with a closer look at the declaratory lawsuit, the main features that differentiate it from other types and certain issues faced in the legal practice. Throughout the article, content analysis and legal normative method is used. The aim is further, to give certain recommendations in possible legislative changes which would enable maximisation of the potential use of declaratory lawsuits, which can be described as restrictive under the current legislation, specifically in the case of the use of declaratory lawsuits for the declaration of existence of certain facts, which currently can only be used if foreseen by specific laws, whose number is very low.

2. The Position of Lawsuit in Civil Law

2.1. Elements of lawsuit

The lawsuit, response to the lawsuit, legal remedies and other statements, proposals and announcements that are made outside the hearing are submitted in written form (written submissions). Written submissions must be comprehensible and must contain all necessary elements to be acted upon. Written submissions are delivered by post or directly in court.

The lawsuit is a means of initiation of the legal dispute in civil law proceedings. After the submission, the content is analysed by the competent court; to determine its conformity with the legal requirements, primarily those stated in applicable laws (Mulabdić, 2010, p. 219). The obligatory elements and the content of the lawsuit are defined by the provisions of Article 53, paragraph 2 of Law on Civil Procedure as follows: "*The lawsuit must contain: a specific request regarding the main matter and secondary claims (claim), the facts on which the plaintiff bases the claim, the evidence establishing those facts, an indication of the value of the dispute, other information that, in accordance with the provisions of Article 334 of this law, every submission must have. If the plaintiff stated a legal basis in the lawsuit, the court is not bound by it."*

The procedural consequences of noncompliance with the required obligatory elements can be serious for the plaintiff and result in the dismissal of the lawsuit, according to the provisions of the Law on Civil Procedure. If certain required elements are missing, the court will order the plaintiff to amend the lawsuit within the given timeframe to avoid it being dismissed. The rationale of such a provision is to raise the efficiency of the legal proceedings and provide clarity for the plaintiff when preparing the lawsuit.

The obligatory elements of the lawsuit include primarily the elements which are generally required by every other written submission such as identification of the parties, their residence/seat, their legal representatives (if they exist), the identification of competent court and, when required, the party's signatures, etc. (Law on Civil Procedure of Federation of B&H, Article

334). Further obligatory elements relate to a statement of the claim the plaintiff has in a legal dispute, as well as the facts on which the claim is based, together with the evidence supporting the stated facts. Indication of the value of the dispute can be estimative and must not be necessarily exact, its main purpose being the determination of the course of proceedings and in some cases competent court (e.g. referring of the case to the division of the court for small claims).

In addition to obligatory elements of the lawsuit, the plaintiff may provide for the legal basis, which is generally considered an optional element. However, the court is not bound by the legal basis stated by the parties and can, in its decision, use a different legal basis, than the one stated by the parties. Together with the claim in the lawsuit, the plaintiff may submit other requests related to procedural matters and requests for interim measures. Matić, 2021, p. 146).

It is to be mentioned that a lawsuit represents only a request by the plaintiff for the court to protect the rights or determination of the content of a certain legal situation as seen by the plaintiff. During the proceedings, the defendant has the right to acknowledge the claims, to refute them partially or completely as well as to submit a counterclaim arising from the same factual basis. Therefore, the plaintiff is under no guarantee to succeed fully or partially in the proceedings, and the costs connected with the proceedings may depend on the success of the parties.

Generally, the plaintiff needs to be able to prove the existence of their legal interest for the initiation of the proceedings. In certain cases the lawsuit can be rejected in the initial stages, such as in the case where the debtor has already fulfilled their obligation, or if there is a situation of already settled matter (*res iudicata*) or proceedings already existing in the same legal matter (*litis pendens*). Also, if the requested performance is still not due will lead to the rejection of the condemnatory claim as premature. If the lawsuit is submitted after the passage of the prescription period, the plaintiff is precluded by forfeiting its legal right, even though legal interest remains. (Law on Civil Procedure of Federation of B&H, Article 67).

When it comes to consequences of the initiation of a lawsuit, as stated they are mostly related to certain procedural consequences such as the start of the deadlines for procedural activities (like a response to the lawsuit), the commencement of the dispute (*litispendentio)*, (Čalija, Omanović, 2000, p. 41), the termination of the statute of limitation, which foresees in certain cases that the lawsuit must be submitted in a certain time, to preclude the loss of a certain right, etc.

a) Claim

The claim represents an essential element of the lawsuit. In the claim, the plaintiff formulates a specific request to the court, concerning the provision of legal protection of certain rights to be provided, or an authoritative recognition of certain legal consequences, stemming from certain factual situations (Matić, 2021, p. 156).

The claim needs to be defined by the plaintiff both in a subjective and objective sense. By defining the subjects, the plaintiff is obliged to provide a precise identification of the parties in the

legal dispute (i.e. the plaintiff and the defendant). In terms of object, the claim refers to the determined or at least determinable request which is the matter of the dispute between the parties that needs to be resolved by the court.

The need for a claim to be specified by the plaintiff primarily exists to enable the court the possibility of conducting the preliminary examination of the lawsuit. Further, since a civil law lawsuit refers to concrete legal protection, defendants must be identified together with the content of the requested protection, enabling the other side of the proceedings to dispute the claims and submit possible counterclaims together with the facts supporting them.

After the court has conducted a preliminary examination of the claim, it is to be delivered to the defendant for the response. The defendant is obliged to submit an answer to the lawsuit within 30 days from the date of delivery of the lawsuit. Following the provisions of the Law on Civil Procedure, the lawsuit can, under certain circumstances be accepted and result in the so-called "judgment by default" i.e. judgment following the failure to respond, due to defendants not submitting their required response, which is aimed at ensuring the court has both sides of the dispute, as per Law on civil procedure.

Together with the main claim, additional claims may be submitted by the plaintiff if they are connected by the same factual matter (Mulabdić, 2012, p. 224), or if, after the court's assessment it is more economical and efficient to settle them together than under two separate procedures. On the other hand, the court can decide to separate claims into different proceedings (Kulenović, 2005, p. 96).

The additional claims can be submitted in the form of an alternative claim or an "eventual" claim. An alternative claim represents a request under which the court orders the defendant to perform the obligation in a certain manner. Failure to perform such action allows the plaintiff to satisfy its legal request in another manner. Thus, the plaintiff is given the alternative in the way the request is to be performed. On the other hand, the "eventual" claim represents an additional request(s) by the plaintiff that the court can order if the primary request has been rejected by the court (Krsmanović, 2010, p. 197). They can be separate claims, although connected by the same factual basis, in which case the plaintiff gives the court a possibility to "choose" the way to satisfy its request (Law on Civil Procedure of Federation of B&H, Article 55).

Depending on the type of lawsuit the plaintiff is submitting, the claims can be different. As mentioned, for example, in condemnatory lawsuits, the plaintiff usually requests the court to order the defendant to perform certain acts in order to fulfil certain obligations (e.g. payment of the financial debt) or to forego certain activity (to allow the other party certain activities on their property). Judgment accepting such a claim orders a plaintiff a deadline of voluntary fulfilment, which starts after the judgment has become final and binding. If the defendant fails to perform, the plaintiff has a right to initiate enforcement proceedings. In a declaratory lawsuit, the plaintiff must specify in the claim, the content of a legal relationship that they want the court to settle (e.g. the determination of invalidity of the testament). In constitutive lawsuits, the plaintiff states in its claim

a specific content of the legal relationship whose modification is requested (e.g. divorce) (Law on Civil Procedure of Federation of B&H, Article 179).

b) Factual basis of the dispute and evidence

The new rules on civil procedure accept the notion of "procedural truth", under which, the court decides solely based on the facts presented by the parties during the proceedings, with the limited fact-finding capabilities where the court can by its motion request evidence. On the other hand, "material truth" concepts, as foreseen by previous procedural codes (both civil and criminal) applicable in former socialist Yugoslavia are abandoned.

Therefore, the plaintiff must present the facts on which the claim is based, regardless if it is a main or additional/procedural claim or request. The presentation of facts, besides its description, includes the presentation of evidence which upholds their existence and truthfulness as presented. From the theoretical and practical viewpoint, facts submitted by the parties, as supported by evidence, must describe certain legal situations in sufficient detail, for such a legal situation to fulfil the requirements foreseen by the law for the court to be able to attach certain legal consequences onto them (Matić, 2012, p. 155).

