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Front Pages

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The current issue is the second of the eighth volume of the *Athens Journal of Law (AJL)*, published by the *Business and Law Division of ATINER*.

Gregory T. Papanikos
President
ATINER

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11-14 July 2022, Athens, Greece

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- Submission of Paper: **13 June 2022**

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- **Dr. David A. Frenkel**, LL.D., Head, Law Research Unit, ATINER & Emeritus Professor, Law Area, Guilford Glazer Faculty of Business and Management, Ben-Gurion University of the Negev, Beer-Sheva, Israel.

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The LGBTI Rights in European Union – Do Survivals get Pension?

*By Lehte Roots**

The rights and discrimination of LGBTI people is constantly changing in the time and space. The approach to this specific group of people depends from the values and morality that is prevailing in the leading political parties of the state. All humans are equal and the first article of Universal Declaration of Human Rights states that „all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". This basic universal value seems to be forgotten in case of giving rights to LGBTI people. European case law has also fixed the superiority of the EU in this matter and some cases of the CJEU will be discussed to give an example of the power of interpretation of law. It shows how limiting one right (survival's pension) will change also the power balance in same-sex partnership. This article will explore and analyse the legal, political approaches to LGBTI rights in European Union using the examples of Estonia and Poland.

Keywords: *Partnership; Same sex union; Charter of Fundamental Rights; Discrimination; LGBT; Human rights: Family rights; Survival's pension*

Introduction

The EU Member States' political agenda on recognition of same-sex marriages has risen during the last twenty years and currently, fourteen European Union Member States allow same-sex marriages, where the Netherlands and Denmark were one of the first countries that allowed same-sex marriages in 2001 and Finland in 2002. Since then, the majority of the MS of the EU recognised same-sex unions in the form of marriage or other forms of partnerships.

The principal institutions of the state have protected traditional marriages between a woman and a man. European Union has also secured these unions by enacting appropriate laws. Under Article 21 of the Treaty on the Functioning of the European Union (TFEU) the citizens of the EU have a right to move freely to another Member State. Also, they are granted to similar rights in the field of work, social security, and social benefits. However, the situation is different from those couples that live in same-sex relationships, as the recognition of same-sex partnerships, marriages and cohabitation is not equal to a system where the country by its national law can decide what policy it enacts or determines towards family unions,[1] the state can freely choose on behalf of the same-sex unions or against it. Even though the European Union has passed anti-discriminatory laws and regulations that prohibit discriminative rules and actions based on sexual

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[1]Roots & Joamets (2018).

orientation, it has not entirely removed the inequalities that same-sex couples face. Diversity of family laws cause legal conflicts in case of cross border relationships.[2]

The Employment Equality Framework Directive (Council Directive 2000/78/ EC) that has been implemented by all the Member States has ensured the basic protection for individuals that are living in same-sex partnerships and marriages. It is Article 2 that explains the concept of discrimination Article 2 a states that "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred in the directive". According to Article 2b indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.

However, similar protection does not cover other areas that are important for the EU citizens that reside in another Member State due to their civil status. Furthermore, same-sex couples have encountered discrimination based on their sexual orientation in the field of social security, more precisely, on the survivor's pensions, where the surviving spouse may claim survivor's pensions after their spouse has died. Even though the benefits, and the right to receive those benefits, differentiate from one country to another, the discrimination has been in place in those situations where same-sex unions have been considered to be equal with heterosexual unions. Therefore, such treatment based on the sexual orientation of the individuals can potentially hinder the free movement within the European Union.

The chapter investigates the problems that same sex couples face with equal treatment. The following article will examine and compare the legislation of Estonia and Poland by covering three main groups of same-sex unions, which are marriage, registered partnership and cohabitation.

Specific issue regarding the grants of survivor's pensions to same-sex couples is used as an illustration of the realistic discriminatory problem that needs a solution. The contemporary legislation of the European Union will be taken into account by analysing the responses of the European Courts.

The Role of European Union in attitude formation of the pro-LGBT

In 2004, the European Union (EU) had its biggest enlargement that added eight Eastern-European countries (including Estonia, Poland), and two Mediterranean countries to the union. This was a strategically important enlargement as seven countries out of ten were formerly either member-or satellite states of the USSR. The enlargement was important to prevent Eastern bloc countries from further Russian influence. The European Union has a vastly different stance on the acceptance of sexual minorities than the Soviet Union. The EU operates on the principles that all people in its member states should be treated

[2]Joamets & Roots (2015).

fairly and equally, including the treatment of sexual minorities. EU promotes equal rights among their member states, but Kollman points out that the EU lacks an enforcement method in the member states, even though they can use soft measures to slightly guide national policy outcomes.[3]

Apparently, the EU has more power among the applicant states than it does among member states. According to Pelz the EU is highly successful in enacting policy changes during the accession period through conditionality.[4] For example, Pelz found that in Montenegro and Serbia (both applicant countries) the pro-LGBT anti-discrimination legislation was passed quickly and smoothly even though the public view is predominantly against sexual minorities.[5] This creates the image that political elites simply pass laws in order to gain fast access to the EU. The Estonian Parliament prohibited discrimination of sexual minorities in the workplace in 2004. However, LaSala, who carried out interviews with homosexual participants for his empirical research, found that this was also only done under the pressure of fulfilling the European Union accession criteria[6]. However, once a country is part of the EU such as Estonia and Hungary, the success rate of the EU conditionality drops dramatically. Therefore, the theory of Europeanisation becomes increasingly important as it gives insight into the "enforcement of supranational rules in domestic contexts"[7] which in this case is the method the EU can use to promote LGBT rights in member states.

The soft measures which the EU uses in member states to promote LGBT rights are aimed to bring about more tolerance and acceptance. For example, ILGA-Europe (2014) found that the EU finances and uses various social campaigns to raise awareness, and cooperates with local pressure groups that stand for LGBT rights. Pelz also introduced the concept of social learning which can influence domestic policy makers by "repeated interactions with EU institutions[8] to persuade the policy makers into the specific goal.[9] However, Kollman pointed out that the Europeanisation theory is flawed as the acceptance of supranational policies through social learning still depends on the local politicians' willingness to accept foreign lobbying efforts.[10]

The first country to accept the Registered Partnership Act in Europe was Denmark in 1989. By 2015, 18 European countries have implemented the legislation, however only two countries have been ex-Soviet satellite states (Czech Republic in 2005 and Hungary in 2009) and one has been ex-Soviet member state (Estonia in 2016) Poland has not adopted relevant legislation. In fact there is still lot of resistance to accept the rights of LGBT in Poland.[11]

[3]Kollmann (2009).
[4]Pelz (2014).
[5]Pelz (2014).
[6]LaSala (2011).
[7]Pelz (2014) at 4.
[8]Pelz (2014) at 4.
[9]Pelz (2014).
[10]Kollmann (2009).
[11]Reid (2021).

Marriage and adoption rights have been granted in many other EU countries. Representatives of sexual minorities agree that state-level acceptance and protection have made significant improvements to their lives.

Rules in European Union

Fundamental Freedoms of Same-sex Couples in the Treaty

The Treaty of Lisbon was ratified by the Member States on 13 December 2007 and entered into force on 1 December 2009.[12] It amends the previous legislation of the EU and promotes efficiency, progress and democratic legitimacy.[13] Its core values lay on the respect to human rights on the broad spectrum.[14] The respect for equality, freedom and human dignity applies to all people including those who belong to minorities. These core values should also reflect the values of the Member States of the EU. According to Article 49 TEU, the Member State should respect and accept the values in order to become a member of the EU. Furthermore, other essential provisions reflect the values of the European Union. According to Article 3(3), there is a general obligation for the EU to combat social exclusion and promote social justice.

Article 10 of the TFEU determines that the EU should adopt policies and activities to combat discrimination based on sexual orientation. Regarding the competence of the EU, Article 19(1) of the TFEU lays down that "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[15] As regards to equal treatment, Article 9 of the TEU determines that "In all its activities, the Union shall observe the principle of equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies".

All these provisions promote and support social justice and provides the possibility for further development. In the case of unequal treatment and discrimination in the Member States, the EU is obliged to amend rules in order to combat those injustices.[16]

Furthermore, the concept of free movement of persons within EU contains the prohibition of discrimination based on nationality, and every citizen of the EU are entitled to exercise their fundamental rights and freedoms.[17] They are also entitled to social benefits, social security and other important cultural rights in another

[12]Roots (2009); Bonde (2009).
[13]Piris & Merkel (2017) at 48.
[14]Piris & Merkel (2017) at 48.
[15]TEFU art 19
[16]Ashiagbor, Countouris & Lianos (2012) at 137-138.
[17]Weatherill (2016) at 376.

Member State.[18] Numerous treaties and directives, where the latest, the Treaty of Lisbon, includes Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), The EU Charter of Fundamental Rights and European Convention of Human Rights have guaranteed the above-mentioned rights. In addition to nationality, discrimination based on sex, race, ethnic origin, sexual orientation, religion or belief is also prohibited and is accompanied by various EU directives. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) Art. 3 provides that "discrimination between human beings on rounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the UDHR and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations".[19]

Fundamental Freedoms of Same-sex Couples under the Charter of Fundamental Rights

Although the Charter of Fundamental Rights came into force in 2000, it, however, became fully legally binding only on 1 December 2009, when the Charter was incorporated into the Treaty of Lisbon and gave it the same status as European Union Treaties. With this change the European Union has positioned principles of human rights as one of the EU's most fundamental values[20] Furthermore, the above mentioned facts are affirmed by Article 6(1) of the TEU, where "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."[21]

Respectively, Article 6(3) of the Charter lays down that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."[22] Therefore, the EU law places fundamental rights as general principles of the EU law, and the Member States should give them full effect by the national courts, and ensure that the national legal provisions are compatible with the principles. One of the most essential principles of the Charter of Rights is non-discrimination. Article 21 of the Charter of Rights states that: "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be

[18]Meenan (2007).
[19]Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), Art. 3.
[20]Peers, Hervey, Kenner & Ward (2014).
[21]TEU at Art. 6(1).
[22]Charter of Fundamental Rights, Art. 6(3)

prohibited."[23] Therefore, there is a clear reference for forbidding discrimination based on sexual orientation, and this has been confirmed by the ECJ in the case between Accept Association and the Consiliul Naţional pentru Combaterea Discriminării.[24] In this case Mr Becali, a manager of the football club, excluded the possibility of hiring a homosexual footballer. The CNDC gave Mr Becali a warning on the grounds of giving harassing statements that had the purpose of violating the dignity of the player. The ECJ concluded that Mr Becali acted in possible violation of the Directive 2000/78/EC22 by directly discriminating the player.

As regards to the rights relating to marriage and founding a family, the Charter of Rights does not prohibit nor impose the rights in granting marriage rights to same-sex couples. It leaves the decision of family foundation and marriage rights to the Member States and their national legislation. However, under the decision rendered by the European Court of Human Rights, has been recognised that same-sex couples that have concluded their marriage in their own Member State should receive some form of legal recognition, at least in the form of civil union. This has also been confirmed by the European Court of Human Rights.[25] In the case, three same-sex couples complained about the non-existing alternative to marry under the Italian law. The Court acknowledged the need for the legal recognition of same-sex relationships as the applicants could not enjoy and gain access to the rights that heterosexual couples enjoy. The Court stated, that the Italian State should ensure certain basic fundamental rights to the couples that are in a committed relationship, such as, mutual rights and obligations, including moral and material support, maintenance obligations and inheritance rights. By providing recognition and protection of the same-sex unions, the applicants would not impose a burden on Italian State.

As it is clear that the Treaty of Lisbon and the Charter of Rights are intertwined by virtue of Article 6 of the TEU, the EU law confers the legitimacy and obligatory application of the Charter of Fundamental Rights. The principle of non-discrimination laid down in Article 21 of the Charter, discusses the anti-discriminatory treatment based on sexual orientation, whereas article 19 TFEU specifies that in case of discrimination based on sexual orientation, the EU should take appropriate action to combat the discrimination. The family members also include the same-sex spouses.

The Court of Justice of the European Union (CJEU) in the judgement *Relu Adrian Coman and others v Inspectoratul General pentru Imigrari and Others*[26] has clarified it in its case law. In this case, same-sex partner Mr Hamilton and Mr Coman, who were legally married, wanted to move to Romania. Mr Hamilton applied for a residency permit based on Directive 2004/38/EC. However, he was denied a residency permit because he was not considered as a "spouse" according to the national law (Romanian law), which did not permit same-sex marriage or same-sex marriage that was entered in another state. In order to apply the EU law

[23]The Charter of Fundamental Rights, at Art. 21.
[24](C-81/12).
[25]*Oliari and others* v *Italy.*
[26](C-673/16)

in a correct manner the Romanian Constitutional Court requested a preliminary ruling before ECJ. The court had to determine whether:

1. "Spouse" in Article 2(2)(a) of Directive 2004/38/EC "includes the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State"[27].
2. If the spouse includes same-sex spouse, can the host State grant a residency permit.

The ECJ and Advocate General concluded in their opinions that the wording of Article 2(2)(a) is presented by a gender-neutral way when referring to marriage, and this leaves a room for further interpretation and intention not to limit further societal changes within the Member States. Furthermore, the Advocate General referred to Article 9 of the Charter of Rights and the European Convention on Human Rights and recalled the case law of the ECtHR on *Taddeucci and McCall* v I*taly*, where the Court ruled that the refusal to grant a residence permit on family grounds to an unmarried same-sex couple, consisted an unjustified discrimination based on sexual orientation. They also stated that Directive includes non-discrimination clause, including same-sex couples as "a spouse".

Moreover, according to the ECJ and "established case law, the restriction on the right to freedom of movement for persons may be justified if it is based on objective public-interest considerations, and if it is proportionate to a legitimate objective pursued by the judgement law. However, in order to rely on the justification of public policy there should be a genuine and sufficiently serious threat to a fundamental interest of the society since derogation from a fundamental freedom must be interpreted strictly. Finally, "an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the State concerned". Therefore, the concept "spouse" in Directive 2004/38/the EC should include spouse of the same sex. So the Court of Justice of European Union is clear about the treatment of same sex couples they should be treated equally with other couples. The court also stated that the same-sex spouse should be granted the residence permit for more than three months in the Member State so in this case the EU law prevails over the national law. This case had an impact on changing the legal landscape by promoting and recognising the same-sex relationships within the EU.

Furthermore, European Court of Human Rights has also taken its stand on the protection of the family. In the practice of the ECtHR, the concept of family life includes unregistered cohabitation of a man and a woman as well as non-traditional families, such as cohabitation of homosexuals and transsexuals and their children born through the donation of sperm and artificial insemination or surrogacy of one of the partners. The Court has stated that the term "family life" in Article 8 of the ECHR does not only cover families based on marriage, but may also cover other *de facto* relationships. Several factors may be relevant in deciding whether a

[27]Directive 2004/38/EC

relationship constitutes family life, including whether the couple lives together, how long the relationship is between them, and whether they have expressed commitment to each other when having children or "in any other way. "[28] At the same time, the ECtHR has limited family life to the concept of a "core family". Thus, the ECtHR has not recognised the relationship between an adult child and his or her parent as family life unless a relationship of dependence between them has been further established.[29] According to the case law of the Court of Justice, cohabitation is not always an obligatory feature of the family, eg in the case of a relationship between a child and a parent[30] or when persons are permanently committed to a relationship.[31] The Court also recognises family relationships within the meaning of Article 8 as links between close relatives.[32]

Whereas the ECtHR previously considered same-sex cohabitation rather to be protected as private life, since 2010 cohabitation has also been protected as family life in the practice of the ECtHR. The ECtHR saw no reason to consider cohabitation of heterosexuals to be family life, but cohabitation of same-sex couples to be purely private, as same-sex couples can similarly live together in a stable, committed relationship[33]. In these cases, the ECtHR assessed Article 8 in conjunction with Article 14, which prohibits unequal treatment.[34]

Rights of same Sex Couples in Estonia and Poland

Family is an essential part of society and it is a reflection of societal norms and social morals. Currently societies are dominated by the heterosexual norms and has had impediments in recognising different family units.[35] The norms within societies are changing in time and become more liberal and also it has affected the same sex couples they have enjoyed the recognition their family rights but there are still inconsistencies to which level the countries offer the protection to their family.[36] As discussed before various human rights mechanisms promote same–sex relationships through marriage or other arrangements and the increasing numbers of states have followed the same paths by amending their legislation. This is the competence of the states that they can regulate the family law. The competence of the European Union in this matter is minor as it can act on behalf of its competence given by the Treaties.