In a procedural sense, the facts and evidence can be proposed by the plaintiff or the defendant until the preliminary hearing. The purpose of the main hearing is thus to present and discuss the proposed evidence, and additional evidence and facts may only be proposed or presented at the main hearing if the party could not do so earlier by no fault of their own (Law on Civil Procedure of Federation of B&H, Article 102). The goal of such provision is to ensure that the facts and evidence are presented at the early stage of the proceedings, for the court to examine whether there is a minimum of facts and evidence supporting the claim in order to continue with the proceedings instead of rejecting the plaintiff as *prima facie* unfounded. On the other hand, it gives the other side in the dispute the opportunity to scrutinize and refute the stated facts and evidence as well as to provide their own.

c) Value of the dispute

As per the provisions of the Law on Civil Procedure, the value of the dispute determines the amount of certain costs of the proceedings, such as the amount of court fees, and the awards of the attorney representing the parties. Further, the value of the dispute can determine the type of the civil procedure (e.g. determine whether the proceeding is to be conducted under the rules applicable to low-value disputes) although in certain cases the value does not affect the type of the procedure (e.g. labour law disputes). Additionally, the value of a dispute can determine whether the party has a right to use an extraordinary legal remedy (request for revision in front of the entity Supreme Court) (Law on Civil Procedure of Federation of B&H, Article 237). As stated, the value of the dispute can be stated in an estimative amount and can be changed during the proceedings.

c) Legal basis

As stated, the legal basis is an optional element of the lawsuit and the plaintiff may state the legal basis under which they consider the claim is based. However, if not stated, the court will not reject the lawsuit. Further, the court is not limited by the legal basis purported by the parties and can base its decision on another legal basis, due to the procedural principle under which "the court knows the law" (Law on Civil Procedure of Federation of B&H, Article 53).

2.2. Types of lawsuit

Lawsuits, depending on the content of the claim, can be divided into three groups:

1) Condemnatory

2) Declaratory

3) Constitutive

2.2.1. Condemnatory lawsuits

A condemnatory lawsuit contains a claim in which the plaintiff requests from the court the legal protection of their rights or interests in such a way that will make the defendant obliged to do or forgo certain specific actions or allow the performance of specific actions by other persons (e.g. the plaintiff). Hence this type of lawsuit is known as a condemnatory lawsuit. The main premise of the lawsuit is that the defendant has violated, with its behaviour, certain rights or interests belonging to the plaintiff, and is therefore requested to perform certain acts in favour of the plaintiff to eliminate the harmful consequence of its actions; therefore lawsuit aims to have a restorative effect. If the plaintiff fails in his claim, the court will come to a negative determination, rejecting the plaintiff's claim, and settling a dispute between the parties which will have a *res iudicata* effect in the concrete case (Čalija, 2000, p. 40).

Therefore it is up to the court to establish, based on the evidence provided, the exact nature and content of the relationship between the parties at the time of the alleged act and what the exact content of the actions is the defendant supposed to do to remedy the breach of the plaintiffs rights.

Having the claim accepted by the court's judgment does not automatically restore the violation of the plaintiff's rights. However, in condemnatory lawsuits, the court orders the defendant to perform certain activities under the threat of coercive enforcement. The court gives the defendant a certain timeframe, which starts following the judgment becoming final, in which they can perform the requested action voluntarily. If the defendant fails to perform the requested activities, the plaintiff can request coercive measures, through the enforcement proceedings, which

are aimed at the performance of the requested actions by the defendant based on judgment as an enforceable document (Law on Civil Procedure of Federation of B&H, Article 179).

2.2.2. Declaratory lawsuits

A declaratory lawsuit is aimed at declaring the existence or non-existence of a specific content of a certain right or of a legal relationship, as well as the falsity or authenticity of a certain document, violation of personal rights, or establishment of the existence of certain facts. While the condemnatory lawsuit is aimed at obliging the defendant to a certain action or inaction aimed at restoring the damage allegedly done by their actions, a declaratory lawsuit is used to petition the court to give an authoritative legal declaration on the existence of certain facts or relationships. That is the main difference between the condemnatory and declaratory lawsuits. In any case, a declaratory claim can be used in conjunction with other types of claims such as declaratory in a single lawsuit.

The existence of a legal interest is very important in the case of a declaratory lawsuit. A legal interest can exist if, for example, another right depends on the previous right whose existence the plaintiff is seeking to legally declare as existing or nonexistent in the declaratory lawsuit. The court examines *ex officio* the existence of the legal interest of the plaintiff, as one of the conditions for the lawsuit, which will be examined further in the article (Račić, 2013, p. 23).

We can differentiate between positive and negative claims in the declaratory lawsuit. A positive declaratory lawsuit aims at obtaining a judgment in which the court declares the existence of a certain legal relationship, fact or right (e.g. declaration of the existence of discrimination). A negative one aims at obtaining a court legal declaration in the judgment that a certain legal relationship or a fact does not exist and that the defendant has no legal right to seek legal protection in connection with said legal basis (e.g. invalidation of certain document).

2.2.3. Constitutive lawsuit

The difference between a constitutive (transformative) lawsuit and a condemnatory and declaratory lawsuit is that the constitutive lawsuit aims at creating a new legal relationship that previously did not exist or the transformation of the existing legal relationship (Matić, 2021, p. 157).

In the constitutive lawsuit, the plaintiff requests from the court the modification of the content of the existing legal relationship or the establishment of a new one. Therefore, the court needs to examine the current state of the legal relationship and whether the requirements for its change or the establishment of a new one exist. In the case the court determines the existence of such requirements it may adopt a judgment in which it modifies or abolishes the existing legal situation, establishing a new one.

Only persons expressly granted by the law have a right to submit a constitutive lawsuit. So for example lawsuits aimed at divorce or annulment of marriage are constitutive and can be submitted only by persons expressly authorised by law.

3. Specific Features of a Declaratory Lawsuit

Following the arrangement of the legislative norm dealing with issues of declaratory lawsuits in the Law on Civil Procedure of Federation of Bosnia and Herzegovina (FB&H), as a main focus of this article, we can analyze the specific questions and uses of declaratory lawsuits. The relevant norm dealing with declaratory lawsuits is found in Article 54 of *Law on Civil Procedure FB&H*, which reads as stated*: "Article 54. (1) In the lawsuit, the plaintiff may request that the court only establish the existence or non-existence of a right or legal relationship in violation of personal rights or the truth or falsity of a document. (2) Such a lawsuit may be filed when it is provided for in special regulations or when the plaintiff has a legal interest in having the court establish the existence or non-existence of a right or legal relationship or the truth or falsity of a document before the due date of the request for action from the same relationship. (3) A claim for determination may be filed for the purpose of establishing the existence or non-existence of a fact if this is provided for by a special law or other regulation. (4) A lawsuit for establishing a violation of personal rights may be filed, regardless of whether a claim for damages or another claim has been filed in accordance with a special law. (5) If the decision on the dispute depends on whether or not there is a legal relationship that has become disputed during the litigation, the plaintiff may, in addition to the existing claim, submit a claim that the court determines that such a relationship exists or does not exist if the court before which the litigation proceeds competent for such a request. (6) Emphasizing the request according to the provision of paragraph 5 of this article shall not be considered as a modification of the claim."*

A declaratory lawsuit is primarily used in situations where the plaintiff requests the court to declare the existence or non-existence of certain rights or legal relationships or the authenticity of private or public documents. However, the declaratory lawsuit can also be in the cases of violation of personal rights or declaratory determination of the existence of certain facts upon which the (future) realization of certain rights is dependent (Morait, 2008, p. 155).

Declaratory lawsuits can be used in cases where it is specifically provided by the law, or in the cases where the plaintiff can show the existence of the legal interest.

3.1. Article 54(1) Law on civil procedure FB&H

The subject matter of the claims in the declaratory lawsuit is often related to the establishment of the existence of certain rights or specific legal relationships. The establishment of existence (or non-existence) of certain rights or relationships is necessary in certain cases, in order to remove an existing legal uncertainty. Compared to a constitutive lawsuit, the declaratory lawsuit does not create new legal relationships but only declares the existence of (already existing) legal relationships. Examples can be found such as parent-child relationship (declaration of paternity), declaration of the existence of marriage, the existence of property rights, the existence of tenancy relationship etc. (Kulenović et al., 2009, p. 93). The declaratory lawsuit is aimed at the declaration of the existence of legal rights or legal relationships at the moment of judgment,

however, the plaintiff can request the establishment of the existence of legal relationships in the past, if such declaration is necessary for the fulfillment of certain rights in the future (Zečević, 2009, p. 65).

Declaratory lawsuits can also be used to establish the falsity of certain documents. An example can be found in the case of a declaration of the falsity of a testament, falsity of certain statements or private (or public) documents (Račić, 2013, p. 20). As mentioned, in the cases of requests for the determination of the authenticity of private or public documents, the question is whether the document itself is authentic or false and the dispute is not dealing with the facts stated in the document. The subject matter is, therefore, not the content of the document itself (Stanković, 2010, p. 340).

Following the legislative changes in past years, the use of declaratory lawsuits has widened. The declaratory lawsuit can also be used in the cases of protection of certain personal rights or determination of the existence of certain facts (e.g. declaration of the existence of the discrimination, determination of mobbing in the workplace).

Under Article 54 (1), of the Law on Civil Procedure, it is foreseen that the plaintiff may request in its claim that the court determines the violation of personal rights, which can be requested regardless of submission of other claims like damages as per Article 54(4). The compensation of damages is usually sought by the condemnatory lawsuit, however, the plaintiff may seek declaratory judgment without the claim for damages, since in certain situations it is a more adequate means of legal protection, especially in cases where ascertaining the damages might be difficult. That can also occur in cases when the violation of personal rights occurred in the past, without the danger of it repeating in the present or future (Račić, 2013, p. 23). Declaratory lawsuit can especially be used for the protection of personal rights, when there was no damaging consequence in the form of mental or physical pain, suffering or fear as foreseen by the rules related to compensation of damages in the code of obligations (or at least none can be proven), so the claim of compensation might be unlikely to succeed. Further, a declaratory lawsuit with a claim aiming to establish a violation of personal right, if successful, can be used in subsequent lawsuits aiming at condemnatory protection, but having the existence of violation already determined (for example “reputational damages” or discrimination cases) (Račić, 2013, p. 21).

3.2. Article 54(2) Law on civil procedure FB&H and the existence of the legal interest of the plaintiff

As per Article 54 paragraph 2 Law on civil procedure FB&H, a declaratory lawsuit can be in cases where it is specifically provided by the law, or in cases where the plaintiff can show the existence of the legal interest. The examples of declaratory lawsuits foreseen by certain laws can be found in the case of family law, which foresees the use of declaratory lawsuits in the cases of determination of the existence of the marriage, determination of the maternity or paternity, a

determination that certain property is part of a joint spousal property. In property legislation, the examples can be found in requests to establish the existence of servitude connected with property. In enforcement proceedings, a declaratory lawsuit can be raised to declare certain property as belonging not to the debtor but to the third party. Insolvency law foresees the use of declaratory lawsuits to determine the existence of the disputed claim. In the inheritance law, it is foreseen to start a legal dispute over the existence of the right of inheritance, to necessary part of the inheritance, prior ownership over the property that is part of an inheritance etc. (Zečević, 2009, p. 65).

The existence of legal interest is one of the conditions for the declaratory lawsuit, and, unless specifically authorized by the law, the plaintiff has to make apparent the existence of legal interest. If the possibility of filing a declaratory lawsuit is foreseen by certain legislation, the existence of legal interest is presumed (Kulenović et al, 2005, p. 94) Otherwise, the plaintiff must state the circumstances and facts, under which the existence of legal interest can be established, and the court is authorized to review the existence of legal interest as a procedural presumption *ex officio*, declaring the lawsuit as inadmissible if no legal interest can be established (Račić, 2013, p. 23).

The plaintiff may seek protection regarding their interest regardless of its nature (economic, personal) since no predetermined criteria exist, and the court establishes the existence of legal interest on a case-by-case basis. In legal theory, the understanding is that legal interest exists in those situations where circumstances that create legal uncertainty exist in certain legal relationships, and a declaratory lawsuit can be used for the removal of such legal uncertainty. The plaintiff may request in the declaratory lawsuit the determination of the existence of a certain claim, even before its maturity (Zečević, 2009, p. 66). However, if the claim has reached maturity, a condemnatory lawsuit should be used (Kulenović et al, 2005, p. 92).

The legal interest usually exists in cases where the plaintiff has to request a determination, by the court, of the existence of a certain right or legal relationship, for which, the plaintiff does not have a certain degree of legal certainty (Kulenović et al, 2005, p. 93), usually due to the behavior of the other party, that negates or evades the existence of said right or legal relationship (Zečević, 2009, p. 66).

If a certain right is better protected by the condemnatory lawsuit, then the existence of the legal interest of the plaintiff may be disputed, however, if, during the ongoing legal dispute, initiated by the condemnatory lawsuit, the existence of a certain right or legal relationship becomes disputed, the plaintiff can submit additional declaratory claim (Zečević, 2009, p. 67), as per Article 54 (5) of the Law on civil procedure, which, in accordance to the Article 54 (6) will not be considered as a modification of the claim. Such a claim is also called “prejudicial”, and is allowed in the cases where court has the competence to decide on both of the claims (Kulenović et al, 2005, p. 94).

The Law on Civil Procedure foresees that, besides physical and legal persons, under certain circumstances, groups of persons can be given a standing in the proceedings. Such lawsuits can be used in the protection of collective rights, for example, those of consumers (Jovanović, 2014, p. 53). In that case, also, the existence of legal interest is also required (Law on civil procedure FB&H, Article 291). Even though similar, a lawsuit aimed at protecting collective rights cannot be equated to a class action lawsuit as recognized in common law traditions (Shreve, Raven-Hansen, Gardner-Geyh, 2013, p. 92).

3.3. Article 54(3) of Law on civil procedure FB&H

The declaratory lawsuit aimed at establishing the existence or non-existence of certain facts can thus be used only in cases that are expressly foreseen by specific laws, as per the current state of Article 54 (3) of the Law on Civil Procedure. The plaintiff cannot request in the declaratory lawsuit, the establishment of any facts, but those that are relevant for the fulfillment of other rights. If the facts are disputed, they can be a part of the legal dispute related to certain right or legal relationships, however, their existence themselves cannot be the subject of a declaratory lawsuit alone (Kulenović et al, 2005, p. 91). The subject of a declaratory lawsuit, also cannot be the nullity of a verdict, as well as the meaning or application of certain legal norms (Kulenović et al, 2005, p. 92).

As stated, the use of a declaratory lawsuit aiming at the declaration of the existence of certain facts is subject to it being foreseen by specific laws. The existence of such specific laws is currently very limited and found primarily in the above-mentioned Law on the prohibition of discrimination. For example, the Law on the prohibition of discrimination of Bosnia and Herzegovina, in Article 12, paragraph 1(a), foresees that the *"... person or group of persons who are exposed to any form of discrimination are authorized to file a lawsuit and request the determination that the defendant violated the plaintiffs right to equal treatment i.e. that the action he undertook or failure to do so may directly lead to a violation of the right to equal treatment (lawsuit to establish discrimination)."* In literature, another example cited can be seen in the possibility of legal protection of collective rights, as foreseen by the Law on civil procedure (Čizmić, 2009, p. 194).

That can be seen as a relatively narrow approach that is not facilitating the full potential of the declaratory lawsuit. The narrow approach could potentially be justified with the principle of economy of legal proceedings, however same effect can be achieved by the establishment of the detailed and uniform legal practice on admissibility in situations where a condemnatory claim is required, or by applying the *litispendencio* rule if another lawsuit in same subject matter is ongoing.

If we take into account the deficiencies of the current solutions in the obligation code, which is overdue for an update, especially those related to the compensation and determination of damage suffered in terms of physical and psychological pain and suffering, the restrictive approach to use of declaratory lawsuit for establishing the existence of certain facts needed for the realization of other rights, can be described as restrictive in providing the possibility of full legal protection.

Furthermore, in certain cases, which would warrant the use of a condemnatory lawsuit, the plaintiff may not be able to succeed, because of the current lack of evidence or proof of causal link and would try to primarily establish certain facts, in order to avoid passage of the prescription period or, for other reasons, avoid the risk a failure of the compensatory lawsuit.

The establishment of the existence of certain facts, through declaratory lawsuits, can also be used together with other alternative dispute mechanisms such as arbitration or mediation, as a "leverage" in the negotiations and overall legal strategy, or in future lawsuits aimed at claiming compensation.

Therefore, a new approach, which would foresee the ability of the court to determine whether to allow declaratory lawsuits aimed at establishing certain facts needed for the realization of other rights, even in the cases not expressly foreseen by the law, subject to the decision of the court on admissibility and establishment of legal interest would enable the development of a legal practice that would determine under which circumstances such legal protection could be used and would enable the use of full potential of the declaratory lawsuit. The legislative amendment *de lege ferenda* could be minimal, by adding in Article 54 (3), the possibility of the use of a declaratory lawsuit to establish the existence of certain facts *"...in other cases subject to court decision".* Such provision would enable the development of case law which would give more specific guidelines concerning the establishment of the existence of legal interest and facilitate further legal development. On the other hand, it would give more options to the plaintiff to plan their legal strategy.