To illustrate the problems that LGBT community faces it is important to look at the societies themselves and the historical background. The satellite states in

[28] *X, Y and Z* v *The United Kingdom*.
[29] *Slivenko* v *Latvia* at § 97; *Senchishak* v *Finland* at 54-55.
[30] *Boughanem* v *France*.
[31] *Vallianatos and oth* v *Greece,* at 49, 73; *Oliari and oth*. v *Italy* at 169.
[32] *Marckx* v *Belgium*.
[33] *Shalk and Kopf* v *Austria*; *Vallianatos and oth* v *Greece*.
[34] *Pajić* v *Croatia*; *Taddeucci and McCall* v *Italy*; *Orlandi and Oth* v *Italy*.
[35] Hodson (2004).
[36] Lee (2010) at 17-18.

Eastern Europe were officially sovereign, but in actuality the USSR had the political, economic and military control over these satellite states.

Poland and Estonia are part of the East European countries built upon democratic values and promoting equality and freedom to its citizens. Religion in Poland is officially separated from the state but the society is highly influence by the Catholic Church.[37] The concept of family unit is very traditional and it is confirmed by the Constitution of the Republic of Poland which was enforced on 17th of October in 1997.[38] According to art 18 of the Constitution, marriage is a union between man and a woman therefor also Polish marital law sees the concept of marriage as a heterosexual union.[39] According to Takács, Dombos, Mészáros & Tóth religion is the most important factor in reference to tolerance towards sexual minorities.[40]

Estonian constitution art 27 states that the family is a foundation of the society and is under protection of the state. It sates also that "spouses have equal rights" but does not specify if the spouses have to be from opposite sex. More specific rules are written down in the Family Act.

As members of the European Union Poland and Estonia have to follow the Charter of Fundamental Rights of the European Union. Poland has acceded to Protocol no. 30 on the application of the Charter of Rights to Poland which gives a chance to opt out and can limit the application of the Charter. As EU law is supranational law the Charter should prevail over national legislation but according to the art 8 of the Constitution of Poland, the Constitution should be supreme law and the provisions should apply directly.[41]

Moreover, there has been argued whether the Protocol should be interpreted in the way that it should not contradict the moral values of the country. This applies then also to the provisions of family law and LGBT rights.[42] As Noack and Cibanou write the Polish regions are not welcoming the EU rules.[43]

The concept of family unions in Estonia has changed from having only traditional marriages to decriminalising homosexuality and allowing registered partnerships.

There is still quite a big percentage of people (43%) who do not support the same sex attraction acceptable in Estonia.[44]

According to the 2021 survey for the first time, more than half of the respondents consider same-sex attraction completely or somewhat acceptable (53%).[45] This survey was conducted among the residents of Estonia and it is remarkable that acceptance has raised 12% compared to 2019. Estonian speaking population is more tolerant as 61% of those questioned accepted these relationships

[37]Slootmaeckers, Touguet & Vermeersch (2016) at 108.
[38]The Constitution of the Republic of Poland.
[39]Johnson (2015) at 64.
[40]Takács, Dombos, Mészáros & Tóth (2012).
[41]The Constitution of the Republic of Poland, Art.8
[42]Kastelik-Smaza (2018) at 104
[43]Noack (2019); Ciobanu (2020).
[44]Estonian Human Rights Centre (2022).
[45]Ibid.

but only 38% of those who speak other languages agreed with this statement. It is an interesting phenomenon to study why the society is divided in this question on the basis of language knowledge.

42% of respondents consider same-sex attraction completely or somewhat unacceptable. Differences in attitudes are mostly related to age, native language and level of education. Respondents mostly regard same-sex attraction as unacceptable because they think that it is abnormal or unpleasant. Remarkably, according to the survey conducted by Turu-uuringute AS in 2012 "Society's attitude towards homosexuality as a whole is considered less tolerant than it really is"[46]. This raises hope that there is increasing possibility to improve the legal norms too that would facilitate the rights of same sex couples.

Regarding the rights of LGBT 72% of Estonian speaking agreed that same-sex partners should have the opportunity to officially register their partnership and 53% of Estonian speaking persons agreed that same-sex partners (gays and lesbians) should have the right to marry each other. There is more tolerance in Estonian society for registered partnership but less tolerance for the marriage.[47] It shows that the traditional conception of marriage is still strongly supporting the marriage between man and a woman. Article 26 of the Estonian constitution states that "Everyone has the right to the inviolability of private and family life. State agencies, municipalities and their officials shall not interfere with the family or private life of any person, except in the cases and pursuant to a procedure provided by a law to protect health, morals, public order, or the rights and freedoms of others, to prevent a criminal offence or to apprehend a criminal offender." Marriage is regulated in Estonian Family Law Act and it was passed 18.11.2009[48]. According to this act art 1 a marriage in Estonia is contracted between a man and a woman and the basic principle is that the adults can get married.

In Poland the law governing the family came into force 1964.[49] According to art 1 of Family and Guardianship Code the marriage is concluded between a man and a woman. Polish law does not recognise the same-sex marriages and partnerships. Still the couples can cohabit although the official marriage and partnerships are not allowed. According to Article 115(11) of the Family and Guardianship Code, "A next of kin is a spouse, an ascendant, descendant, a brother or sister, relative by marriage in the same line or degree, a person being an adopted relation, as well as his spouse, and also a person actually living in cohabitation."[50] According to this provision persons can enjoy informal romantic relationships and live in the same household. Furthermore, discrimination is forbidden by the art 32 of the Polish Constitution.[51] In this comparison Estonia and Poland in the normative viewpoint are similar. But the government policy is different and depends a lot from the governing political party views.

[46]Turu uuringute AS, 2012.
[47]Ibid.
[48]RT I 2009, 60, 395
[49]The Family and Guardianship Code 1964, Poland.
[50]The Penal Code Act of 6 June 1997
[51]Konstytucja Rzeczypospolitej Polskiej of 2 April 1997

Survival's Pension as an Example of Unequal Treatment

One field, where the unequal treatment of persons in legal marriages and cohabitation of same sex couples leads to discrimination, is the survivor's pension which by the law cannot register their marriage and become legally spouses is the field of survivors' pension. Survivor's pension is the benefit that the survived spouse may be entitles after the other spouse has died. In Poland these pensions are regulated by the Act on Retirement Pension.[52] The pensions are granted to a survived spouse due to the deceased spouse's contributions paid into the pension scheme for a sufficient amount of time.[53] In order to receive the survivor's benefits certain conditions should be met. The survived spouse should be 50 years old at the time of death of the deceased spouse.[54]

In Estonia Right to receive survivor's pension arrives upon the death of a provider, family members who were maintained by him or her have the right to receive a survivor's pension. The right of the provider's children, parents and the widow or widower to receive a survivor's pension does not depend on whether they were maintained by the provider or not.[55]

In both cases, the pensions are available to persons that have been married. However, since Poland and Estonia do not recognise same-sex unions, and the cohabitating partners have limited rights, the same-sex partners do not enjoy similar rights as the couples in heterosexual relationships.

CJEU has expressed its opinion in some cases like in *Tadao Maruko* v *Versorgungsanstalt der deutschen Bühnen*[56] case. In this case the applicant was Mr. Maruko who was homosexual and in registered partnership with the other man. His partner was a member of the German Theatrical Pension Fund (hereinafter, "the Pension Fund") and had contributed voluntarily to that institution during the periods when he was not obliged to be a member. After deaf of Mr. Maruko's partner, Mr Maruko applied for the widower's pension. The Pension fund rejected the application on the grounds that only spouses were entitled to such benefits. The decision was challenged in the Bavarian Administrative Court, Munich Germany. The main claim was that there is discrimination on the grounds of sexual orientation and that such treatment infringed the principle of equal treatment, since German legislature has positioned life partnership and marriage on the equal footing. The partners were equally committed to the lifetime union and they also accepted responsibilities towards each other. The Administrative Court referred 3 questions to the ECJ.

First the Court asked whether the Directive 2000/78 could be applied and can the survivor's pensions be regarded as "pay" within the meaning of Article 3(1)(c) of the Directive. The Court identified by referring to the case law of the Court, that benefits payable to survivors come within the scope of the concept of "pay".

[52]Act on retirement pension schemes for workers and their families (Text No. 267). Dziennik Ustaw, 1982, Texte 267, ISN:POL-1982-L-10639
[53]Ibid
[54]The Survivors' Pensions Act (No. 38 of 1969)
[55]Pensioniseadus §20 lg1.
[56]C-267/06.

Second the Court wanted to know, whether the provisions of Article 1 and Article 2(2)(a) of the Directive 2000/78 excludes provisions such as in the Pension Fund, under which a spouse that lived in life partnership, cannot receive survivor's benefits, equivalent to those offered to a surviving spouse. Answering this, the court concluded that there is discrimination and the case falls within the scope of Directive 2000/78. And thirdly they wanted to clarify if the combined provisions of Article 1 and 2(2)(a) of Directive 2000/78 excludes provisions such as presented in the Pensions Fund, is the discrimination on the grounds of sexual orientation permitted in the light of Recital 22 in the preamble to the Directive. According to the ECJ the widower's pensions should be classified as pay within the meaning of article 3(1)(c) of the Directive. To the next question, the Court ruled that, because the Directive's aim is to combat certain forms of discrimination in the field of employment, and when the situation of surviving life partner is comparable with that of a spouse, the denial of a survivor's benefit to life partners can be considered as direct discrimination within the meaning of articles 1 and 2(2)(a) of the Directive. Regarding the third question and Recital 22 of the preamble to the directive, which states that "Directive is without prejudice to national laws on marital status and the benefits dependent thereon", the Court ruled the following: "The Court acknowledged that the civil status and its benefits fall within the competence of the Member States, but the decisions must still comply with the principle of non-discrimination. Therefore, the Recital 22 could not be taken into account."[57]

Another relevant case that needs to be taken into consideration is *Jürgen Römer* v *Freie und Hansestadt Hamburg*[58], where Mr.Römer was previous employee enjoying his retirement. Since 1969, he has been living with his partner Mr Alwin Ulrich. In 1999, they registered their partnership in the City of Hamburg using the available registration scheme and in 2001, they entered into partnership. Mr Römer requested for higher amount of his supplementary retirement due to his change of his status. However, his request for higher amount was denied and the case was brought later on before the ECJ for interpretation of Directive 2000/78. In this case the Court decided that same-sex couples should have equal access to pensions in the same way as heterosexuals under the Directive. The Court ruled that "if a member state has a registered partnership putting same-sex couples into a legal position comparable to married couples, exclusion from marriage benefits constitutes direct discrimination".[59]

Conclusion

The research shows that the family law in general is still mainly regulated by the EU member states and there is little coordination between the states regarding rights of the same sex couples. There is still a strong need to create common rules

[57]Ibid
[58]C-147/08.
[59]Ibid

based on the values of European Union to protect the same sex couples. Court of Justice of European Union has taken a clear stand for the protection of the same sex couples and their right to live together in another EU member state. This nevertheless does not change the fact that there are still many EU states that do not accept same sex partnerships or these partnerships are not equal to marriage. It leads to an unequal treatment in cases of inheritance or in custody of child care and also the survivor's pension.

Last decade countries of European Union have steadily recognised some forms of same-sex unions. But there are still some European states that do not recognise the marriage nor the registered partnerships. However, the number has increased starting from 2005. Now in most countries the same sex marriage or registered partnership is allowed. It is an important development as the number of same-sex relationships is also increasing.

The Lisbon Treaty and the Charter of Fundamental Rights and the European Convention of Human Rights are the main instruments that set the requirements for the protection of humans, promotion of equality and stabilising the principle of non-discrimination on all areas of life for all citizens of European Union.

Despite this there are still problematic issues due to the inconsistent application of the EU legislation and lack of coordination. These inconsistencies can especially be witnessed in the field of employment, where persons do not receive the equal payment from the pension funds, even in cases where the state has recognised some forms of same-sex unions. Furthermore, the protection cannot be extended to those couples that live in a state where same-sex unions are not recognised. This leads to the violation of equal treatment. *Tadao Maruko* v *Versorgungsanstalt der deutschen Bühnen*[60] and *Römer* v *FHH*[61] cases have clarified some situations in the case of the direct discrimination on the grounds of the sexual orientation. However, this analysis has also shown that within the EU the inequality still exists. The fact that same-sex couples are not entitled equally to the survivor's pensions is more about the discrimination rather than the preservation of family life.

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Duty, Human Rights and Wrongs and the Notion of Ubuntu as Humanist Philosophy and Metaphysical Connection

By Angelo Nicolaides[±]

This article reviews and discusses the issue of one's duty, rights and wrongs within the Humanist African Philosophy of Ubuntu. 'Ubuntu' is an Nguni Bantu term denoting "humanity". It asserts that "I am because we are" and expresses of having a sense of "humanity towards others" which in the Zulu language is stated as "umuntu ngumuntu ngabantu". The roots of African Life, culture and value systems in Southern Africa in particular are found in the philosophy of Ubuntu but they have also been partially influenced by specifically the Judaeo-Christian tradition. Ubuntu considers human rights as moral principles or norms that designate certain standards of human behaviour that are required in dealing with other human beings. One's rights and duties in society are grounded in a multifaceted philosophy because of the moral aspects which are a mixture of heritage and tradition. Ubuntu avows that society, and not any transcendent being, provides human beings with their basic humanity. An authentic individual human being is part of a complex and important relational, communal, societal, environmental and even mystical world. One's actions are correct to that extent that they are a matter of living harmoniously with others and doing one's duty while acting ethically and within the ambit of the law, and thus demonstrating reverence towards others in communal associations. It calls for apology, and forgiveness when doing something wrong and ultimately reconciliation with guilty or injured parties.

Keywords: *Ubuntu; Rights; Wrongs; Duties; Metaphysics; African humanism*

Introduction

It is invariably the case that all individuals are products of particular societal structures and systems and owe much of their identity to the community in which they live and to their cultural heritage. Individuals who live in the Western Christian world generally tend to base their ethical beliefs and their behaviour on the Decalogue (Ten Commandments) that were handed to Moses on Mount Sinai. Ethics for them is then a series of laws and principles that individuals should try to live by, but often fail to do. There is thus a profound connection between ethics and the Abrahamic religions' Holy Scriptures of Judaism, Islam and Christianity and also the ethics of great Western philosophers, predominantly from Classical Greece such as Aritotle, Plato and Socrates.[1] Aristotle asserted that the highest good

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[1]Nicolaides (2014).