4. Conclusion

The lawsuit is a primary means of protection of the legal rights and interests of the plaintiff in civil law litigation proceedings. From the procedural point of view, the lawsuit represents a means of initiation of a legal dispute between the parties. In the legal system of Bosnia and Herzegovina, the rules regulating lawsuits are primarily found in Laws on Civil Procedure in two entities, Brčko District and state level of Bosnia and Herzegovina. The Law on Civil Procedure foresees the main elements of the lawsuit, as well as its main procedural consequences and necessary elements such as the claim, a description of facts and evidence supporting the claim, an indication of the value of the claim, and other information necessary for any other written submission (such as the indication of parties, competent court etc.).

Depending on the type of claim, we can distinguish three types of lawsuits such as condemnatory, where the plaintiff is requesting the court to order the defendant to perform or forgo certain actions or allow other parties to perform certain actions (e.g. request to pay the debt). The constitutive lawsuit is used by the plaintiff to establish a new legal relationship or transform a previous one (e.g. action for divorce).

Declaratory lawsuit, on the other hand, has various uses. It has primarily been used to legally declare the existence or non-existence of certain rights or legal relationships, and the authenticity of public or private legal documents as well as for the protection of personal rights. If foreseen by the law, a declaratory lawsuit can also be used for the determination of certain facts necessary for the fulfilment of other rights. In certain situations, the plaintiff will be required to use a condemnatory lawsuit instead of a declaratory one, however, the use of declaratory lawsuits has in certain cases been proven to be more adequate than other types of lawsuits.

The existence of legal interest is one of the conditions for the declaratory lawsuit that the court is ascertaining *ex officio*, and the plaintiff needs to be able to prove the existence of legal interest. Regarding the use of declaratory lawsuits, legislative changes in recent years have widened the scope of the use of declaratory lawsuits, including the possibility of the use of declaratory lawsuits in the cases of determination of facts necessary for the fulfilment of certain other rights. However, such use can only be granted if specifically foreseen in the legislation, as per Article 54 Paragraph 3 of the Law on Civil Procedure FB&H. The number of those specifically legislated possibilities is very low, like the one in the Law on the prohibition of discrimination B&H. Such an approach can be seen as restrictive since not many such express provisions in other legislation exist and possible legislative changes *de lege ferenda* with the inclusion, in Article 54, paragraph 3 of the Law on Civil Procedure, of the possibility of use of declaratory action for the establishment of certain facts *"...in other cases, subject to court decision*" would allow for the development of dynamic case law establishing the rules on ascertaining the existence of legal interest and standing in cases of declaratory lawsuits aimed at establishing certain facts necessary for the fulfillment of other rights. Such an approach would also maximize the potential for the use of declaratory lawsuits.

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FULFILLMENT OF PROPERTY RIGHTS IN BOSNIA AND HERZEGOVINA

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Abstract

This article aims to give an overview of the main influences on the development of property law and property rights in Bosnia and Herzegovina as well as an overview of certain current issues. As one of the main legislative influences for the development of civil law in general and property law specifically in the legal system of Bosnia and Herzegovina, the Austrian General Civil Code can be identified. However, one of the most significant events is the impact of the transformation of private property through nationalization and confiscation in the period of socialist Yugoslavia. The aftermath of such radical change and the effects of subsequent subpar solutions aimed at privatization and the transformation of ownership of the property has left significant difficulties in the fulfillment of property rights. Especially detrimental is the stalemate in the issues of restitution of property to previous owners, which is specifically interesting in the case of waqf property. Another issue is the politically charged question of state-owned property. Such a situation results in several instances of violation of human rights as well. Especially worrying is the practice of disregarding the property rights of the returnees. After the overview of the main historical points and the current situation of the fulfilment of property rights, specific issues and cases are presented. Throughout the research, the legal-historical method, together with content analysis, case study and normative methods are used. The main goals are to give an overview of the historical context and provide an analysis of the most important current issues related to the fulfillment of property rights in Bosnia and Herzegovina such as the question of state-owned property, restitution and compensations as well as issues related to rights of returnees. Finally, certain recommendations related to the main issues such as state-owned property, restitution and certain legal discrepancies related to condominium ownership rights are given.

Keywords: Property Law, Property Rights, Civil Law, Restitution, State-Owned Property

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1. Introduction

In order to give a general overview of the main points in the historical development and transformation of property law and the content of the property rights that have happened in the legal system of Bosnia and Herzegovina since the late 19th century until today, we need to understand the main political and social changes happening in that period. The first major transformation occurred in the period following the occupation and subsequent annexation of Bosnia and Herzegovina by the Austro-Hungarian Empire. Although certain legal rules and concepts existing in the previous Ottoman period remained important, the rise of influence of legal solutions found in the Austrian Civil Code represented a sort of basis for the development of property law and civil law in general. Further significant change occurred during the period of the Socialist Federative Republic of Yugoslavia which adopted the concept of socialist economy and political order conducting large-scale nationalization and confiscation significantly reducing the quantity of private property. The main concepts regarding the substance of property rights changed with the adoption of the doctrine of "self-managing socialism" (*samoupravni socijalizam*), with the introduction of the concept of societal property (*društvena imovina*). In the last years of the existence of Yugoslavia, certain changes with the aim of transformation of property rights have been undertaken, however, any activities concerning the restitution and privatization were halted by the breakup of Yugoslavia and subsequent wars. In Bosnia and Herzegovina, the war and subsequent legal structure, created following the Dayton Peace Agreement (DPA) presented new challenges which are visible primarily in the solutions related to the transformation of societal property to state-owned property and the subsequent stalemate in finding solutions related to state-owned property. Further activities in privatization brought new dilemmas. Legislative changes in the area of property law, in the first line the adoption of updated Laws on property rights represent reaffirmation of the concept of ownership as the basis of property rights and private property as the basis of economic activity. However, besides those "systemic" issues certain specific issues are visible. Another worrying aspect is the practice of disregarding of property rights of returnees, with specific legal and administrative obstacles that amount to violations of human rights.

Due to the importance and large number of the issues related to property rights, many aspects of them demanding separate research and analysis, this article aims to give a brief overview of the main topics such as the overview of the historical context, the analysis of the issue of "state-owned" property and restitution, as well as certain issues the returnee population is facing in fulfilment of their property rights. Throughout the article, the historical-legal method, together with content analysis, case study and normative method is used. Certain recommendations are given, specifically concerning the use of the term "state-owned property" and possible options to be considered related to the reform of the "state-owned" property and restitution, as well as certain recommendations related to identified deficiencies in the application of the new property law legislation, primarily related to the issues of condominium ownership rights. Solutions related to state-owned property are found to be inadequate, anachronistic and in contravention of the constitutional order, starting from the very term "state-owned" property. Further, the inactivity in

the process of restitution or payment of compensation for the previous owners of the property confiscated during the socialist period creates significant issues. The issues of returnee discrimination are concerning. Newly adopted legislation related to property has shown certain deficiencies regarding ownership of condominium rights, especially in the development phase. This article aims, following the analysis to provide certain recommendations in addressing the enumerated issues.

2. The Overview of the Transformation of Property Law and Property Rights in Bosnia and Herzegovina

2.1. Historical aspects of the development of property law in the late 19th and early 20th century

The process of legal codification of property law in the legal system applicable in the territory of Bosnia and Herzegovina can be traced to the late period of the rule of the Ottoman Empire. However, the process of legal reforms, which included the adoption of codified laws practically coincided with the start of the rule of the Austria-Hungary Empire in Bosnia and Herzegovina, first in the period of occupation and then in the period of annexation. The legal reforms in the form of the adoption of the Ottoman Land Law from 1858 and the Ottoman Civil Code (*Mecelle*), whose regulations were adopted successively in the period from 1869 until 1876, encompassing different aspects of civil law, including property rights was influential in Bosnia and Herzegovina even throughout the Austria-Hungarian rule (Čajlaković, 2009, 244). The new ruling empire, especially in the initial period relied on already existing social and legal order gradually introducing reforms. Because the majority of lawyers and judges, at least in the initial period, received legal education during the Ottoman period, and in the case of personal relations different sets of rules of customary/religious origin were applicable, during the period of the rule of Austria-Hungary, the mix of legislation, including sharia rules, *Mecelle*, customary rules and legislation introduced by the Austria-Hungary was applied. In the Ottoman period, property rights were usually divided into *erazi miri* which could be described as the property owned by the state, or under the ownership of the sovereign, with restrictive rules related to the use and disposal of such property, and *erazi mulk*, which could be described as personal property which represented private property, with specific rules applicable to *waqf* as a specific type of religiously motivated endowments made for the public use (Ćeman, 2011, 244). The quantity of *waqf* property and its importance in the Ottoman period, and in the first period of the rule of Austria-Hungary was of great importance and was a subject of many disagreements between the local population and the administration, showing a need for significant legislative activity (Čajlaković, 2009, 244).

In the later period of Austria-Hungary's rule, the most significant impact on the civil law and especially property law aspects of the legal system of Bosnia and Herzegovina was by the General Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch* - ABGB). Generally, the rules of ABGB applied at a time, a modern understanding of property rights and private property based

on general rules rooting back to the main understandings of Roman law and its adaptations. The rules of ABGB were applied by the new courts and gradually received reception in the legal system of Bosnia and Herzegovina *de facto* becoming generally applicable rule of law. Such a situation remained even in the period following the dissolution of the Austro-Hungarian Empire and the formation of the State of Serbs, Croats, Slovenes, and the period of the first Yugoslavia. The legal landscape of the Kingdom of Yugoslavia was characterized by stark legal particularization since different parts of the country had very different legal backgrounds and previously applicable legal systems and the legislative activity aimed at legal unification was rudimentary (Povlakić, 2009, 16). However, as significantly detrimental, the activities related to agrarian reform can be pointed out, especially in their discriminatory effects (Čajlaković, 2009, 246). Therefore, during that period, the application of a mixture of different rules, out of which the most prominent one being the rules of ABGB was prominent in Bosnia and Herzegovina.

2.2. *Property law and property rights in the socialist Yugoslavia*

The formation of socialist Yugoslavia after the Second World War started the process of significant changes in property law and the extent of property rights in general. The qualitative change was a stark reduction of private property rights in favor of public property. Due to the introduction of socialist economic and political order, the large-scale reduction of private property and nationalization was undertaken by the series of legislation such as the Law on Agrarian Reform and Colonization from 1946, the Law on Nationalization of Rental Buildings and Construction Land from 1958, the Basic Law on Expropriation from 1949, the Basic Law on Agricultural Land Utilization from 1959, the Decree on arrondissement from 1946, the Law on Property Rights in Business Buildings and Business Premises from 1979 and many other laws and regulations (Halilović, 2022, 16). The quantitative substance of private property was dramatically reduced, including all types of private property, together with the development of a socialist planned economic model.

The substance of property rights has also changed over time, following the changes in the constitutional order and understanding of the political and economic system. Generally, property law rules distinguish between state-owned property, private property and personal property (Povlakić, 2009, 20). Only state-owned property and personal property were enjoying constitutional recognition, while private property was considered a source of class disparities and treated unfavourably in the laws. Personal property, on the other hand, was allowed and owners were able to use and dispose of it. Personal property was understood as property for personal and family use and was under quantitative restrictions (e.g. up to 10 hectares of agricultural land or up to one house or apartment). The use of private property for acquiring profit in the market was severely restricted and even the use of immovable property for rent was subject to legal restrictions (Povlakić, 2009, 22). The main ideological idea was that the use and amassing of private property was a source of class disparity.

The understanding of state-owned property, on the other hand, was subject to changes which were reflected primarily in the Constitution itself. In the initial period of the establishment of a socialist order, the property was nationalized and considered state-owned, and the economy was administratively organized and planned. With the development of socialist society and doctrinal understandings, the state-owned property (*državna imovina*) was replaced by "societal property" (*društvena imovina*), via constitutional and legislative changes starting from 1974. The change was influenced by the development of the doctrine of "self-managing socialism" (*samoupravni socijalizam*), which was seen as an authentic socialist doctrine of former Yugoslavia incorporating the elements of workers-owned enterprises and elements of the market economy. The substance of societal property comprised of different elements or rights to conduct, use and dispose (*pravo upravljanja, korištenja i raspolaganja*) of that property (Šarčević, 2012, 31). The main theoretical premise was that workers, entering into associations of economic nature (organizations of unified labor – *organizacije udruženog rada*), as well as social or political ones, invested their labor and were entitled to use the means of production as well as the results (profits) of their labor. Therefore, theoretically and conceptually societal property and state-owned property cannot be considered as same, since, theoretically, societal property is broadly considered as property of the people or, more precisely, the property of the workers (which in turn, in modern terminology could be understood as property of citizens) and not of the state as a legal entity. The largest extent of the substance of property rights was contained in the right of disposal (*pravo raspolaganja*). In the land registry, the immovable property thus was registered as societal property with the right of disposal belonging to a certain economic enterprise or unit of government (e.g. municipality) (Šarčević, 2012, 31).

Towards the dissolution of Yugoslavia, certain changes were introduced as a sort of preparation for the transition to private ownership and market economy. Therefore, certain constitutional and legislative changes in the constitution of federation and republics as well as legislative changes recognized the equality of different types of ownership (societal, private, and personal property), removing certain quantitative restrictions on private and personal property (Mehmedović, 2011, 21). However, any further economic changes were abruptly halted by the brake out of several brutal wars encompassing several Yugoslav former republics.

2.3. *Transformation of property rights since the independence*

Following the breakout of war in Bosnia and Herzegovina and the formation of the Republic of Srpska (RS) and Federation of Bosnia and Herzegovina, who were later recognized as "entities" under the sovereignty of Bosnia and Herzegovina by the Dayton Peace Agreement and its constitutional setup, both of the entities have adopted certain legislation concerning the transformation of ownership of the societal property. The steps undertaken have created significant difficulties which are present even in the current legal and political sphere. Namely, both entities adopted similar legislation transforming societal property into "state-owned" property (Mehmedović, 2011, 27).

However, such steps can be seen as highly problematic for several reasons. The first one is the already mentioned conceptual difference between state-owned property and so-called societal property in the sense that those two are not synonyms but different societal and legal concepts altogether. Further, the very definition of "state" in adopted legislation is highly problematic, because the legislation of the Republic of Srpska recognizes it as the entity as the "state" and practically undertakes a complete usurpation of any land and property that would belong to Bosnia and Herzegovina as the state (Povlakić, 2009, 46). On the other hand, the law adopted at the level of the Republic of Bosnia and Herzegovina (later Bosnia and Herzegovina) does another dangerous operation of dividing "state-owned" property between the level of Bosnia and Herzegovina and level of Federation of Bosnia and Herzegovina (Povlakić, 2009, 48). Thus by applying the territorial approach with a vague or absent definition of "state". Therefore, it can be said that laws were aimed as a sort of political "land grab". Both laws also ignore the needs of local government and municipality city level of governance. After entering into force of the Dayton Peace Agreement, the entities enacted legislative changes in the form of Laws on basic property rights, abandoning the previous concept of "societal property" and the content of its rights (such as right of use and right of disposal). However, the previous "societal property" property in land registries is registered as "state-owned" with the certain beneficiary being identified as a holder of the right of disposal (*nosioci prava raspolaganja*), thus perpetuating the previous concept of property rights and assigning "right of disposal", whose content, as previously noted, is conceptually different and anachronistic to the new property legislation that recognizes the concept of ownership and its substantial content. Further, the transformation of the companies under "societal ownership" was to have effect only in the sense of ownership of those companies as legal entities, and not their property, which was supposed to remain as part of the property mass of the company itself (Povlakić, 2009, 51).

Following the establishment of the "Dayton" legal system, entities have entered into the process of privatization of parts of the (previously societal) now state-owned property. The privatization encompassed state-owned (previously societal-owned) companies and has more or less been completed, producing results that are largely seen as unsatisfactory. Regarding immovable property, activities aimed at denationalization and restitution of previously privately owned property that was taken by previous owners in the period of socialist Yugoslavia have been stopped by the decisions of the High Representative (Ćeman, 2011, 108).

The segments of immovable property that were subject to privatization and partial denationalization are the apartments and (partially) the property in the urban areas i.e. urban developmental property (*gradsko građevinsko zemljište*). The apartments were privatized by the holders of the right of use (*pravo korištenja*), which was largely done by the use of certificates (vouchers recognizing certain value a person has in the "societal property" as calculated by their years of employed work). The certificates could be used in the privatization of companies and flats largely speeding up the process. In that regard, there was a situation of conflict of rights of the previously nationalized apartments and property in general, because instead of restitution of property to previous owners (or compensation), the right of holders of right of use was seen as

having priority (Ćeman, 2011, 180). The holders of the right of use of the apartments that were not nationalized or taken away by previous owners, (i.e. that were built during the period of socialist Yugoslavia) thus had a "clearer" situation where there was no conflict between their claim and claim of previous owners. The situation was especially significant concerning the property (previously) belonging to religious societies as holders of various endowments, including *waqf*. The law in the Federation of B&H foresaw some sort of compensation to the previous owners by requiring that registration of the holder of a right of use, is conditional to the registration of the right of the previous owner on another property. However, such a solution was annulled by the Constitutional Court of the Federation of B&H, due to the difference in treatment between the holders of the right of use (Decision 28/06, Const. Court, 2007), *de facto* giving priority to the holders of the right of use and priority to privatization, instead of previous owners and their request for restitution or compensation.