(eudaimonia) of people is a life of cogent activity of the soul in harmony with virtue and this aligns with Ubuntu. Lutz maintains that Confucian ethics shares the Ubuntu ethics perspective that the family is a dominant building block of society[2].

In Africa, there is an assortment of values and practices that people view as making them authentic human beings who have a role to play in a grander and important relational, communal, societal, environmental and mystical world. All societies are forged on a set of values and norms through which people are expected to live. These norms allow for the creation of principles, conventions, ethical and cultural values, and they emerge as a philosophy aimed at guiding human existence in an ethical direction. This is what Ubuntu entails[3]. Yawson states that Ubuntu is an auxiliary to a diverse approach of leadership which is an Afrocentric leadership style which is the principal obligatory style of leadership in Africa[4]. In African societies, the values generally championed are those which align with the values of the local community as a set of commonly understood moral principles and conventions which are grounded on realistic and rational judgments of what moral conduct entails. The values passed down through the generations become very robust determining factors of attitudinal and behavioural change and thus necessitate recognition as being significant in sustaining efficacious human rights observances. For many indigenous African communities, their values are traditionally based and generally derived from their own unique values, in this case the notion of Ubuntu[5].

Ubuntu has long existed in oral literature and appeared in South African written sources from the mid-19th century. Ubuntu is still prised and is not simply a relic of the past in any sense[6]. The term covers ideas relating to human nature, humanness, virtue, goodness, and compassion[7]. From around the 1970s, Ubuntu began to be designated as a specific kind of African humanism. Mafunisa asserts that Ubuntu is a divinely inspired positive action and it allows Africans to function according to socio-cultural norms and values which are founded on the truth of one's inner being[8]. An ethical action in Africa, is one which is considered to be the idyllic action by society[9]. In observing human rights one is expected to treat all people as possessing dignity, as "exhibiting a superlative non-instrumental value. Alternatively, a human rights violation is a failure to honour people's special nature, often by treating them merely as a means to some ideology such as racial or religious purity or to some prudentially selfish end"[10]. Gyekye mentions that African ethics is that which 'refer[s] both to the moral beliefs and presuppositions of the sub-Saharan African people and the philosophical clarification and

[2]Lutz (2009).
[3]Mkabela & Luthuli (1997).
[4]Yawson (2017).
[5]Mkabela (2014).
[6]Ramose (2001).
[7]Gade (2011).
[8]Mafunisa (2000).
[9]Gyekye (2010).
[10]Metz (2011).

interpretation of those beliefs and presuppositions'[11]. Ubuntu incorporates moral values such as inter alia humility, conformity, and responsiveness, which regulate how an individual is viewed within indigenous African communities. In an African milieu a sense of duty and the responsibilities of individuals are more dominant than the notion of individual human rights as in the West.

Ubuntu is a plausible African moral theory and is compatible with various ethical theories including the common good approach, the utilitarian approach, the rights ethical or deontological approach, the justice or fairness approach and the virtue approach. The greatest parallel is with the common good approach which is endorsed collectively in a range of common values and moral or ethical principles that exist in virtually all societies. Societies across the globe share in common what are considered to be either positive and negative values. Charity begins primarily with the family, and it fundamentally divulges the primary nature of God's existence within people[12].

The Issue of Rights

Human rights are intrinsically a set of norms or moral principles of shared standards of acceptable behaviour by individuals and groups. In terms of national and also international laws, these rights are universal and protected and are inalienable fundamental rights[13]. Ubuntu, Judaism, Islam, Buddhism, Hinduism and Christianity all call for consideration to be shown towards others and their human rights for the perpetuation of actions which are steeped in moral integrity. It is only through others that a person can be considered to be a human being and one's full acceptance of this and positive participation are then imperative. All people need to be treated inclusively and have their proposals and thoughts carefully considered, and in particular, they should be treated with the utmost human dignity and afforded their human rights to the full extent of the law. Sound ethics necessitates that all individuals have virtues and a set of principles or standards of what is considered to be right or wrong and they have the capacity to make libertarian choices[14].

Eze, states the fundamental issue of Ubuntu is that a person becomes a person through other people and thus one's humanity comes through recognising the 'other' as a different and unique being. Humanity is thus not entrenched in one's persona solely as an individual but is rather co-substantively conferred upon the other and oneself and this requires sustaining[15]. African society has for the most part developed its ethics based on customs and on what is believed to be moral or immoral by various cultures. African societies tend to afford the family the highest standing and it is families that are considered to be the core model relating to the

[11]Mulemfo (2000).
[12]Smith (2005).
[13]Mkabela & Luthuli (1997).
[14]Smith (2005).
[15]Eze (2010).

concept of community[16]. It is also the case that Ubuntu imbues all persons with unique intrinsic worth as they have a capacity to relate to fellow human beings in a communal sense but this is not necessarily how they are treated in return - there is thus a possible disjunction. A person is considered to be spiritually consequential since all people and even the elements of the natural environment possess a life/vital force and all these diverse forms of life are interrelated. People thus complement everything else that exists[17].

The values inherent in Ubuntu are a fundamental part of that value system which is contained in the South African Constitution and speak inter-alia notions of human dignity, equality, the advancement of human rights and freedoms[18]. Ubuntu also stresses that the greatest good should be created for the greatest number of people and the notion of ethics is evaluated as a duty and not as a right, and so human welfare is stressed first and foremost[19].Strangers as well as all members of a community need to be treated respectfully. Kindness is not prerequisite of community development but tend to guard against instrumentalist relationships. However, it may often be the case that genuine kindness may leave one vulnerable to those who harbour ulterior motives. There is additionally a problem in that ubuntu has an association with the early pastoral societies relationships with ancestors and also has a collectivist orientation, and some suggest that it necessitates a "[…] group-think, uncompromising majoritarianism or extreme sacrifice for society, which is incompatible with the value of individual freedom that is among the most promising ideals in the liberal tradition"[20].

Of great metaphysical importance is the question as to whether or not a human being is self-sufficient in their daily existence and yet still depends on his or her relationship with other people. We also need to ask if a person has an ontological priority over the community in which they live or whether they are communitarian beings[21]. The African philosophy welcomes consultation and inclusivity from all role-players from all walks of life, and this can be translated into any organisation's strategy. Consequently, the development of practices, policies, procedures and processes must all be aimed at developing people and this includes in the institutions in which they serve[22]. Rights are considered to be ego-centric in relation to the home-grown notion of a person as a being of moral value. The common value takes precedence and this implies that moral duties and individual rights should be assimilated. Respect is the notion that is crucial in Ubuntu and this means that all people should be treated fairly since they have common human rights. Respect is shown by one being humble, understanding and empathetic towards others. Harmony and equilibrium are vital in collective whole.

[16]Shutte (1993).
[17]Mkabela & Luthuli (1997).
[18]Constitution of the Republic of South Africa, 108 of 1996.
[19]Griggs & Louw (1995).
[20]Metz (2011).
[21]Gyekye (2000).
[22]Mbigi & Maree (2005).

One's Duty

Ubuntu emphasises that it is a society and not any transcendent being which ultimately gives people their humanity. This essentially then emanates from meeting the requirements to be accepted as being part of for example, a tribe. It is deemed proper to treat one with an Ubuntu spirit and to deny a family member or one from a local community Ubuntu is considered to be an extremely immoral act[23]. This is because African society generally embraces communalisation and all human life has a strong communitarian association. According to Ubuntu, one is mandated to advance one's level of humanity by honouring and sharing a sense of identity and solidarity with others who possess dignity by virtue of their characteristic capacity to participate in such relationships. So when there are human rights violations "these are serious degradations of this capacity, often taking the form of very unfriendly behaviour that is not a proportionate, counteractive response to another's unfriendliness"[24]. Ubuntu incorporates a shared human partisanship that endorses a community's good through an unconditional acknowledgement and also a general appreciation of individual exceptionality and uniqueness[25]. For most Africans, freedom exists in an assortment of privileges and exclusions that derive from the notion of a collective life and how one is inclined to handle their responsibilities as members of the community at large. For example, the crux of education is family, community, societal and environmental well-being which is one's duty[26].

Ubuntu directs and promotes much African education, and seeks to decolonise it from western educational paradigms which have been in place for a century or more[27]. Ubuntu education utilises the family unit, community, society, environment and even spirituality as sources of knowledge but correspondingly as teaching and learning media[28]. Ubuntu education requires that learners become critical about their social conditions and strive to enhance them. Interaction with others, participation in communal activities, recognition, respect and inclusion of others are all important aspects of a desired education. Teaching and learning activities should include groupwork and desired community supportive approaches. In fact, the very objectives, content, methodology and outcomes of education need to be fashioned by Ubuntu. Tang asserts that Ubuntu "implies that everyone has different skills and strengths; people are not isolated, and through mutual support they can help each other to complete themselves."[29]

The nuances of African ethics and Ubuntu *per se* are important to comprehend, since it is the peculiarities that should be reflected in all African leadership decision-making processes where the notion of collective management is of supreme importance. It is one's duty to serve as an effective and virtuous leader

[23]Ramose (2003).
[24]Metz (2011).
[25]Eze (2008).
[26]Hapanyengwi-Chemhuru & Makuvaza (2014).
[27]Hapanyengwi-Chemhuru & Makuvaza (2014).
[28]Mugumbate & Chereni (2020).
[29]Tang (2015).

and this must be at the core of every effective organisation. Effective leaders who are duty bound are inclined to be those who are inspiring role models of virtue, and sound ethical and moral leadership. Ubuntu thus views leadership as a moral service and duty and it includes a transformational element. This implies that in people should be true to themselves and endeavour to exist in truth and sincerity, while being bereft of pretence and narcissistic obsession with their egos.

In an African context, the values that should be championed by leaders include legitimacy in their particular role, the desire to develop a group and promote the growth of individuals, a community focus, joint decision making in a spirit of sharing values, the promotion of dignity and respect in the culture of an organisation and in its climate, diversity and management and the sharing of values in an environment where solidarity is evident[30]. From a political philosophy vantage point, Ubuntu as duty encourages community equality, and the distribution of wealth. The socialisation aspect assumes that in a community, the population within which an individual shares empathy, collective prosperity is the ultimate goal.

The five pillars of Ubuntu involvement include the family, community. society, environment and spirituality[31]. This implies that Ubuntu spirited leaders also require a vision and be proactive in how they lead and value the interrelation they share with society. An Ubuntu oriented leader will invariably tend to project honesty and total consistency and should be bent on endorsing and supporting an environmental stance in which ethical practice is a given since it is one's duty to preserve the natural environment. The spirit of Ubuntu is thus contrary to the erosion of communal values by corrupt leaders. If a person displays an egoistic propensity he or she is nor viewed as a person. When unethical leaders furtively acquire any assets, special privileges or advantages, those who serve under them habitually tend to become disloyal to them or the organisation in which they serve since they have abandoned their duty to serve ethically[32]. Where a leader is corrupt, his or her imperfections should be accepted by the community and it is up to the community to always pursue a path to redeem the that person.

It is clear that Ubuntu concentrates not only on rights but especially on one's duty when it comes to bearing in mind the well-being of others in society[33], so that rights of all stakeholders, both the individuals and also the collective, need to be dealt with in an ethical way[34]. Ubuntu is against materialism and individualism and valued in the West and it looks at an individual person holistically, not only their financial standing. It views people as unique beings with worth irrespective of social status or wealth. This is of course the antithesis of the western paradigm in which human beings are commended to act independently and thus as separate entities which are free to act as they wish irrespective of the damage they may

[30]Van der Colff (2003).
[31]Mugumbate & Chereni (2020).
[32]Van Rensburg (2007).
[33]Mbigi & Maree (1995).
[34]Ozar., Berg, Werhane & Emanuel (2000).

cause both to themselves and also to society at large. Ubuntu serves the critically important role of sustaining the integrity of interconnected life forces[35].

The South African government's has a white paper which recognises that Ubuntu expresses "[…] each individual's humanity through his/her relationship with others and theirs in turn through recognition of the individual's humanity."[36] Whether Ubuntu exists in practice is debatable given that corruption is either visible or hidden in Africa as needed policies are often neglected by politicians due to their focus on making more money, inspired by an ethic of self-preservation at the expense of others[37].

Mboti contends that the normative definition of Ubuntu, and the formulation of moral rules that have direct implications for what human actions, institutions, and ways of life should be like, is still contentious and that Africans are in any event generally interdependent and seek harmony in all their dealings[38]. Metz provides three chief reasons why Ubuntu sometimes receives censure. He argues that it is considered to be vague as a philosophical thought and does not possess a firm framework; In addition, he maintains that due to its collectivist orientation there is some danger of foregoing individual freedoms for the sake of society and that as a philosophy it is applicable and useful only in traditional African societies[39]. Ubuntu fairness has elements which diverge from what exists in western societies. It values mending damaged relationships and requires compensation for damage[40].Spiritual beings and community members can caution and even punish one for misdemeanours perpetrated against a community member.

Discussion

In Africa one's destiny is inexorably linked with a personal life existing in a community within which a person is interconnected. A community is realised through individual people who collect together. In this arrangement, people are communal entities and have social interactions with others with whom they are linked culturally and share common interests, values and even objectives. In such a community, the individuals share a range of emotive attachments and are willing to stand together to defend the common interest. The collective is supportive of the notion of rights although generally speaking, the rights are borne by individuals. Nonetheless, if one takes a Kantian critical philosophy view, Ubuntu aligns to an extent with the Categorical Imperative which is a core principle of morality.

Behaviour is absolute for all agents, and the validity is not contingent on any desire or end.

According to Kant and his deontological moral system, responsive beings occupy an exceptional place in creation, and morality is an imperative, or definitive

[35]Mkabela & Luthuli (1997).
[36]Republic of South Africa, Government Gazette, 02/02/1996. No.16943.
[37]Nicolaides (2016).
[38]Mboti (2015).
[39]Metz (2011).
[40]Metz & Gaie (2010).

commandment of reason, and it is from this that all duties and obligations derive. For him then an imperative is any proposition affirming a certain action (or inaction) to be necessary in a given situation. Kant stated "Act only according to that maxim by which you can at the same time will that it should become a universal law" is a logical statement and it articulates the condition of the rationality of conduct rather than that of its morality, which he expressed in another prescription: "So act as to treat humanity, whether in your own person or in another, always as an end and never as only a means."[41] In the Kantian theory is the understanding that persons have an exceptional worth because they have a strong capacity for autonomy, whereas in Ubuntu they do possess worth because they have the capacity to relate to others in a communal way and sound relationships are important.

Mangena states that the moral imperative of Ubuntu ethics identifies and values the importance of the exchange of ideas in the conceptualisation and organisation of society, and that the community is at the very heart of all moral considerations based on the idea of a communal or group rationality also termed as the Common Moral Position (CMP)[42]. Dei asserts that African ethics is to a large extent grounded on religion and that there is close and specific reference to "[…] the African conception of the triadic constitution of community as including the living, the living-dead and the yet to be born".[43] Etieyibo argues that there is a clearly humanistic approach to Ubuntu, through which the welfare, needs and security of the group are seen to be more important than anything and there is with a strong stress on sharing, consideration and empathy for others. Etieyibo says "your pain is my pain, my wealth is your wealth and your salvation is my salvation".[44] The standing and part played by elders is also considered to be of paramount importance in the conceptualisation and organisation of African communities. This is because the elders, due to their vast experience are perceived to be the custodians of the community's cultural conscience and it is ultimately they who forge and convey moral wisdom to the younger generation through folklores, proverbs and other knowledge tools[45]. Moral wisdom is dialogical and also spiritual in essence and the key stakeholders are the Creator, ones ancestors, and then the elders of the community and the younger generation[46].

Conclusion

In drawing to a close, it should be noted that irrespective of which philosophical trend one accepts, the golden rule applies to all that one should care for one's neighbour as one cars for oneself. Our task as human beings is to reaffirm

[41]Kant (1993).
[42]Mangena (2012).
[43]Dei (1994).
[44]Etieyebo (2014).
[45]Mangena (2016).
[46]Mangena (2016).

human dignity and worth and care for ourselves as well as others. The role of Ubuntu ethics in African society is important and its altruistic value focus is highly beneficial to harmony in society. It considers the interests of all role players and its collective worldview '*umuntu ngumuntu ngabantu'* is powerful in forging a sense of community, esprit de corps, compassion and sharing. The Ubuntu value system reinforces the significance of African indigenous principles and morals which allow individual human rights to increase in a community in which human dignity and worth are paramount and communality is stressed. It clearly stands at odds with the narcissistic ethic of self- preservation and egocentricism which is pervading western nations. This is not to say that such elements are absent in Africa. Ubuntu's support of human rights is noteworthy[47]. Any action is the right one if the objective is to live in harmony with others and positive relationships are highly valued. A person's driving ambition in life should be to become a truly human person[48]. An adherent of Ubuntu will possess a life view that is based on reflection and they will tend to evaluate and question their view while respecting those of others. They are righteous ethicists and not moralists who believe their life view is superior and that they indeed possess all the answers in life. They also endeavour to work within the existing laws, standards, frameworks and guidelines in their society and contribute positively to all the participants in the collective. Indigenous values as espoused in Ubuntu are contributory in sustaining sound cultural and ethical standards.

The indigenous values provide a sense of direction or a moral compass in living a life of value. We should re-awaken a seemingly lost vision of altruism and strive to become concerned human beings given that our position in contemporary civilisation is threatened by increasing narcissistic tendencies which will ultimately lead to our self-destruction. Ubuntu is a poignant paradigm for positive and valuable human interactions in terms of which both individual and communal life can benefit. Thus, through achieving the status of true personhood integrated into society as proposed by Ubuntu, we can contribute positively towards the common good and global sustainability.

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Distributive Justice Narratives among Different Ethnic Groups in the Niger Delta Post-Conflict Peacebuilding Processes

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Oil exploration and exploitation is characterised with inequality, marginalisation, neglect, divide and rule in the Niger Delta, Nigeria. There are different ethnic groups in this region. It worrisome to note that one ethnic group is favoured above others when it comes to the distribution of oil wealth. Distributive injustice gives room for lack of cohesion and unity among the inhabitants of the Niger Delta region. Policy makers, peace entrepreneurs, government, and international oil companies failed to realise effects of distributive injustice on peacebuilding processes in the Niger Delta. This article therefore, sets to identify reasons for protracted Niger Delta conflict. It sets to examine the nature of distributive injustice in the region. It also examines the impacts of distributive injustice on ethnic relations in the region. It examines how ethnicity brings about distribute injustice in the Niger Delta. This paper posits that resolution of ethnic divisions would lead to enduring peace in the Niger Delta. Distributive Theory is the theoretical explanation adopted in the study. The theory pointed out that equity, equality and fairness will reduce inequality in the distribution of oil wealth in the region. The total number of participants in the study was seventy-two. It was found that the general demands of the inhabitants of the Niger Delta could be stated as sharing of political offices, the creation of State structures, the creation of Local Government Headquarters, apology, oil bloc allocation, more compensation and the monetisation of benefits but distribution of these were ethnic based. Most ethnic groups in the region were neglected, abandoned, and discriminated against. Distributive justice including fairness, equity, and equality should be the focus of socio-political actors in order to ensure enduring peace in the Niger Delta, Nigeria

Keywords: *Distributive, Justice, Conflict, Oil, Ethnicity, Conflict, Peacebuilding*

Introduction

Distributive injustice by major actors in oil exploration and exploitation has been the major reason for the Niger Delta conflict. The distributive injustice is reflected in the distribution of oil wealth, socio-economic goods in the region. Most findings in the literature failed to look at a narrative such as ethnicity, as a major issue in the Niger Delta conflict. The Niger Delta is located in the South-South geo-political zone of Nigeria. It comprises nine States of the 36 States of Nigeria. The States include: Abia; Akwa-Ibom, Bayelsa, Cross-River; Delta; Edo;

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Imo; Ondo and Rivers. The Niger Delta region comprises several nationalities, including, Ogoni, Ikwere, Ekpeye, Ogba, Egbema, Engenes, Abua, Isoko, Urhobo, Itsekiri, Kwale and others[1]. The region covers the area of about 70,000 square kilometres with an estimate of over 31 million people of which 16,092,797 are males and 15,131,780 females.[2]

In the Niger Delta region, the dominant occupations are farming and fishing[3]. There are oil mineral deposit and other natural resources in the region, which include timber, cocoa, rubber, coal and tin[4]. The Shell-BP started oil exploration at Oloibiri in the Niger Delta in 1956[5]. As of January 1, 2012, Nigeria's oil reserves stand at 36.2 billion barrels (5.61×10^9 m^3). The Niger Delta region produces one fifth of world oil and gas, making Nigeria the 6th largest oil producing nation in the world and Africa's biggest oil producer. The proceeds of oil production in Nigeria largely end up in the pockets of a few cabals[6]. According to Idoko[7] the ''black gold'' has become a ''cabal gold'' in the hands of few who hold political power. The Niger Delta region is affected by lack of security of life and poverty, as well as a lack of infrastructure, wanton ecological damage, theft and unjust distribution of revenue from the sale of oil. Ekpolomo said that conflict in the Niger Delta is as a result of ethnicity, politics of corruption and embezzlement of funds by the government officials, and apathy by the Federal Government, multinational oil and gas companies when it comes to the development of the region[8].

This study examines ethnicity as a major factor in the Niger Delta. It examines how ethnicity brings about distributive injustice in the Niger Delta. This paper posits that resolution of ethnic divisions could lead to enduring peace in the Niger Delta. This paper is divided into sections and subsections. Section One provides introduction while section Two explains distributive justice and ethnicity. Section Three provides the contextualisation of the study. Section Four examines different dimensions of the conflict. Section Five consists of method while the Sixth section discusses the findings. The final section provides the conclusion which sees ethnicity as an important narrative in the quest for the Niger Delta conflict resolution.

Contextualising the Niger Delta Conflict

The history of the Niger Delta conflict can be traced to the period of amalgamation, by the British of the Southern protectorate, the Northern protectorate and the Lagos colony. According to Olukoshi & Laakso[9] the Colonial

[1]Ajodo-Adebanjoko (2017).
[2]Egere (2021).
[3]Akintunde & Hile (2016).
[4]Kew & Phillips (2013).
[5]Anifowose, Lawler, Horst & Chapman (2008).
[6]Kalejaye (2012).
[7]Idoko (2013).
[8]Ekpolomo (2015).
[9]Olukoshi & Laakso (1996).

Government's Mineral Ordinance of 1914 (section 1) stated that the entire property and control of all mineral on the land, and under the rivers, streams, water courses in Nigeria, is and shall be vested in the colonial power. The ordinance was replicated in the Nigerian Independent Constitution. The ordinance provides that every piece of land within the geographical entity called Nigeria belongs to the Federal Government of Nigeria and must be made available for use whenever needs arise. The law removes control over the land and its resources from the Niger Delta inhabitants.

The Niger Delta environmental and human rights abuses led to the establishment of the Henry Willink Commission by the colonial government in 1957 to inquire into the minority groups' concerns and to allay their fear. The commission recommended, among other things, that the Niger Delta region be treated as a special area for development. The committee's recommendations led to the creation of the Niger Delta Development Board (NDDB) in 1960, which was created to address to the development issues in the region. Lack of funds and political turmoil marked its operations[10]. The same fate befell the development of the Niger Delta in 1976 when eleven river basin authorities were created in the country, and the Niger Delta River Basin Authority (NDRBA) was deliberately starved of funds because of the fear that such funds may be diverted to sponsor unrest in the region[11]. The oil Mineral Producing Area Development was also created (OMPADEC) in 1992, and the Niger Delta Development Commission (NDDC) in 2000. They were all created for the socio-economic development of the Niger Delta region. Okpongkpong notes that the initiatives generally failed due to ethnic politics in the country, and they were also used to prevent the Niger Delta indigenes from occupying sensitive political positions in the country[12]. According to Jekayinfa[13] ethnic tension began in the Niger Delta during the colonial era when one ethnic group was favoured over others. This is reflected in the struggle for socio-political economic development among the various ethnic groups. Ethnicity has become a major problem and has adversely affected issues concerning Niger Delta development. Arguably, and given what has happened historically, the three hegemonic groups are usually united to conspire when it comes to the issues concerning the Niger Delta. The groups are the Yoruba, Hausa and Igbo. They usually pay ''lip-service'' to the development of the region. This is evident in the petroleum industry bill presented before the National Assemblies, which until today has not passed into law.

The politicisation of the development of Niger Delta also surfaces in the derivation formula, which allocates certain percentages of total oil earnings to each State in the region from the federation account. Anugwom[14] notes that there was a battle about the oil derivation formula between the Nigerian legislative arm of government and the Niger Delta people before a 1.5% special fund increment was approved in 1980 for the development of the oil mineral producing areas. However,

[10]Ajodo-Adebanjoko (2017).
[11]Nuoli (1978).
[12]Okpongkpong (2003)
[13]Jekayinfa (2002).
[14]Anugwom (2001).

the oil revenue sharing formula has been the subject of much controversy even before Nigerian independence. Ojo notes the oil revenue sharing formula in the pre-independence era[15]. In 1958, 50% of oil derivation was allotted to each State in the region; in 1968 it was reduced to 10%. The status quo was maintained until 1999 before it was increased to 13%. Attempts to increase it beyond 13% were rebuffed by the legislators from the Northern part of Nigeria. The argument was that the oil belongs to the entire country but the land belongs to the indigenes of the Niger Delta[16]. This position is buttressed by the existing Land Use Act, which was inherited from the colonial masters[17].

To compound the problems of the Niger Delta inhabitants, many leaders have also called for an end to the derivation formula. The Governor of the Central Bank of Nigeria, Sanusi Lamido Sanusi in an interview with the Financial Times, in 2012 noted that Boko Haram, poverty and the general unrest in the Northern part of the country is a result of the lower sums they get from the Federation Account compared with the oil producing States which get 13% derivation every month. The same position was echoed by the Niger State Governor Aliyu Babangida[18]. He called for a review of the revenue sharing formula to 'reflect current realities'. He went further to say that the North, apparently is beginning to see the extra funds allocated to oil producing States under the 13% derivation allocation as an injustice that ought to be redressed, and a direct cause of the Boko Haram onslaught. The Governors from the Niger Delta States saw these provocative statements from two leading Northern elites as political manipulation and calculated attempts to put the Niger Delta in perpetual poverty. This reflects the political tension between the North and the Niger Delta. Makinde & Adeyoke[19] note that the Oil Pipelines Act 1996, the Petroleum Decree of 1969, the Land Use Decree 1978, the Exclusive Economic Zone Act 1979, the Oil Mineral Pipeline Decree 1990, the Petroleum Decree 1991, the Land (title vesting) Decree 1993, the National Inland Waterways Decree 1997 and other relevant legislations, including those dealing with revenue allocation, are all offshoots of colonial ordinances. These laws taken together vest all the land where oil is extracted, produced, transported, stored, and the proceeds thereof, in the State and are therefore sources of conflict in contemporary times. However, the indigenes of where oil is found can only be paid compensation and the amount to be paid as compensation cannot be determined by the Niger Delta people[20].

The inhabitants of the region formed social movements to address environmental and human rights abuses. The Immigration and Refugee Board of Canada (1998) notes that the Ijaw National Congress (INC) was formed in 1991 to challenge environmental and human rights abuses in the region. The congress came together to bring Ijaw nationality under one fold, to forge ahead politically, economically

[15]Ojo (2010).
[16]Iyobhebhe (2005).
[17]Mbanefo & Egwaikhide (1998).
[18]Wallis (2012).
[19]Makinde & Adeyoke (2007).
[20]Omorogbe (2003).

and socially within the Nigerian federation. The aim of the organisation is to achieve peace and justice for the Ijaws nationwide.

Human Rights Watch[21] reports that December 1998 was critical for the Ijaw. The day was a political turning point in the life of the region. The Ijaw Youth Conference (IYC) is made up of all the Ijaw at Kaima. The conference was attended by Ijaw youth drawn from over five hundred communities, which represented over forty Ijaw clans. Representatives of twenty-five various organisations signed the memorandum that crystallised the Ijaw struggle for resource control and self-determination. According to Courson[22], IYC through lobby and petitions to the Federal Government demanded three contiguous, autonomous and homogenous Ijaw States namely: Bayelsa, Toru Ebe, and Oil River States along the coast of Niger Delta. This demand was largely borne out of the fact that the Ijaws, the fourth largest nationality in Nigeria, did not have any State of their own as noted above. Nwajiaku highlights that for political reason the Ijaw was divided into six States.[23] The other three major nationalities (Hausa-Fulani, Igbo and Yoruba) all have three or more States in the federation. Courson[24] notes that in 1996 the Administration of General Sani Abacha announced the creation of Bayelsa State for the Ijaw while creating more States and Local Government Areas in Nigeria. This was the same period Warri Southwest Local Government Area (LGA) was created with headquarters in Ogbe–Ijoh, and another LGA was created for the Ijaws in Ondo State with headquarters at Igbekebo. The LGA created in Ondo State for the Ijaw in Ondo State like the Warri South west and resulted in a violent conflict between the Ijaw in Ondo State and the Ilaje. The Ilajes argued that the Ijaws are tenants, and therefore should not be entitled to political self-rule. In short, the LGA headquarters re-relocation led to protracted conflict between the Ijaw and Itsekiri of Warri, and Ijaw and Ilaje.

The conflict in the Niger Delta can also be traced to the historical antecedent of the three major ethnic groups in the region (Imobighe, 2002). According to Okoh[25], there are some undisputed assertions in the literature on the rightful owner of Warri in Western Niger Delta. First, there are three ethnic nationalities in Warri that is Itsekiri, Urhobo and Ijaw. Second, the ethnic groups have lived in Warri for over a hundred years. Third, the three ethnic nationalities have no other place that can be called ‘‘home’’ and lastly, all the three ethnic groups claim to be the original settlers, i.e., the indigenous. According to Okwechime[26] most of the intra-tribal conflicts are basically about land and tenancy issues. These conflicts erupt as a result of oil fields located on particular pieces of land. The notables among such conflicts are: the Ayankoroma/Egbo conflict; the Gbekebo/Oforiagbala conflict; the Oboro/Olota conflict; the Ayakoroma/Okwagbe conflict; the Bomadi/Ororoama conflict; the Ogbe-Ijoh/Aladja conflict; the Okerenkoko/Ogidigben conflict; and, the Kpakiama/Ofoni conflict.

[21]Human Rights Watch (1999).
[22]Courson (2007).
[23]Nwajiaku (2005).
[24]Courson (2007).
[25]Okoh (2016).
[26]Okwechime (2013).