On the other hand, entity Laws on urban development land partially de-nationalized the land in urban areas by allowing the return to previous owners of immovable property that was not taken away by the laws on nationalization but by the decisions of municipal councils if they have not been put to use as foreseen by the development plan (Povlakić, 2009, 166). Further legislative changes in RS give the possibility of the municipal governments to dispose of urban developmental land even in the case it was nationalized by laws on nationalization and not just by the decisions of the municipal council, through the decisions on the sale of land. A similar solution exists in the Federation of B&H, where municipal governments can "award" land for development and building to the investor, who, following the completion of the project becomes its owner. Such a solution, however, produces uneven results and certain arbitrary decisions by local governments which ultimately results in a practical reduction of the substance of the urban development property (Povlakić, 2009, 51).

Through privatization of companies and flats and partial denationalization of urban development land, the quantity of "state-owned" property is reduced. Further attempts at its reduction and disposal by the entities were stopped by the decisions of the High representative, by the introduction of decisions and Laws on the prohibition of disposal of state-owned property (Mehmedović, 2011, 21), in line with the decision of the Constitutional Court of Bosnia and Herzegovina, who considers that such legislation must be adopted at the state level of Bosnia and Herzegovina (Decision No U-1/11, Const. Court FBH, 2012). The Commission on State-owned Property was established with the task of drafting the state legislation and the disposal of state-owned property by issuing exemptions from the prohibition of disposal, including the property which belongs to Bosnia and Herzegovina following the succession from former Yugoslavia. However, the Commission could not come up with an agreement on the legislation, leaving the issue in the *status quo* situation (OHR statement).

Discussions over the issue of state-owned property have become a major political issue, especially in recent years. The Republika Srpska Peoples Assembly on 10 February 2022 adopted the *Law on Immovable Property Used for the Functioning of the Public Authority of the Republika Srpska* (Official Gazette of Republika Srpska, 29/22). This Law makes it possible for the part of

"state property", which is under the ownership of Bosnia and Herzegovina, to be transformed into an entity's property, including the property of the local self-government units, public companies, public institutions and other public services. The Constitutional Court of B&H concluded that the adopted entity law is in contravention of Articles I (1), III (3)(b) and IV(4)(e) of the Constitution of Bosnia and Herzegovina and that said law is unconstitutional in its entirety (Const. Court, Decision No. U-10-22, 2022). Furthermore, the Office of the High Representative (OHR) called on that, this adopted law does not affect the validity of the state-owned property disposal ban and thus, does not change this legal reality (OHR statement, 2022). Discussion of the state/public property goes back several years. In November 2020, Republika Srpska and Serbia agreed to build three hydroelectric power plants on the Drina River. For example, the construction of Buk Bijela hydroelectric power plant started in May 2021. Since the permission was granted without approval at the state level, a complaint was filed with the Constitutional Court of B&H, which ruled in July 2021, when the Constitutional Court B&H determined that rivers and riverbeds were state property (EU Commission, 2022).

On the other hand, the legislation related to property rights in both entities is updated by the introduction of new entity Laws on property rights (*Zakon o stvarnim pravima*), legislation related to land registries (*zemljišne knjige*), and legislation related to company law and state-owned companies etc. The new legislation generally gives protection to private property accepting private ownership and market economy as basic foundations. As the basis for the legislative changes, as seen in the novel Laws on Property Rights, the Austrian civil code is taken once again (Povlakić, 2009, 78). The new property rights laws introduce certain updates specifically concerning condominium rights (*etažno vlasništvo*) and the right to build (*pravo građenja*). That way, the property law legislation in Bosnia and Herzegovina has made a sort of full circle, by returning to the Austrian civil code, as its original inspiration.

2.4. *Current state of property law in Bosnia and Herzegovina and main issues in fulfillment of property rights*

Bosnia and Herzegovina currently faces numerous issues which are having a detrimental effect on the fulfillment of property rights. The number and the extent of them exceed this article, however, we can have a brief overview of certain issues which are leaving the biggest impact currently.

As stated, the basic concepts of property rights have traveled kind of a full circle by returning to the concept of private property and ownership as the basis of property rights and the Austrian civil code as a basis of legislative inspiration. The previous concepts of "societal property" (*društvena imovina*) with the substance of its right divided between separate concepts of right to conduct, use and dispose (*pravo upravljanja, korištenja i raspolaganja*) are abandoned, at least, in the norms of positive law. However, there are a lot of unresolved issues, together with certain newly created ones.

The first issue can be described as the stalemate in the efforts of denationalization and restitution or compensation (in the cases of impossibility of natural restitution) of the property that has been taken by the previous owners during the socialist Yugoslavia. Legally, restitution and compensation are strictly not required neither by the Council of Europe or European Union legal regimes, and multiple models exist in former socialist countries. However, the restitution and/or compensation are anticipated by certain legislative solutions and especially by the economy and the society itself. The *status quo* of uncertainty and inaction in regard to a sizeable mass of property has detrimental effects on economic development and investment. For example, the sheer mass of agricultural land that is not put to use and is practically "blocked", coupled with a situation of no apparent plan of the "state" for its more rational use, is staggering. Such property, if released, could be used as a catalyst for the development of agriculture and food production, which could be described as strategic resources. Further, the rights of previous owners and especially of the holders of *waqf* and other endowments are completely disregarded.

The current state of partial denationalization of urban development land (*gradsko građevinsko zemljište*) leads to discrepancies in its use and the reduction of a valuable resource belonging primarily to the local communities. One of the reasons for possible inactivity in the area of restitution and compensation is the projections of high financial burdens which would befall the state in the process. However, several models of state bonds and other solutions exist in other countries and that alone cannot be regarded as justification (Povlakić, 2009, 69). The model of restitution that favours the natural restitution of the property (i.e. the return of the property to previous owners) should be followed. Since such return and restitution in many cases is impossible, in the case of the inability of the restitution of the property, financial compensation, either in a single payment or in the form of long-term state bonds should be used.

Another major problem is the status of the state-owned property. Main issues can be identified in the conceptual approach related to the status of state-owned property. The first conceptual problem is in the very name used by legislation and policy documents. The name "state-owned" property can be described as imprecise and often misused. The first reason is because of the lack of definition of the "state", which due to its vagueness often relates to different entities, municipalities, and even enterprises that do not represent "state" in the sense of the current constitutional setup of Bosnia and Herzegovina. Therefore, the legal scholarly literature proposed a more adequate term that should be used in the form of the use of term "public property" (*javna imovina*). Further, the current manner in which state property is registered in land registries by considering it as state property with "right of disposal" (*pravo raspolaganja*) designated to certain beneficiaries is absolutely out of sync with current legislation which does not use the previous concepts of right of conducting, usage and disposal as elements and content of the "societal property". That being said, it needs to be reiterated that the concepts of "societal property" and state-owned property are not synonyms but two separate concepts altogether and following the previous doctrine of self-managing socialism (*samoupravni socijalizam*) which produced the concept of "societal property", the "society" as a title holder is not equivalent to the state as a legal entity.

Any laws regulating state-owned property need to abandon the territorial concept which considers all state-owned property situated on the territory of a certain entity as belonging to that entity thus considering the entity as filling the role of the "state". The first reason is that the "territory" of both entities is under the sovereignty of Bosnia and Herzegovina, and the inter-entity demarcation line is not considered as a border but as an "administrative delineation". Instead of a territorial approach, a functional approach (or a certain combination of the two approaches), which recognizes the user of the "public" property is recommended (Povlakić, 2009, 61). The functional approach would primarily consider the fact of who is the user of the property instead of blanket appropriation of "state-owned" property by the entity based solely on the fact that it is situated on its "territory". Therefore, it could include local communities and public enterprises as well. In that sense, the legal regulation of the concept of the user or holder of the right of disposal (*pravo korištenja*) is necessary, if their direct definition as the "owner" wants to be avoided. However, that issue is a source of much political tension and disagreement and no viable solution is in sight. Recently it has even been used to fuel separatist rhetoric in the entity of the Republic of Srpska (n1info.ba). Further issues that can be identified are the issues of divergence and general discrepancy between the data in the land registry and cadaster which needs to be brought in line.