Political Conflict

The Nigerian general elections in 2003, according to Campbell (2008), heightened the already tense situation in the Niger Delta. The election provided an opportunity for the militarisation of the region. Politicians gave arms and ammunition to militant groups to further their electoral aims. The elections were marred by rigging and violence[27]. After the elections, the arms and ammunition ended up or stayed in the hands of militant groups, who used the arms for the regional campaigns and to terrorise the multinational oil companies, foreigners, oil workers, security agents and government officials[28].

Human Right Watch[29] notes that most of the guns bought by politicians ended up in the hands of their supporters who now use them to rob innocent citizens, and create a regime of tension and fear in the region. Joab-Peterside[30]noted that the 2003 elections in the Niger Delta were nothing but a charade and violent struggle for the control of the resources of the region by the ruling class, and their desire to continue to exploit the region (16). Historically, following the dawn of democracy in Nigeria in 1999, a number of ''guerrilla'' movements have sprung up in the Niger Delta. Militant groups in the region have taken up arms against the Federal government of Nigeria because of corrupt practices of political elites, long-term neglect and collusion with multinational oil companies to share the oil wealth[31]. The movements have come up with both old and new demands from the oil companies and the Federal Government of Nigeria. Prominent among such groups are the Movement for the Emancipation of the Niger Delta (MEND), The Niger Delta People Volunteer Force (NDPVF), the Joint Revolutionary Council (JRC), and the Movement for the Survival of the Ijaw Ethic Nationality (MOSEIN). According to Hunsaker-Clark (2009) the first violent militant group to emerge in the region was the Niger Delta People's Volunteer Force (NDPVF) in 2003, which was formed by Mujahid Dokubo- Asari. The group demanded redress for the human and environmental abuses in the Niger Delta from the multinational oil companies and federal government. In the same year, another group named the Niger Delta Vigilante Group (NDV) led by Atake Tom was formed.

Militant groups in the region have taken up arms against the Federal government of Nigeria because of corrupt practices of political elites, long-term neglect and collusion with multinational oil companies to share the oil wealth[32]. The two groups shared similar characteristics. They were militant groups from the same ethnic origin, their operations were focused on Port Harcourt and it suburbs. There were other ethnic militia groups which began as local University fraternities. These groups adopted names largely associated with western sub-culture groups which include the Icelanders, Greenlanders, KKK and the Vulture. These groups

[27]Emeseh (2011).
[28]Otuchikere (2010).
[29]Human Rights Watch (1999).
[30]Joab-Peterside (2007).
[31]Olufowobi, Ihuoma, Adebayo, Adepegba & Okpi (2012).
[32]Olufowobi, Ihuoma, Adebayo, Adepegba & Okpi (2012).

were constituted mainly by young men from Warri, Port Harcourt, Ilaje and other sub-urban areas in the region[33].

The militant groups engaged in ‘‘guerrilla’’ warfare with the Federal Government. They attacked oil pipelines, were involved in oil smuggling, killed oil workers, and kidnapped oil workers and the affluent in the country. The militants attacked police, military and oil installations. At times, the militant groups also operated in other regions beyond the Niger Delta, such as Lagos in the South west and Abuja in the North. To receive the attention of the international community, the militants have attacked pipelines and offshore facilities in the *Bright of Benin* and Lagos harbour[34]. Militants also targeted Chevron pipelines in Lagos international harbour after amnesty was given to them by the government[35].They carried out the attack to show their grievance to the whole amnesty arrangement[36]. Asuni[37] reported that the Nigerian government arrested and prosecuted some of the militant members but all were later released as a result of the amnesty agreement that government signed with the militant groups in 2007. After the peace agreement in 2009, some of the militant groups were however not satisfied. They decided to return to jungle and resumed attacks on oil workers and oil installations. For instance, as a result of renewed attacks on oil installations and oil workers, the Nigerian army descended heavily on the belligerent militant groups led by John Togo. John Togo was killed and his hideout, Oporoza in the Gbaramatu Kingdom was destroyed[38]. In the Niger Delta, protests by women have never included hostage taking until 2003. According to Abiola[39], in an extreme reaction to the deplorable environmental conditions, about six hundred women in the region took hostage of about seven hundred oil workers from different nationalities.

Distributive Justice and Ethnicity

Distributive justice is a method of sharing benefits and burdens of lives between members of a society or community[40]. The benefits and burden could be classified as social, economic or moral. Maiese[41] argues in some cases, the thing to be distributed is not a benefit, but a burden (2). The principles of distributive justice arrange how the benefit and burden *ought* to be shared or distributed among members of a given society[42]. The concepts of what, how, where, when, who, whom and which are very important in distributive justice. According to Waldron[43],

[33]Ojo-Olatunde (2002).
[34]Emued (2013).
[35]Gleichmann, Odenwald, Steerken & Wilkinson (2004).
[36]Gleichmann, Odenwald, Steerken & Wilkinson (2004).
[37]Asuni (2009).
[38]Amnesty International (2009).
[39]Abiola (2002).
[40]Armstrong (2012).
[41]Maiese (2013).
[42]Armstrong (2012).
[43]Waldron (2010).

distributive justice involves choosing criteria for the distribution of something valuable among people who have some claim to a common social good or benefit. The most important thing is that distribution must follow the principle of ‘‘fair share’’. Fair allocation of resources among diverse members of a community is paramount in distributive justice[44]. Fair allocation depends on the pattern, procedure and total amount of goods or quantity of burden to be shared. Rawls[45] argues that one's place of birth, social status, and family influences are matters of luck and should not unduly influence the amount of benefit we receive in life. He maintains that the job of distributive justice is to limit the influence of primordial sentiment so that socio-political and economic benefits might be distributed more fairly and to everyone's advantage. Nozick[46] believes that distributive justice is a matter of setting down rules that individuals should follow in acquiring and transferring resources and benefits.

The aim of distributive justice, according to Maiese is not to achieve any particular outcome of distribution, but rather to ensure a fair process of distribution. In human society, the number of available resources and wealth are scarce and limited. Procedure, pattern and the process of distribution have always been contestable. Therefore, available resources must be rationalised among members of society. If the principle of rationalisation is based on the principle of equity and fairness, generally, it is assumed that justice is done and served. Rescher[47] says that the morally acceptable form of distribution is ‘‘fair share’’. There are three identified principles of distribution which have become acceptable as ‘‘fair share’’. They include equality, equity, and need[48].

The first principle of distribution is equality. Rawls[49] and Dworkin[50] claim that equality is a strong norm in contemporary democratic societies such as USA, UK and other Western nations, where social and economic justice movements appeal to the principle of equality when decrying the inequalities, we see around us. The equality principle determines who gets what and how goods will be distributed equally among all persons[51]. This principle falls into economic criticism because individual wants are different, even in a socialist economy. Dworkin[52] argues that a person who worked so that he would have enough resources for a rainy day is not treated with equal dignity if he is required to subsidise the person who did not work or save, despite being conscious of the consequences and despite having had the opportunity to do so. This is in line with the second principle of distribution, namely equity. This includes distribution of benefits in proportion to the individual’s contribution[53]. It is based on the

[44]Rawls (1971).
[45]Rawls (1971).
[46]Nozick (1974).
[47]Rescher (2002).
[48]Rawls (1971).
[49]Rawls (1971).
[50]Dworkin (1971).
[51]Deutsch (1985).
[52]Dworkin (1971).
[53]Maiese (2013).

individual's ability to produce. Those who make a greater productive contribution to the society deserve to receive more benefits. Thus, in theory, people who work harder in more valuable jobs should earn more money[54]. This sort of distribution is typically associated with an economic system where there is equal opportunity to compete, such as a capitalist economy. In competitive systems, wealth or goods might also be distributed according to effort or ability[55]. The third principle is need/desert, where benefits/burden is distributed according to individual or group need, so that people would get an equal outcome. Individuals that need more social benefits or goods will receive more, as occurs when governments offer social support based on size of family[56], or states provide reparations payments to victims.

The conflict in the Niger Delta, contrary to many popular views, is not far from ethnic or tribal conflict over oil exploitation and exploration. It is essentially about economic rights, environment rights, and unequal distribution of oil wealth in the region[57]. Enemugwem[58] notes that the issue of marginalisation and underdevelopment of Niger Delta was discussed towards the end of colonial rule in Nigeria before oil became a factor in the national politics in 1957. Taking a look at how distributive injustice and ethnic conflict are related. For example, Nigeria, with its abundant oil resources has the capacity to produce about 3.2 million barrels of oil per day. Ethnic conflict has had untold effects on oil production. Nigeria can no longer meet the Organisation of Petroleum Exporting Countries' (OPEC) production quota. The country's oil production level dropped below 1 million barrels per day (mbpd) owing to frequent shut-ins due to renewed attacks on oil facilities in the Niger Delta region. The United Nations Secretary General (2004) reports that prior to the escalation of violent attacks on oil installations, Nigeria produced between 2.5 and 2.6 million barrels of crude oil per day. Douglas[59] opines that the ethnic nationalities in the Niger Delta have become observant of the marginalisation tacit of the major ethnic nationalities in Nigeria. These major ethnic nationalities control political power and resources at the Federal level to their advantage. The ethnic minorities in the Niger Delta lack political power to make meaningful socio-economic policies in their favour. The balance of power in Nigeria is based on the supremacy of the ''sectional'' or "national" interests over local rights. Bassey[60] notes Nigeria is a country where a powerful group of individuals, with the aid of State apparatuses, are able to influence national decisions in his/her favour to create an ethnic agenda, distort history, and, ensure inequality in the allocation and distribution of resources.

The Ijaw ethnic nationality in the Niger Delta constitutes a large area where government generates its major source of revenue. As a result of oil patronage, the area has been divided into various coastal States. In the early 1990s, according

[54]Maiese (2013).
[55]Maiese (2013).
[56]Maiese (2013).
[57]Waldron (2010).
[58]Enemugwem (2009).
[59]Douglas (1999).
[60]Bassey (2002).

Martinez-Alier[61] the socio-economic, environmental and human rights abuses among the Ijaws in the hands of the multinational oil companies and the Federal Government of Nigeria increased tremendously. These subsequently increase agitation for resource control and self-rule. The ethnic groups were not happy about their predicaments, the socio-economic conditions and human rights abuses by the Federal Government Joint Military Task Force and multinational oil companies. According to Okolo[62] the internal uprisings within the Niger Delta are a product of divide and rule mechanisms employed by the State and multinational oil companies among the inhabitants of the region. The State and multinational oil companies have used the allocation of oil fields and oil installations to determine the communities that would receive high patronage and royalty[63]. Distributive justice is central to a meaningful post conflict peace process, whether rooted economically, socially or politically. In any situation of distributive injustice, renewed conflict is more likely[64]. Efforts to ensure a just distribution of benefits/burden, is therefore key to peacebuilding processes. The next subsection contextualises the Niger Delta conflict.

Method

This study is a qualitative research. It uses purposive method of data collection to achieve its objectives and research questions. This section of the paper discus location of the study, sampling technique, data collection, and data analysis.

Location of the Study

The study location was Warri Kingdom, which is situated in the Warri Southwest Local Government Area with its headquarters in Ogbe-Ijaw, Delta State, Nigeria. Delta State is situated in the Niger Delta, Southsouth region of Nigeria, which is one of the World's largest wetlands, and Africa's largest delta covering about 70,000km^2. The region is situated on the accumulation of sedimentary deposit transported by the Niger and Benue Rivers[65]. The Niger Delta is a low topography region with many streams, rivers and coastal lanes. It commences in the north at a place called the south of Aboh, which is also known as Obotoh, where Niger River fork into the Forcados Rivers. On the west, the Niger Delta is bordered by Osun and Ogun State; on the east, it is bordered by the Bakassi peninsula, in the Republic of Cameroun, and the south by the Atlantic Ocean.

[61]Martinez-Alier (2002).
[62]Okolo (2008).
[63]Okolo (2008).
[64]Maiese (2013).
[65]World Bank Report (1995).

There are sixty ethnic groups in the Niger Delta. The total population of the region is about thirty-two million (Nigerian Population Census, 2005). There are five major ethnic groups in the Niger Delta, they are: Ijaw, Yoruba, Edo, Igbo and Delta Cross. Other notable ethnic minority groups in the region include Ikewere, Isoko, Kwale, Itsekiri, Ogba, Ogoni, Urhobo and a host of others. The Ijaw ethnic group has formed a nation as a consequence of conflict over oil resources. They are estimated to be ten percent of the Nigerian population (Central Intelligent Agency, 2008). The study was carried out in Warri Kingdom, Warri southwest Local government area, Delta State, Nigeria. The Area was selected because it is located in the Niger Delta region where gross violations of environmental and human rights took place as a result of conflict. Warri Kingdom has the largest deposit of crude oil in the Niger Delta. It has a number of oil companies and oil installations. Different forms of conflict have taken place in the Kingdom, such as political conflict between the Ijaw and the Itsekiri, environmental crisis between the inhabitants of the Kingdom and multinational oil companies, and human rights abuses resulting from the destruction of the community by the Federal Government Joint Military Task Force.

The study was carried out in 2016; nine years after amnesty and post conflict reparations were awarded to the militant groups. When the researcher visited the region during the period of data collection, evidence of conflict was visible all over the Kingdom. There were burnt houses, destroyed amenities and the numbers of people in the community scant. Military, police and other security outfits were present in different locations in the Kingdom. Fear and apprehension were clearly present among the inhabitants. The researcher was only able to enter the Kingdom with the support of an ex-militant and consent of the leaders of communities selected for this study: Itsekiri, Ijaw, and Urhobo.

Sampling Techniques

Qualitative sampling techniques were used in this study. A purposive method was used to select the towns and villages that participated in the study. The participants were also selected purposively based on socio-economic attributes which reflected a balanced of representation in the selected study area. These methods of sampling were used because it was an explorative study that sought an in-depth understanding of the problem. This study required face-to-face interaction. The total number of participants in the study was seventy-two. Six participants did not continue with the study. They withdrew their initial consents during the visits of the researcher to the study location.

Figure 1. *Distribution of In-depth Interviews by Respondents*

Participants	Itsekiri	Ijaw	Urhobo	Total
Political Office Holders	03	03	03	09
Delta State Oil Producing Area Development Commission	03	03	03	09
Traditional Figures	03	03	03	09
Oil Company Workers	03	03	03	09
Non-Governmental Organisation Staffers	03	03	03	09
Market women	03	03	03	09
Artisans	03	03	03	09
Militant Members	03	03	03	09
Total	24	24	24	72

Source: Fieldwork, 2019

Method of Data Collection

Qualitative methods of data collection were used to gather information from the participants. As mentioned above, the study was an exploratory one which employs qualitative methods of data collection. In-depth interviews were conducted among seventy-two respondents in the selected areas. Permission was sought from the participants and different associations/organisations to which each respondent belongs, before any interview was conducted. Many associations/ organisations forbid their members from granting interviews without permission, most especially the multinational oil companies' staff because of the worries about information being stolen and use against the organisation in future. High-level consultations were initiated by the researcher to get consent of these associations/ organisations before the data collection. Transport fare was given to the respondents from the Travel Grant secured by the researcher from Boston University West Africa Research Centre.

The study was limited to data intended to reflect the views of the wider Niger Delta community rather than individuals who have experienced severe trauma since the purpose of the study was to understand how distributive injustice among ethnic group could promote conflict in the Niger Delta. Arrangements were made in case of inadvertent inclusion of victims of severe trauma. Referral networks were arranged with local NGOs to give supports for individuals if this happened. This was not necessary however in the end. Discussants were members of the community, but none were victims of rape, widows, and widowers.

This study used in-depth interview guide to gather information from participants. The interview guide consisted of semi-structured questions. The guide contained a series of qualitative questions on how distributive injustice and conflict are interrelated. What forms and types of redress women and men desire in the Niger Delta conflict. How the narratives of distributive injustice enhance understanding of ethnic conflict and a series of other questions on the application

of distributive justice to address human rights violations, and ensure recognition of political and civil rights in the Niger Delta region.

Data Analysis

Thematic analysis of qualitative data collected was used in this study. Themes for analysis were generated by the researcher during the interviews processes and from the literature review. The themes that emerged for analysis in the study including: conflict; divisions; marginalisation; benefit; politics and power; and socio-economic

Findings

In this section, the findings from the analysis of data collected were reported. The findings were categorised as follow: Conflict; divisions; marginalisation; benefit; politics and power; and socio-economic.

Conflict

In this study, the roots of the Niger Delta conflict were examined. It was noted above, the Niger Delta is comprised of nine States and different ethnic groups. These ethnic groups have different reasons for conflict. Many were agitating for political recognition, creation of additional local authorities and economic empowerment, and many were asking for control of resource. To get the attention of the authorities and to get their demands recognised, different ethnic groups directed their focus towards oil benefits distribution injustice. This was revealed in the first in-depth interview conducted with a director of a nongovernmental organisation who participated in the study. He said that it was an agitation for resource control and recognition in the distribution of wealth that aroused the interest of different ethnic groups in the Niger Delta conflict. This was confirmed by a woman leader who participated in in-depth interviews. She said that women supported men in the struggle directed towards environmental and human rights protection.

Conflict in the Niger Delta among the ethnic groups was as a result of inequality, marginalisation, segregation and alienation of other communities by oil bearing communities. Every ethnic group wants proceeds of oil exploitation and exploration to be extended to them.

Ethnicity and conflict are closely associated in the Niger Delta. Marginalisation of one ethic group by the other leads to a protracted ethnic conflict in the region. Potentially, distributive injustice festered ethnic hatred and tensions in the Niger Delta region.

Politics and Power – Conflict

Ethnicity in the Niger Delta is examined from the point view of politics. Government practiced divide and rule among the inhabitant of the region. Many people opted out of politics because they did not see any benefit accrued from involving in politics. Politics is the region favoured the group that had people in the position of authorities. A youth leader added:

Since the creation of Delta State, an Ijaw man has not emerged a governor of the State. The usual campaign is that the nation's president is an Ijaw man. But, this is a state affair. We must have an opportunity to serve at the State highest office.

Clearly, the ethnic division was pervasive and described as ''everywhere'' and reflected, according to participants, in ''everything''. A female youth leader claimed:

Ethnic divisions are everywhere in this community. There are divisions in the market, government ministries, among the artisans, professionals and nonprofessional, and politicians. People belong to different associations that are identified with their ethnic group.

A Director of an NGO said: Ethnic division is reflected in everything people do. It is easier for a foreigner to buy a parcel of land in Warri than the indigenes to be allocated a parcel of land outside his/her ethnic group. The Urhobo are not ready to welcome the Itsekiri. What brings them together is school because government determines the allocation of pupils to primary and post-primary schools.

It is evident in this paper, therefore, that ethnic divisions contributed to the protracted Niger Delta conflict but were also exacerbate by the conflict. The causes of the conflict, as noted above are interwoven and interlinked. But there is little doubt that oil companies and federal government patronised the ethnic groups that possessed oil resources and neglected others. The neglect of ethnic groups without oil compounds the Niger Delta conflict had severe consequences on both men and women in the region.

Ethnic Divisions - Conflict

Ethnic divisions characterised the relationship among the Niger Delta inhabitants. The people of the region were living together in peace before oil politics divided them. Ethnic divisions led to ethnic conflicts between Ijaw and Itsekiri; Itsekiri and Urhobo in the Niger Delta. Conflict between ethnic groups is always over land distribution and the ownership of land, most especially a piece of land with commercial oil deposits. As noted above, the participants said that the Niger Delta conflict created divisions among the inhabitants of the region. They said that before the conflict the three major ethnic groups in Warri lived like brothers, sisters and neighbours, that is, the Ijaw, the Urhobo and the Itsekiri. The conflict created a deep division among these ethnic groups. The participants also said that government and oil companies were fond of creating disunity in the

region. Participants assumed that government used favouritism and nepotism to divide the inhabitants of the region. Oil companies used royalties, contracts and employment as weapons of division. Many interviewees said that some ethnic groups were favoured more than the others. They received contracts, jobs and money from multinational oil companies, while others were neglected. A political office holder described how the government used the availability and amount of oil extraction from communities as a determinant of government patronage. He said: The Itsekiri are more favoured in terms of contracts award and employment in the oil companies. They have people in high places in government and oil companies. Oil companies give employment to the Itsekiri more than the Urhobo and the Ijaw because Chevron has its oil rigs and platforms in the area.

Ethnicity has divided the inhabitants' unity of purpose. The inhabitants think and act in ethnically divided ways whenever it comes to the distribution of political and economic materials. Conflict between Ijaw and Itsekiri almost destroyed the entire Warri, a city that housed the regional headquarters of most of the oil companies. The political office holder went further to say:

Hardly the Itsekiri support other ethnic groups in the struggle for the emancipation of the Niger Delta. They are government allies. They are favored people. Government usually favoured them at the expense of other ethnic groups. For instance, the Itsekiri have become the Chairpersons of Warri South West and Warri South east Local Government than the Urhobo and the Ijaw. Favouritism and nepotism have created deep-seated hatred between Itsekiri and other ethnic groups in Warri. The other ethnic groups at times transferred aggression towards the Itsekiri, burnt and destroyed their communities.

There were always contestations between the Ijaw and the Itsekiri over perceived favouritism from the multinational oil companies. Chevron was considered to favour the Itsekiri because it has its oil rigs in the Itsekiri land. Another political office holder that participated in the in-depth interviews claimed:

Government sees the Itsekiri as the original settlers in Warri but this is not true. Warri belongs to the three ethnic groups Ijaw, Itsekiri and Urhobo. Look at the settlement patterns; you will agree with me that each ethnic group occupies a different quarter. Warri is no man's land. It belongs to different ethnic groups.

Marginalisation - Injustice

Ethnic conflict affects the peace processes in the Niger Delta region. The Itsekiri complained of marginalisation during the peace process. The participants in the in-depth interviews said that the Itsekiri were not considered in benefits distribution processes because their involvements in the conflict were not recognised. Many Urhobo and Ijaw make accusations of favouritism against the Itsekiri. The Itsekiri are alleged to have collected contracts and appointments from the oil companies such as Chevron and Shell. A female youth leader observed:

Many times, government would not invite the Itsekiri to a peace meeting. The negotiators would say the conflict did not affect our community like others but this

is not true. Most of our villages and settlements were attacked and destroyed by the Ijaw militants and the Joint Military Task Force.

The divisions among the ethnic groups reflected the way the participants responded to the question on who are you fighting in the Niger Delta? A youth leader who was involved in the in-depth interviews said:

Land allocation causes a major conflict among the Ijaw, the Itsekiri and the Urhobo. In the region, if you get a portion of land, the resources on it belong to you. The oil companies usually patronise individuals and communities that possess oil fields. Ownership of land has become a major issue among the ethnic groups. It is common for an ethnic group to grab the land of the other. This usually generates conflict in this region.

Benefits- Distributive Injustice

Ethnic considerations were applied when negotiations were underway after the cessation of hostilities by the militant groups. The composition of the groups involved in the distribution of oil revenue was based on ethnic recognition. It was observed that the Ijaw ethnic group was mainly considered in the negotiation process. The Itsekiri and Urhobo were not adequately represented. A woman leader claimed:

When the government representatives wanted to talk to women in the community, they looked for elite women. The elite women have been disconnected with the grassroots. Government bribes them by given them money, appointments and contracts to talk to us. Government takes the voices of these women as other women's voices but this is not so because they are not part of us in this community. They do not represent us because what they got ended in their pockets.

A participant in an in-depth interview said that ethnicity played a pivotal role on the ethnic militant groups that benefited from government largess. He said that militant groups that were of Ijaw extraction were favoured above other ethnic groups. The researcher asked a further question from a Director of an NGO as to why distribution of oil wealth was one-sided. He said that the so called ex-militant groups that consisted mainly of the Itsekiri do not fit the description of militants because their objectives were unconnected with the struggle. As revealed in the literature, the Itsekiri Native Youth Council is a socio-cultural association and they cannot be referred to as a militant group.

That said, the actual number of Ijaw compared to the Itsekiri and Urhobo benefitting from distribution from government compensation could not be ascertained because the Presidential Amnesty Committee did not provide an analysis of the beneficiaries on ethnic basis. Yafugborhi reported in the that there were alleged irregularities in the distribution of benefits of the Federal Government sponsored for the Itsekiri[66]. The Itsekiri National Youth Council (INYC) led by Esimaje Awani, called for a stop to further payments of the Itsekiri beneficiaries' monthly stipends to David Tonwe's faction of INYC. The Itsekiri Native Youth

[66]Ugbajo Itsekiri USA, Inc. (2010).

Council, the name used to collect payment of benefits from the government, is unknown to the Itsekiris. No one knew what they were doing. A political office holder that participated in the second in-depth interview said: Majority of the militants that were given monthly allowance, collected scholarships and vocational training were majorly from Ijaw ethnic group. What about the Itsekiri? Government and oil companies enjoy dividing us in this region.

A political office holder corroborated this view: Many of the beneficiaries of oil wealth are from a particular ethnic group. The Itsekiri ex-militants were excluded. When the list of beneficiaries was released we realised that the names of the Itsekiri ex-militants were not include. The list contained the names of the Ijaw ex-militants as if the conflict affected the Ijaw alone. The conflict affected the Itsekiri, the Urhobo and the Ijaw.

As noted in the findings of this study, inhabitants of the Niger Delta demanded sharing of political offices, the creation of State structures, the creation of Local Government Headquarters, apology, oil bloc allocation, more compensation and the monetisation of benefits. Other demands included the rebuilding of communities, hospitals, markets, roads, schools, housing, scholarships, waterways, small cottage industries, electricity, recreation centres, and loans for agriculture. In the literature review, it is interesting to note that in some circumstances, national and administrative panels often recommended distributive justice for the victims of gross violations of fundamental human rights.

Socio-economic - injustice

Allocation of socio-economic facilities also had ethnic dimensions. Ethnicity played a major role in which ethnic group enjoyed government patronage. The government faced a problematic responsibility in the allocation of socio-economic facilities[67]. A political office holder said:

Most of the facilities provided after the conflict were located within the Ijaw community. The three ethnic groups were not contacted to determine the location and even distribution of these facilities.

Ethnic division affected where government offices were located. An interviewee in Delta State Oil Producing Area Development Corporations (DESPODEC) said: If your community does not bear oil deposit, please, forget about social amenities. Social facilities are provided by government as a weapon of politics in this region.

Ethnic divisions in the Niger Delta region were reflected in government institutions. DESPODEC for example, has three offices in Warri alone. Different offices were allocated to different ethnic groups. There are offices that were occupied just by the Itsekiri. The one for the Ijaw has employees from the Ijaw and the one for Urhobo has only Urhobo as their employees.

[67]Ihuanedo (2014).

Conclusion

In this study, ethnicity is identified as a major narrative of the Niger Delta Conflict. Distributive inequality, environmental degradation and imbalanced socio-economic distribution are also identified. Distributive Theory is the theoretical explanation adopted in the study. The theory pointed out that equity, and equality will reduce imbalance in the distribution of oil wealth in the Niger Delta. The theory also shows that only distribution of social, economic and political power based on equity, equality and need could bring enduring peace in the Niger Delta region.

As noted in the findings of this study, the general demands of the inhabitants of the Niger Delta could be stated as sharing of political offices, the creation of State structures, the creation of Local Government Headquarters, apology, oil bloc allocation, more compensation and the monetisation of benefits but distribution of these were ethnic based. Most ethnic groups in the region were neglected, abandoned, and discriminated against. However, women's demands, on the other hand, included the rebuilding of communities, hospitals, markets, roads, schools, housing, scholarships, waterways, small cottage industries, electricity, recreation centers, and loans for agriculture. This finding supports the notion that women's needs often slightly different from general demands in peacebuilding processes. This reason is majorly because of the socio- biological nature of women. These demands could be categorised as socio-economic and political justice. In the literature review, it is interesting to note that in some commissions, national, and administrative panels often recommended distributive justice for the victims of gross violations of fundamental human rights but the effort must be ready to accommodate every ethnic group in the Niger Delta. The provision of socio-economic facilities should be the priority of the government, however, the region is abandoned, neglected and underdeveloped, as noted in the findings of this study. These are attributed to ethnic tensions, and fuelling the Niger Delta conflict. In this study, it can be concluded that the provision of basic socio-economic rights is the constitutional responsibility of the government, and this should be the major focus of any form of peacebuilding processes in the Niger Delta. Distributive justice including fairness, equity, and equality should be the focus of socio-political actors in order to ensure enduring peace in the Niger Delta, Nigeria.

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A Reflection on Corporate Social Responsibility in Africa contrasted with the UAE and some Asian Nations

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Corporate social responsibility (CSR) is still a controversial theme in discussions about companies and what they do to benefit communities in which they operate and society at large, and many argue that it does not permit the maximisation shareholder value. CSR is nonetheless a significant matter to consider in any business conduct. A plethora of research proves that socially responsible companies benefit both themselves and society. A key benefit that emanates from CSR is ab enhanced relationship between a company and the community in which it operates. CSR must be leveraged by organisations who are committed to society and stakeholders. Only in this way can sustainable development be realised, and this must be done in a transparent and ethical fashion so that maximising profits do not remain the key drivers of CSR which is a mere façade as noted. Corporate social responsibility offers numerous advantages and strategic benefits to companies that adopt it and do so in a serious manner. This study aims to fill that gap in knowledge by providing a different perspective to the discussion on CSR in South Africa, using insights garnered from the UAE approach and that of some other nations.

Keywords: *Societal support, organisations, good governance, ethical practice, regulations.*

Introduction: CSR in South Africa

Since 1994, political change and the efforts to balance out the unequal distribution of wealth from the period of apartheid have been a major driver of CSR in South Africa.[1] A key piece of legislation is the Broad-Based Black Economic Empowerment Act, 53 of 2003 as amended, commonly known as BBBEE Act, which was promulgated for the advancement of previously disadvantaged groups in the population, as a basis for CSR initiatives.[2] In addition to the specifications of the BBBEE Act, there are no special laws in South Africa that regulate CSR.[3] However, there is a range of laws relating to

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[1]CSR Weltweit (2012).
[2]Office of the President (2003).
[3]CSR Weltweit (2012).

the responsibility of companies, such as the Employment Equity Act 55 of 1998[4] in terms of which affirmative action must be applied within organisations when considering appointment of staff, and the Skills Development Act 97 of 1998 as amended in terms of which companies are obligated to invest in skills training for both their staff and unemployed people.[5] The social picture of the country after the apartheid era was one of marked inequalities in terms of education, infrastructure, economic power and basic services access. The democratic regimes that have governed the country since 1994 have made important efforts in combatting those social imbalances through different social programmes and various public initiatives.