As certain newly raised issues, the subpar solutions in the reformed Law on private property can be identified, especially in the case of condominium ownership rights (*etažno vlasništvo*). Namely, the legislative solutions in the Federation of B&H do not allow for certain protection in the phase of development and construction of new buildings. Instead, future owners of flats have to wait for the completion of construction for the separation of flats (*etažiranje*) to commence for them to be able to become owners of the individual flats (Handalić, 2021, 177). The solution created in practice of the conclusion of "contracts of joint investment" is subpar and does not give full protection. Therefore, a certain level of protection and recognition of legal status in the construction phase needs to be given to the investors. The possible solution can be found in Turkish legislation which recognizes the concept of "floor easement" or *kat irtifak*, as a sort of recognition of rights of ownership over future flats in the construction phase, which upon its full completion is transformed into condominium ownership rights *(kat mulkiyet)*.[16]

In addition to enumerated issues, the issues that returnee communities face, in the sense of obstacles in having their confiscated or destroyed property returned are alarming, together with certain legislative changes which have detrimental effects on the fulfilment of the property rights belonging to returnees.

[16] Article 1 of the Flat Ownership Law:
"Independent ownership rights may be established by the owner or co-owners of that real estate, in accordance with the provisions of this Law, on the parts of a completed building such as floors, flats, business offices, shops, stores, cellars and warehouses that are suitable for use separately and independently.
Easement rights may be established by the landowner or co-owners of the land, in accordance with the provisions of this Law, on the parts of a building that is being constructed or will be built in the future, specified in the first paragraph, as a basis for the condominium ownership that will be transferred after the building is completed."

3. Issues of the Fulfilment of Property Rights of Returnees in Bosnia and Herzegovina

The current situation of property rights in Bosnia and Herzegovina can be discussed through the evaluation of the enjoyment of individuals' rights on private properties and the legal status of public/state properties. Key concerns have arisen about the lack of updates and interconnections of the entity-level cadaster and land registry databases and no resolution has been found for ongoing repossession cases. The Commission on Real Property Rights of Displaced People and Refugees is also evaluated as an inactive branch (European Comission, 2022).

The Dayton Peace Agreement (DPA) opened up the possibility of returns, most especially the politically sensitive cross-boundary return of Bosniaks and Croats to their previous homes in the entity of Republika Srpska and Serbs to the Federation (Toal and Dahlman, 2006, 1).

During the war, Serb nationalists followed the strategy of providing non-Serb land and real estate to Serbs to preserve the demographic consequences of ethnic cleansing and genocide (Toal and Dahlman, 2006, 2). These kinds of strategies were boosted by legal instruments. Abandoned Property Act 1996 *(Zakon o korištenju napuštene imovine)* can be an example of that.

In the post-DPA period, new sort of laws and regulations were enacted to protect the property rights of the displaced people. The Restitution of the Property Act of 1998 (Law on termination of Code on use of abandoned property, 2010), which regulates the restitution of privately owned real property abandoned after 30 April 1991, abrogated the Abandoned Property Act of 1996. Other legal restorations for the property rights were tried to be achieved through the Law on Temporarily Abandoned Real Estate Owned by Citizens in the Federation of Bosnia and Herzegovina (*Zakon o privremeno napuštenim nekretninama u vlasništvu građana u Federaciji Bosne i Hercegovine)* and Law on Amendments to the Law on Termination of Application of the Law on Abandoned Residences in the Federation of Bosnia and Herzegovina "*Zakon o izmjenama i dopunama Zakona o prestanku primjene Zakona o napuštenim stanovima u Federaciji BiH".*

These amendments aimed to ease procedures and fulfil the obligations put under the Annex 7 of the DPA.[17] However, these amendments caused even more inconsistencies and burdens for the returnees. Article 35 of the *Law on Termination of Application of the Law on the Use of Abandoned Property*, Article 17 item d)of the *Law on Temporarily Abandoned Real Estate Owned by Citizens in the Federation of Bosnia and Herzegovina* and Article 18 item a) of *Law on Amendments to the Law on Termination of Application of the Law on Abandoned Apartments in the Federation of Bosnia and Herzegovina* have put an obligation of reimbursement of necessary expenses to the temporary users by the real owners. The legal provisions established that, after the

[17] "*All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.…The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons."*

property has been returned to the owner, temporary users have the right to claim reimbursement of expenses invested in temporary residences for living (Ombudsperson Institution, 3).

Court decisions obligated returnees to pay compensation for these invested funds, and legal interest, and cover the costs of court proceedings. As these fees often surpass the value of the property as determined by the court and since the returnees do not have the financial means to collect these fees, the court chooses to resolve the monetary claims of temporary users through enforcement proceedings, including the sale of the property held by the owner. This results in the owner losing their property and beginning to doubt their right to return and their right to a home. The court decisions in this regard essentially undermined the application of Annex VII (Ombudsperson Institution, 3).

Authorities in Bosnia and Herzegovina have set up housing offices in every municipality throughout the country to ease procedures for individuals to initiate claims for property repossession. The claiming process is characterized by its administrative nature, chosen for several advantages over a judicial process. Using an administrative approach prevented the potential overload of the judicial system with a high volume of property repossession claims, which might have otherwise resulted in lengthy waiting periods for claimants seeking resolution. Furthermore, the post-conflict Bosnian court system was perceived as having ethnic biases, particularly concerning refugees and displaced persons who had experienced property deprivation through court proceedings. Overall, the local housing offices have received approximately 260,000 claims for property repossession (Prettitore, 2009, 9).

3.1. Violations of Private Property Rights of the Returnees – Case of Ms Fata Orlovic

Private property rights violations in BiH in plenty of cases could not be resolved through local remedies. Caseloads, lack of proper enforcement mechanisms, opacity around land records (Parramore, 2020, 23), long delays and inconsistent legal procedures guided citizens to seek solutions in international institutions. In particular, no solution was found for pending repossession cases. According to the 2022 European Commission report, the Commission for Real Property Claims of Displaced Persons and Refugees is inoperative (European Commission, 2022).

One landmark case that revolved around the right to return of property is the case of Fata Orlovic. The case is about Ms Orlovic and her family members, who were displaced from their home during the war and subsequently unable to return to their family residence. Article 1 of Protocol No. 1 of ECHR was the main violation of the case. Ms Orlovic and the other 13 applicants have complained that they had been prevented from effectively enjoying their possession due to an unlawfully built church that had not been removed from their land for decades.

The applicants' land was expropriated by Bratunac Municipality in 1997 without their knowledge. The expropriated land was allocated to the Drinjača Serbian Orthodox Parish for the construction of a church. In 1998, a church was built on expropriated land without the necessary

technical documentation. Later, in 2003, the Parish applied for planning permission for the church from the Spatial Planning and Housing Unit of Bratunac Municipality. In 2004, the Construction Inspectorate issued a decision to stop the use of the church. However, the Municipal Inspectorate failed to enforce this decision, and the deputy mayor intervened, advocating for a higher-level political resolution. Simultaneously, the applicants initiated restitution proceedings through the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) (Orlovic v. Bosnia and Herzegovina, 2020).

The Commission for Displaced Persons and Refugees was created according to Annex 7 of the Dayton Peace Agreement by the International Community to fully implement the right to repossession of property. It used to be called the Commission for Real Property Claims (CRPC). The job of the CRPC is to handle property claims, whether it's about getting the property back or getting compensated for it. The CRPC had three international members and six national members, and its decisions were final (Prettitore, 2003, 9). CRPC was issuing decisions about whether the claimant was the owner or occupancy right holder as of April 1992 - the start of the conflict. In the case of Fata Orlovic, on 28 October 1999 CRPC issued a decision that, Ms. Orlović's late husband, Š.O., had been the owner of the land in Konjević Polje and annulled any involuntary transfer or restriction of ownership after 1 April 1992 and Š.O.'s heirs were entitled to repossess the land (Orlovic et al. v. Bosnia and Herzegovina, 2020). However, due to the lack of CRPC's internal enforcement mechanism, the decision hadn't been applied for decades.

In 2002, Ms Orlovic initiated a civil action against the Serbian Orthodox Church in Bosnia and Herzegovina, seeking the removal of the church from her land and the restoration of the land to its original condition. The Court of First Instance initially rejected her claim in 2003, citing a lack of subject-matter jurisdiction. However, the District Court overturned this decision in 2006, leading to a re-examination of the case. During the re-examination proceedings, the other applicants joined the case, specifying the respondents as the Zvornik-Tuzla Eparchy of the Serbian Orthodox Church, the Bratunac Parish, and the Konjević Polje Parish. They sought a court order for the church's removal and transfer of the land to them within thirty days. After several adjournments and negotiations, in 2010, the applicants shifted their claim to recognize an out-of-court settlement reached in 2008. This settlement required the removal of the church within fifteen days of providing alternative land for building a new church in Konjević Polje. Subsequent court decisions, appeals, and legal cost adjustments further complicated the case, which primarily centres around property rights, church construction, and the validity of the out-of-court settlement.