Current Status

Although the South African Companies Act 71 of 2008 does not oblige companies to engage in CSR projects, the King II[6] and King III[7] reports explicitly address the need and relevance for corporations to acknowledge all stakeholders and to adopt a "triple-bottom-line" approach to doing business. In particular, the King reports constitute accepted guidelines for best practice in corporate governance in South Africa, focusing on social, environmental and economic concerns.[8]

There is no comprehensive or concrete CSR policy or law in most countries in the Sub-Saharan African (SSA) region, apart from some rather ad hoc legislative and non-regulatory activities.[9]

An exception is the previously mentioned BBBEE Act in South Africa. CSR aspects are most often evident in the various state policies and laws on economic development, environment, labour, health and safety, transparency and other related issues. Beyond this, regulations which have an impact on CSR are often based on the ratification and interpretation of international agreements.

A major development in African trade is that trading groups such as the Common Market of the East and Southern Africa, Southern African Development Community, East African Community and the Economic Community of West African States are now looking at CSR, although this remains secondary to increasing trade to the US and Europe.[10]

In several African countries, local networks of the UN Global Compact have emerged.[11] In a few cases, these network activities have led to collective actions on CSR; for example, in Malawi the combatting of corruption and in Zambia

[4]Office of the President (1998a).
[5]Office of the President (1998b).
[6]IODSA (2002).
[7]IODSA (2009).
[8]Flores-Araoz (2011).
[9]Klins, Van Niekerk & Smit (2010).
[10]Klins, Van Niekerk & Smit (2010).
[11]Klins, Van Niekerk & Smit (2010).

addressing HIV/AIDS at the workplace. The exception is South Africa, where the CSR landscape is well developed, and incorporates initiatives like the OECD Guidelines for Multinational Enterprises, the King Report on Corporate Governance, UN Global Compact, ISO 14001, GRI and the Social Responsibility Index of the Johannesburg Securities Exchange. There are also sector agreements, like the Kimberly Process Diamond Certification Scheme, the Extractive Industries Transparency Initiative and the Equator Principles for the finance sector. While CSR is generally well incorporated by larger companies, SMEs still struggle with the unclear boundaries between CSR and Corporate Social Investment (CSI).[12] Elsewhere in Africa, the research suggests that CSR is often seen as an add-on, secondary to the core business.[13] Most CSR practitioners only allocate about 20–40% of their work time to CSR matters.[14] CSR departments are rare and many operate from within marketing, communications, corporate affairs, training or human resources departments. Even where CSR policies are established, they often refer to philanthropic approaches.

CSR policy adherence is typically not evaluated or assessed. Corporate leadership involvement in CSR matters tend to be focused on launching community projects, supporting CSR policies and ensuring resources for CSR projects, rather than embedding CSR in business processes. Reporting is established in many of the larger companies, but the scope and depth is limited. Several firms have been delisted from the UN Global Compact for failing to comply with reporting requirements. Critical success factors for implementing successful CSR projects in Africa are (ranked in order of importance):

1. Project management skills
2. Staff commitment and involvement
3. Stakeholder/partnership involvement
4. Alignment to company objectives; and
5. Executive/management commitment.[15]

The involvement of government through regulations, incentives or support for CSR dialogues was considered critical in successful CSR projects. In both Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH research studies stated that the private sector called for more CSR regulation and stronger government support.[16] For instance, communication experts in Ghana requested that the government set up a national corporate social responsibility framework to define parameters for CSR in the country. Government was also identified as a deterrent to CSR in some cases, with particular reference to restrictive policies, organisational practices and lack of effective leadership to deal with CSR agendas.

The social role of corporate activities in South Africa is mainly dominated by

[12]Klins, Van Niekerk & Smit (2010).
[13]Imani Development (2009).
[14]Imani Development (2009).
[15]Imani Development (2009).
[16]Imani Development (2009); Zimmer & Rieth (2007).

large enterprise.[17] However, besides the corporate entities, the countries apartheid history plays a big role in driving CSR in South Africa.[18] Since 1994, although poverty and inequality still remain high in South Africa, much has been done by the South African corporate sectors and its government with regard to social development through radical transformation of the country's economy and social involvement of business enterprises.[19]

Mr Cyril Ramaphosa (the President of the RSA, 2018) said that despite substantial progress, the transformation of South African society and economic empowerment of all its people remain thorny and much debated issues.[20] Historically, the CSR concept in South Africa was mainly dominated by the notion of corporate philanthropic responsibility, predominantly pre-1994.[21]

CSR initiatives in South Africa first mainly derived from the banking, mining and oil industries in the early 1970s.[22] The first recorded CSR case in South Africa was described in 1972 when Meyer Feldberg (a professor of Business Administration at the University of Cape Town), delivered a lecture on business profits and social responsibility at the University of Cape Town.[23] Professor Meyer Feldberg argued that business leaders should get involved in the communities in which they operated and sold products, or from which they drew employees for the purposes of sustainability and prosperity.[24] In the 1970s, business organisations recognised that the poor living conditions of the black majority were seriously affecting the country's economic development. In this context, the "Urban Foundation," was established in 1976 (today called National Business Initiative, established in 1995) to set up a long-term development goal for the improvement of the black population.[25] Until 1995, the foundation contributed ZAR1.8 billion for housing projects, completed many schools and trained more than 20,000 school teachers.[26]

During 1977, the Sullivan Principles were launched in South Africa for American companies operating in South Africa.[27] The Principles were launched in order to persuade American companies in South Africa to treat their African employees and American employees equally.[28] Furthermore, according to the Sullivan Principles, American companies that invested in South Africa were required to contribute to community development from their profits.

As a result, many big businesses in South Africa started establishing "trust funds" for contributing to social causes; for example, Anglo-American and De

[17]Ladzani & Seeletse (2012).
[18]Fig (2002).
[19]Trialogue (2008).
[20]Trialogue (2004).
[21]Ramlall (2012).
[22]Fourie (2005).
[23]Fourie (2005).
[24]Trialogue (2004).
[25]CSR Weltweit (2011).
[26]Fourie (2005).
[27]Fourie (2005); Van-Den Ende (2004).
[28]Van-Den Ende (2004).

Beer's Chairman's Fund, the Gencor Development Fund, Gold Fields Foundation, the Liberty Foundation. Many other companies also established such types of trust funds.[29]

To support the historically disadvantaged population groups (Black, Coloured and Indian populations and some Chinese who were South African citizens by birth or who were naturalised during the apartheid period), the South African government introduced BBBEE (commonly known as BEE). The BBBEE Act 53 of 2003 became a law in January 2004 and has placed BEE firmly on the corporate agenda.[30]

The government launched the BEE scheme to encourage transformation in the economy and redress the inequalities of apartheid by providing socioeconomic opportunities to historically disadvantaged groups, as the economic opportunities were hardly available to them during the apartheid era.[31] To promote CSR activities in South Africa, the BEE Act of 2003 was set up by the government. CSR programmes were formalised through CSI guidelines provided by BEE.[32] Companies need to become BEE compliant if they want to do any business with the government.[33] CSR debates in Africa had historically been framed in terms of the ethics of apartheid and the prevalence of corruption and fraud on the African continent.[34] However, regarding CSR in South Africa, there is substantial support from the companies (local and foreign) operating in the country including the government.

CSR projects are carried out by most large and multinational organisations and CSR activities are encouraged, in particular, by the following factors:

- The new Constitution of 1994 and the reform of the legislature have brought social and environmental topics to the top of companies' agendas
- The BBBEE Act of 2003 which aims at the advancement of historically disadvantaged groups of the population, sets out particular activities to companies to do for the more equal distribution of resources
- South Africa's massive HIV/AIDS problem encourages companies' involvement in the health field.[35]

It is worth noting that, in South Africa, firms generally prefer the term CSI instead of CSR.[36] Furthermore, most CSR initiatives are conducted through CSI.[37]

Trialogue, the regular publisher of the CSI Handbook found that most South African companies adopted the following key elements depicted in Table

[29]Fourie (2005).
[30]Skinner & Mersham (2008).
[31]Econobee (2012).
[32]CSR Weltweit (2011).
[33]Econobee.co.za. (2012).
[34]Visser (2008).
[35]CSR Weltweit (2011).
[36]Fig (2005).
[37]Nxasana (2010).

1 below on strategic CSI programmes to guide their CSI activities.

Table 1. *Key Elements of Strategic CSI Programmes adopted by Companies*

Key elements of strategic CSI programmes adopted by companies
Formalised approach/documented strategy
Regular reporting
Senior management/Board involvement
Alignment with core business
Working partnerships
Dedicated CSI staff
Dedicated CSI department
Regular stakeholder consultation
Employee involvement
Regular monitoring and measurement
Imitation of successful projects
Development of best-practice guidelines
Sharing of lessons and insights

Source: Trialogue (2006)

With regard to the integration of CSI programmes within an organisations structure and business objectives, the following guidelines are represented in Table 2 below.[38]

Table 2. *CSI Guidelines*

CSI Guidelines
Align CSI with the business
Select focus areas
Understand the development context
Consolidate the CSI function
Integrate CSI into the business
Encourage employee volunteerism
Engage stakeholders
Forge working partnerships
Monitor and evaluate projects
Replicate and scale up successful models
Build knowledge-sharing mechanisms
Report on CSI practice

Source: Trialogue (2006)

In order to be socially responsible, there is a range of CSR-related regulations in South Africa which have been introduced by South African government to encourage corporate sectors for CSR practices.[39]

Table 3 below represents CSR relevant laws in South Africa.

[38]Trialogue (2006).
[39]Ramlall (2012).

Table 3. *CSR-related Laws in South Africa*

CSR-related laws in South Africa
BBBEE Act 53 of 2003
Mineral and Petroleum Resources Development Act 28 of 2002
Promotion of Access to Information Act 2 of 2000
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
National Water Act 36 of 1998
Employment Equity Act 55 of 1998
Skills Development Act 97 of 1998
National Environmental Management Act 107 of 1998
Labour Relations Act 66 of 1995
Occupational Health and Safety Act 85 of 1993
Mine Health and Safety Act 29 of 1996

Source: CSRWeltweit (2011)

An extensive economic impact assessment study on Unilever in South Africa was made by Kapstein.[40] The findings showed that Unilever's direct impact includes 3,000 suppliers and their 20,000 employees, while indirect impact includes supporting approximately 100,000 jobs. This means that for every job directly created by Unilever, another 22 workers depend on the company for some part of their livelihood. This illustrates CSR cooperation in terms of job creation that is linked internally and externally to Unilever.[41]

In addition to the above, the Wits Business School in South Africa has established the African Centre on Philanthropy and Social Investment (ACPSI) that conducts CSR activities in the country as well as serves as a proponent for greater investment and research in the area. ACPSI operates with the objective of teaching, training practitioners and conducting research in social investment and philanthropy in Africa as well as leading to the management of a local network of policymakers, foundations, enterprises, and local communities for the benefit of African society.[42] For instance, the centre held a conference to discuss how disaster management and philanthropy could be applied for dealing with the aftermath of cyclone Idai.[43]

Asian Studies on CSR

Many studies of CSR in developing countries have been conducted in Asian countries. Chambers, Chapple, Moon & Sullivan studied CSR in Asia by reviewing the websites of companies operating in India, South Korea, Thailand, Singapore, Malaysia, Philippines and Indonesia.[44] They found three primary factors that characterised CSR in Asia. Here, CSR lags behind the western world; different international systems of business relationships influence CSR and thus there is no

[40]Kapstein (2008).
[41]Visser & Tolhurst (2010).
[42]ACPSI (2019a).
[43]ACPSI (2019b).
[44]Chambers, Chapple, Moon & Sullivan (2003).

uniformity among the Asian countries; and CSR in Asia is enhanced by globalisation. However, two major limitations were identified in their study. First, websites were not widely used for business communications in Asia because information technology facilities were still at a basic stage and internet usage was low.[45] Secondly, the top 50 companies were the largest companies in these countries and adopted more strategies to implement CSR. However, in developing countries, the larger companies implement more CSR plans than smaller companies do.[46]

Key Trends in Past Research

Several studies in developed countries have looked into the role of CSR. Human rights, environmental degradation, and labour concerns are all issues that developing countries face. Organisations are constantly striving to improve their financial results, and by engaging in socially beneficial practices, they can overcome these issues. Despite this experience, it has been acknowledged that CSR is most commonly applied and researched in developed countries such as the USA, Canada, Australia, and the UK.

This is problematic because CSR can be seen as an agent of change for companies seeking to enter developing-world markets. Legal obligations are commonly regarded as less important in developing countries than in developed countries. Government compliance capability remains a significant constraint, reducing the efficacy of legislation as a driver of CSR. While policies are not yet mature, there are guidelines that help organisations implement CSR initiatives. This creates a win-win situation for both the community and the environment because CSR programmes help both the community and the organisation.

Despite this, research has shown that in some situations, there is a reluctance to accept CSR. For example, reducing carbon dioxide emissions helps businesses to lower the cost of compliance with potential environmental legislation, drive down operating costs, boost their firm reputation, increase key stakeholder loyalty, and improve their efficiency. It is critical to note that there has been an increase in scepticism and mistrust about CSR practices: greenwashing, ethical scandals and contradictory practices (such as layoffs but increased CEO pay) are all examples of negative practices that alienate key stakeholders and sometimes leave them sceptical of an organisation's intentions.

Nonetheless, CSR implies that an organisation owes a duty not only to its shareholders but to all stakeholders impacted by the company. In South Africa, there is a rudimentary ethics infrastructure in most businesses, but they are for the most part not well-formulated and thought out and are ineffectual.[47] CSR will help build a more environmentally friendly work atmosphere for employees and consumers, assist the business in gaining a competitive edge, and improve

[45]Chapple & Moon (2005); Rotchanakitumnuai & Speece (2003).
[46]Lepoutre & Heene (2006); Perrini, Russo & Tencati (2007).
[47]Nicolaides (2018a).

the business's corporate profile. Each stakeholder feels a sense of connection to the business's proposal. Thus, stakeholder theory has emerged as a critical theoretical paradigm that has the potential to benefit both developed and developing countries. Additionally, institutional theory offered a fruitful avenue for examining the various ways in which the boundaries between business and society are built, as well as for improving our understanding of CSR practices.

Additionally, business ethics philosophy is founded on a broader sense of social responsibility and the moral obligation that every business has to society. According to business ethics theory, CSR obligations are philanthropic and ethical in nature, rather than legal and economic in nature. CSR has been described as business leaders' responsibility to implement strategies, make decisions, and take actions that are beneficial in terms of society's goals and values. Significant CSR improvements occurred in the 1990s as a result of concepts for adopting CSR, such as Wood's corporate social success model. CSR dimensions became principles, strategies, and processes as a result of model production in developing countries. CSR criteria, concepts, and codes have evolved and continue to evolve.[48] Carroll asserted that an explosion of rigorous theory development and analysis on the subject has occurred across numerous disciplines. This means that CSR research will continue to evolve as the economy and organisations evolve.

However, in terms of developing countries, scholars paid relatively little attention to CSR in the early 2000s. This is despite the fact that globalisation has been credited with growing the popularity of CSR globally. Additionally, comparative CSR research has primarily concentrated on the disparities in CSR between Europe and the USA, as well as between European countries. International bodies, as a result of globalisation, remain diverse and continue to form the idea of CSR across countries. The findings of previous research are inconclusive and often conflicting. Individuals can conceptualise CSR studies differently, making collaboration between organisations difficult.

CSR has been a widely recognised term for what was previously referred to as corporate philanthropy, corporate citizenship, business ethics, community engagement, corporate responsibility, socially responsible investment, sustainability, triple bottom line, corporate transparency, and CSP. Regrettably, these widely used CSR indicators cannot be used explicitly in studies of developed countries. Although developed countries such as the USA and the UK have implemented CSR, it is not clear whether the practice easily transfers to emerging or non-Western countries.