On August 6, 2014, the Supreme Court rejected the applicant's appeal on points of law, noting that negotiations in 2008 between the applicants' representative and the Republika Srpska's Prime Minister and his adviser had revolved around government financial aid for the relocation of the church from the applicants' land. The Supreme Court found that no agreement had been reached between the parties, including the applicants and the Serbian Orthodox Church, upholding the lower court's conclusions. Subsequently, on October 17, 2014, the applicants lodged a constitutional appeal, citing violations of their right to the peaceful enjoyment of possessions due to the illegal construction of the church on their land. They also argued that the bishop had given

consent to the out-of-court agreement during a telephone conversation with M.D. On September 28th, 2017, the Constitutional Court of Bosnia and Herzegovina dismissed the appeal as ill-founded, with a five-to-four vote. The Constitutional Court held that the lower courts had provided clear and convincing reasons for their rulings, which were not arbitrary.

Legal discrepancies in the repossession procedure for the returnees became more difficult due to physical harassment by officers of ethnically engineered ethnicities (Toal and Dahlman, 2006, 1). While legal procedures were pursued, Ms Orlovic encountered with few physical attacks by police officers in Konjević Polje, in her family residence (Orlović et al. v. Bosnia and Herzegovina, 2020). Following the physical attack by one of the police officers in 2008, the High Representative in a press release condemned the harassment and stated that Fata Orlovic's right to private property would be respected (Press Release). In 2010 Ms Orlovic was again attacked on her property by a police officer (Orlović et al. v. Bosnia and Herzegovina, 2020).

The ECHR assessed that B&H had to protect the right of property, especially when there is a direct link between measures expected from authorities and the effective enjoyment of possessions. The applicants' right to full restitution had been established through various decisions, and the state had a positive obligation to implement these decisions and restore the applicants' property rights. However, the responsible branches of State failed to act, even authorizing the unlawfully built property to remain on the applicants' land.

The Court considered that the very long delay amounted to a refusal to enforce the binding decisions, leading to a disproportionate burden on the applicants, resulting in a violation of Article 1 of Protocol No. 1 to the Convention.

The court unanimously held that there has been a violation of Article 1 of Protocol No. 1 to the Convention, Article 6 of the Convention and the respondent State must take all necessary measures to secure full enforcement of the CRPC's decision of 1999 and the decision of the Ministry for Refugees of 2001, including in particular the relocation of the unlawfully built object from the applicants' land.

The ECHR judgment established important precedents related to property rights and restitution in post-conflict Bosnian and Herzegovinian society. The case contributed to shaping legal principles and practices for addressing property-related issues in the aftermath of conflicts, particularly in the context of the Bosnian War.

4. Conclusion

In conclusion, it may be said that property law legislation and the fulfilment of property rights in Bosnia and Herzegovina are facing numerous issues.

The development of property law legislation, and civil law in general, in the period after Bosnia and Herzegovina was incorporated into the Austro-Hungarian Empire, was under the strong

influence of the Austrian Civil Code, although certain legal rules and concepts from the Ottoman period remained significant. However, the most significant change occurred during the period of socialist Yugoslavia which saw a large-scale reduction of private property through nationalization and confiscation, intending to establish of socialist economic and societal model. During the development of socialist doctrine in Yugoslavia, an important step was the introduction of the concept of self-managing socialism (*samoupravni socijalizam*) and the concept of societal property ownership (*društvena imovina*), and the content of property rights defined as (separate) rights to conduct, use and dispose of (*prava upravljanja, korištenja i raspolaganja*).

Current issues facing property law in Bosnia and Herzegovina are mostly connected with the aftermath of the abandonment of the socialist ownership concept, or more specifically, certain inadequate solutions which followed.

The first one that can be identified is the transformation of "societal property" into "state-owned property" by the entity laws. Such transformation is problematic for several reasons; the first one being the fact that the concept of societal property and state-owned property are not synonyms. The "societal property" existed within the concept of self-managing socialism and its emanation in the sense that the content of property rights (right to conduct, use and dispose of) does not equate with the pure concept of ownership as understood by current legislation. Further, the non-definition or vague definition of "state" itself together with the territorial approach proclaiming all property on the territory of an entity as belonging to that entity is solely aimed at putting the entity in the position of the state and reducing the substance of the property belonging to Bosnia and Herzegovina, which is by the Dayton legal system the only one specifically defined as the state. The situation where the land registry recognizes certain property as state-owned giving certain beneficiaries the right of disposal is also not in line with current legislation and connects two unconnected concepts of property rights.

As a recommendation, any solution of state-owned property should use the concept of "public property" (*javna imovina*) as more precise instead of "state property" as a term which is misused in the majority of cases. Further, instead of a territorial approach, a functional approach (or some combination of the two), recognizing the user of certain "public property" could be used together with the adoption of a new definition of the "right of use" or "right of disposal" (*pravo korištenja, raspolaganja*) which is more in line with current legal conception instead of anachronistic use of legal concepts originating from socialist period. The functional approach would consider the user of the property instead of blanket appropriation of the property by the entity solely based on the fact that it is situated on its "territory". Such a functional approach would also recognize the interests of the local community and enterprises which are currently not adequately addressed. However, the issue of state-owned property is politically charged with no solution in sight.

Another issue that is not adequately treated is the issue of restitution or payment of compensation to previous owners of the property that was taken during the socialist period. The privatization of companies is practically completed with mixed results to say at least. Privatization

of apartments *de facto* favored the holders of the right of use (*pravo korištenja*) and the process of privatization itself, as compared to the process of restoration and rights of previous owners. Surely, in some of those cases, there is a conflict of "two rights", however, no compensation was given to previous owners, much of them representing the holders of previous *waqf* properties. The projections of the high cost of compensation may be one of the reasons for the stalemate; however, different concepts of long-term state bonds exist in comparative practice that could be seen as economically viable solutions. The restitution should primarily aim at natural restitution and return of the property to previous owners, however, if such return is not possible for a variety of reasons, compensation in the form of a single payment, payment in instalments, or long-term state bonds should be considered. In any case, the stalemate in which large quantities of property are "frozen" and left out of economic use is detrimental, especially if we take into account large amounts of agricultural land, for which the "state" has no organized and strategic plan of usage, which could represent significant economic resource, especially if we take food security as a strategic national goal. On the other hand, the solutions of partial denationalization of urban developmental land (*gradsko građevinsko zemljište*) are producing significant discrepancies in practice.

The new legislative changes in the form of newly adopted Laws on property rights (*Zakon o stvarnim pravima*) in both entities are based on the Austrian Civil Code and represent a sort of return to the pre-Yugoslavian "starting point". Solutions in the Laws on property can generally be described as adequate.

However, we can identify certain subpar solutions concerning the regulation of condominium rights (*etažno vlasništvo*), specifically in the regulation of condominium rights. Namely, the current solutions do not give much protection to the future owners of the flats during the construction phase, and they can only register their condominium rights after the construction is finished and the division of flats is conducted. Before that fact (which can be temporally very far away) the investors and future flat owners are practically not visible and are forced to enter into obligatory contracts (e.g. Contracts on mutual investment) instead of property rights-related contracts. A good example of a solution could be found in Turkish legislation which recognizes certain rights in the construction and investment phase through the concept of floor easement or *kat irtifak*, which, upon the completion of construction turns into condominium ownership rights.

Issues such as discrepancies between the data in the land registry and cadaster exist and need to be addressed through reforms and unifications of the cadaster/land register data.

Issues of state-owned property not being adequately solved also result in certain cases of violation of human rights as identified by the cases dealt with by the European Court of Human Rights. However, a specific issue poses the issue of treatment of property rights of returnees which is connected to the issue of discriminatory attitude towards the returnee population. The ECHR judgments established important precedents related to property rights and restitution in post-conflict Bosnian and Herzegovinian society. The case of Fata Orlovic has contributed to shaping legal principles and practices for addressing property-related issues in B&H. Further, the Republika Srpska entity government should consider waiving court fees for victims of wartime

torture to whom statutes of limitations have applied in the past; as in nearly 200 cases victims have faced confiscation of their property for non-payment, a worrying trend further infringing on their property rights (European Commission, 2022).

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