CSR agendas in developed countries have historically been less evident on a global scale and often have been deemed non-compliant with CSR standards. Companies are increasingly aware that a one-size-fits-all approach to CSR in operations is unsuccessful at addressing organisational drivers for socially responsible conduct. This advice is unique since the majority of organisations prioritise green measures and environmental conservation practices. The governments of several major emerging economic powerhouses, including China, have taken a number of measures to ensure that their countries' effect is tailored to foreign and social interests.

[48]Carroll (2016).

In the South African context, one of the hospitality organisations have developed long-term, mutually beneficial relationships with its suppliers of products and services.

Via a targeted recruitment plan, the company assists black companies in South Africa. Annually, a percentage of the company's pro-spending is allocated to social investment. CSR activities are modelled after those seen in developed countries such as the USA, the UK, and Europe. It has been argued that approved CSR practices vary significantly between countries and varies by region-specifics.

CSR activities are known to vary by country due to cultural differences. In developed countries, culture is strongly influenced by the religion practised. CSR supports the company by increasing revenue and customer satisfaction, improving efficiency and quality, and reducing complexity and costs. There is no indication that businesses profit from adopting CSR plans for developing countries. There is little evidence that businesses in developing countries have implemented CSR policies, guidelines, or principles based on international CSR standards, policies, or principles. Recent years have seen the emergence of a similar CSR system for Asian and African countries based on Carroll's CSR pyramid model. CSR continues to be a voluntary programme for organisations, and there are no laws or regulations governing its implementation. From time to time, new measurements are applied to the concept of CSR, and organisations can incorporate these dimensions when defining CSR.

CSR programmes and issues in developing countries are distinct from those in the developed world. According to the World Bank, developing countries would be compelled to embrace CSR activities as a result of environmental and social factors such as globalisation, economic development, investment, and business activity. Numerous governments in developing countries are grappling with severe poverty, and as a result, they depend on the private sector to carry out social and environmental functions that they are unable to provide. Private sector participation in social responsibility is a critical trait for successfully leading CSR.

Four Key Roles in Promoting CSR

Additionally, previous studies have identified four key roles for governments in promoting CSR, including mandating (legislative), facilitating (guidelines on content, fiscal and funding mechanisms, and creating framework conditions), partnering (engagement with multiple stakeholders, stimulating dialogue), and endorsing (tools and publicity). The second alternative CSR practice is to address local social issues. Social business activities are market-based in nature that aim to improve the lives of the poor. For example, one of the most influential CSR organisations in South Africa is the Tsogo Sun Hotel, which pioneered transformation and continues to be a leader in empowering historically marginalised individuals, businesses, and communities. The research conducted allows a more in-depth examination of its importance within society. In India, for

example, the organisation Tata Steel has been recognised for its significant contribution to the UAE's infrastructure growth. Additionally, in India, it is mandatory for businesses to participate in CSR, and over 100 corporate foundations conduct CSR activities.

The majority of CSR research in developing nations has focused on Asia, Africa, the Middle East, and Latin America. CSR views prevalent in developed nations are incompatible with those prevalent in developing ones. In other words, CSR develops in relation to external forces, such as fulfilling legal and regulatory obligations and responding to public opinion. In industrialised nations, environmental responsibility and development of environmental management techniques are increasingly critical. Many individuals define corporate environmental responsibility as the organisation's duty to pay for the environmental repercussions of its actions, products, and facilities. CSR is gradually moving away from its historical focus on corporate giving and toward a broader collection of activities that engage businesses with a broader range of stakeholders and assist organisations in integrating CSR practices into their core strategy. CSR's origins and conceptualisation are inextricably linked to each country's historical and cultural traditions and are strongly impacted by ethical ideals and religious practices. Additionally, CSR is evolving from its historical focus on business philanthropy to include a broader range of activities that engage businesses with their whole ecosystem of stakeholders and assist integrate CSR practices into the organisation's fundamental strategy. Additionally, reporting efforts are growing in scope with the hope that systematic monitoring and evaluation of outcomes would bolster CSR's credibility and make it simpler to verify. Additionally, CSR is evolving in reaction to external pressures, including as fulfilling legal and regulatory requirements and responding to broader public opinion, such as meeting environmental criteria and maintaining appropriate labour standards across the supply chain. For example, businesses are increasingly depending on partnerships with other stakeholders, including governments and non-governmental organisations, to conduct CSR activities. Economic donations, on the other hand, have been characterised as the most important CSR activity, since they provide a cost-effective method for businesses to have a social impact. Asia has less CSR policies and activities than the USA, Europe, and Australia. Equal pay, associational freedom, and worker benefits are only a few of the policy differences between European and Asian companies.

CSR Drives in the UAE

In terms of tourism, the UAE is one of the top nations in the Middle East. CSR should be a requirement that businesses consider more strategically in their business plans. UAE laws have emphasised the significance of CSR and environmental regulations in order to safeguard the country's natural resources, promote corporate ethics, and adhere to global sustainability norms. CSR is increasingly being ingrained in regional corporate activities in the UAE. CSR is a western idea that is gaining traction in the Middle East. The UAE is the

most suitable location to provide insights into CSR since other Middle Eastern nations are not embracing the concept at the same rate as the UAE. Recently, there have been global efforts to invest ethically and to direct earnings toward improving community life and protecting the environment. The UAE is one of the region's most socially conscious nations, providing a range of public services aimed at ensuring a high degree of social stability. This has included the construction and supply of infrastructure and municipal services, as well as education and health.

The UAE's economy is booming, and many organisations are focusing their efforts on CSR and related activities.[49] By adopting CSR, businesses not only do the right thing, but also demonstrate their responsiveness to societal demands. The UAE government has a strong sense of social responsibility. There are indications of increasing government acceptance of CSR, sustainable development, and environmental stewardship principles. The Middle East and Northern Africa (MENA) region is ahead of the curve because it takes a regional, organised, and policy-driven approach to CSR.

Numerous MENA governments are collaborating with industry to accomplish environmental and social goals via public–private partnerships. His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Vice-President and Prime Minister of the UAE and Ruler of Dubai, announced a Cabinet decision on 05th February 2018 regarding CSR in the UAE. According to the order, social responsibility is defined as voluntary contributions made by businesses and institutions across the nation. Contributions in kind or cash will be utilised to support economic, social, and environmental development programmes and projects in the UAE. This programme aims to increase business sector understanding of its role and duty toward the community and the nation's growth. Furthermore, according to the World Giving Index, the UAE is a globally recognised leader in philanthropy.

The UAE government is committed to establishing innovative sustainable development initiatives that align with the country's overall development plan. The UAE-NSYG 2017 seeks to promote overall sustainable development on a national scale via the establishment of efficient partnerships between official government and private sector organisations. The UAE's Council of Ministers issued a resolution (the CSR Law) concerning CSR in the UAE which came into force on 1st February 2018. The CSR law imposes reporting requirements on contributions made to CSR activities and financial contributions, which will apply to many companies in the UAE on a mandatory basis, and to others on a voluntary basis. It also offers various incentives to contribute to CSR initiatives.

The CSR Law in the UAE states that social responsibility is based on voluntary principles. However, while CSR contributions will remain voluntary, filing a CSR return and listing on the platform will be mandatory for all businesses in the UAE which fall within the scope of the CSR Law.[50] Before the annual trade licence renewal, the CSR Law provides that businesses must disclose their contribution, or non-contribution, to social responsibility for the preceding year,

[49]Dubai Chamber (2018).
[50]Dubai Chamber (2018).

via the CSR Smart Platform. If the company discloses a CSR contribution, it must include all data and information relating to the type and volume and the beneficiaries of the contribution.

Conclusion

However, while the benefits of CSR are well known in developed countries, they are not well understood in developing countries due to fragmented and restricted studies. Furthermore, since there is no specific mandate for CSR implementation in the developing world, companies in developing countries do not clearly grasp the definition and implementation of CSR. As a result, many Arab and African businesses lack an adequate structure for implementing CSR and, as a result, are unable to reap the many benefits that CSR initiatives produce. Since previous research has found that CSR initiatives in the developed world differ from those in the developing world, the aim of this study is to provide a structure for CSR implementation in developing countries while highlighting the benefits of CSR on CP.

Businesses need to be conscious of the notion that they need to establish CSR into their fundamental strategic visions but many pretend to do so. When CSR is applied it must not be for exclusively financial returns but rather be viewed as a moral and ethical imperative which also adds value and helps to sustain a competitive advantage.[51]

South Africa is not included in the CSR pyramid. Philanthropy may take priority over a company's other responsibilities in Africa. The relative interests of different types of CSR are strongly affected by the cultural context in which they operate. Through socio-cultural elements such as communalism, ethnic-religious beliefs, and philanthropic behaviours, CSR is defined in an African context. Additionally, it was found that the African humanist tradition's value-based philosophy supports many of the African continent's current approaches to CSR. Skills development and basic education, on the other hand, remain a major concern throughout Africa. The financial and administrative ability of African nations to accomplish these goals is limited. Between 1981 and 2005, poverty remained stable in Sub-Saharan Africa. Between 1981 and 2005, the number of poor/underprivileged individuals almost doubled, from 200 million in 1981 to 380 million in 2005. This remains a significant issue, and it is partially the responsibility of governmental and non-governmental initiatives to assist Africa in overcoming this dilemma and CSR has a role to play.

Finally, future studies can undertake an action research methodology that can allow them to implement CSR practices and policies in the hospitality industry in developing countries and identify what the impacts are on CP parameters such as customer satisfaction, brand value, revenue and profitability given that the greatest perceived socio-economic impacts of the hospitality sector are increased employment, better living standards, greater tax revenues to the State and local governments, and of course growth in retail sales supporting sustainability.

[51]Nicolaides (2018a)

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Beyond any Reasonable Doubt between Science, Jurimetrics and Criminal Procedure: New Perspectives?

*By Rocco Neri**

The advent of artificial intelligence applied to law raises many doubts about the correct application of the reasonable doubt criterion and its elaboration according to the scientific method. The aim of the paper is to find the right algorithmic formula resulting from the right compromise between logic and interpretation of the presumption of innocence.

Keywords: *Jurimetrics; Reasonable Doubt; Criminal Procedure: Scientific Method; Algorithm*

Introduction

We start from a premise. The criminal procedure is divided into four phases. Initially, the formulation of a hypothesis of reconstruction of the trial event is required. The investigator in the preliminary phase and, then, in the trial the parties (Public Prosecutor and Defendant) and the Judge himself, formulate one or more hypotheses of reconstruction of the facts. Assuming that a story is made up of a plurality of events, each of which can have the most disparate causes, one first tries to list all the possible causes of each event, thus delimiting the scope of the reconstructions that can be abstractly proposed; then, among those that can be proposed, one chooses the hypothesis of reconstruction of the event that appears most probable in a certain perspective of coordination among the different possible causes of the plurality of events[1]. Chosen as a hypothesis, it is proposed a "story" that explains the story in question, deductively drawing all the consequences that give meaning to this "story".

This allows one to test whether the story finds confirmation in other facts that were ignored or not considered significant in the immediate case, but which assume relevance in the particular perspective selected. The particularly complex framework mentioned above and the attempt at criterion interpretation ("Beyond Any Reasonable Doubt": B.a.r.d.) has strained the relationship between science, mathematics, and law. Is there a way to manage this complexity through scientific tools that tend to a certainty or absolute truth, not only procedural? In this short article we analyse the consequences of the Italian codification of reasonable doubt through a comparison with American jurisprudence and doctrine. An attempt will be made to formulate a valid epistemological theory considering past logical-legal theories in order to understand and make less cryptic the criterion B.a.r.d. The

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[1]Anderson, Schum & Twining (2005).

objective is to understand if the criminal process can be represented through a statistical process. It is essential to re-evaluate the legal epistemology trying to identify what concrete meaning is attributable to reasonable doubt.

The Current Status of Criterion B.a.r.d.

The criterion beyond any reasonable doubt of Anglo-American matrix follows the adversarial system[2]. The unfounded verdict of the jury has reduced: the tests of reasonableness of doubt, the epistemic importance of cross-examination, the evidentiary inferences, the appreciation of alternative hypotheses[3]. The connections between evidence and decision therefore assume cryptic dimensions.

The article 5 L. n. 46 of 2006 (Law Pecorella) has introduced the principle B.a.r.d. in the Italian system through art.533.1 cpp. The Pecorella Law has avoided doubts about the interpretation of the rule itself, which is configured as a rule of evidence and a rule of judgment for the establishment of guilt and for the pronouncement of conviction of the defendant[4].The criterion B.a.r.d. is closely related to the rule "in dubio pro reo" and the principles of the presumption of innocence of the accused, the exclusive burden of proof of guilt on the prosecution, the obligation to state reasons for the judgment[5]. The B.a.r.d.'s rule focuses on the logical-epistemic profiles of evidence and decision-making alongside the values underlying the criminal due process[6].

Therefore emerges the concept of unreasonable doubt that legitimises as such a pronouncement of conviction: this happens when the uncertainty depends on the lack of a minimum feedback in the emergencies of the trial and is outside the natural order of things and normal human rationality[7]. Ergo, the judge must verify the doubt that surrounds the alternative reconstructive hypothesis. The prosecution's claim that the defendant is guilty acquires high plausibility only to the extent that some relevant evidence has been established as true that can be easily explained if the defendant is guilty, but would be difficult if the defendant were innocent[8]. If the hypothesis of guilt is equally compatible with a hypothesis of innocence, then the prosecution's case is not strong enough to justify a conviction. In fact, it is preferable to acquit a guilty person than to convict an innocent person[9].

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[2]Langbein (2003).
[3]Sheppard (2003).
[4]Marzaduri (2007) at 88; Paliero (2006) at 73-82.
[5]Dershowitz (2007).
[6]The standard analysis with scientific method provides three syllogisms: deduction in which the conclusion is unknown, induction in which the major premise is unknown, abduction in which the minor premise is unknown. See Iacoviello (2006); Paulesu, (2009); Edgington (1985); Fiandaca (2005); Illuminati, (1979).
[7]Cass., Sez. I, 21 maggio 2008, Franzoni, in Ced. Cass., n. 240763, Cass., Sez., IV,12 novembre 2009, Durante, in Ced. Cass., n. 245879.
[8]Whitman (2008).
[9]Caprioli (2009) at 51.

Complexity and Mathematics: The Attempt to Explain B.a.r.d.'s Criterion

Algorithmic complexity management occurs through the causal explanation of an event (H) as a function of a given piece of evidence (E).

Bayes' theorem evaluates the impact of a given evidence E on the personal degree of belief of a judge G in relation to a given reconstructive hypothesis H[10]. The criminal process according to jurisprudence is governed by the law p (HK) = r, where the probability (p) of the hypothesis (H) is proportional to the degree of consistent information (K), introduced into the process through the acquisition of evidence, and as K increases, the degree of resistance (r) to falsification of the hypothesis increases[11].

For example:

- H0 the defendant is innocent (no hypothesis is true unless there is sufficient evidence to reject it);
- H1 the defendant is guilty if there is not enough evidence to reject H0 when H0 is not true, because there is not enough evidence to reject the hypothesis H0. As K increases, r (probability of conviction, probability of rejecting H0 and affirming H1) increases. If K is lower, the lower r (the probability of convicting H1 and accepting H0) will be. It follows that the prosecutor must prove that H0 is false to prove that H 1 is true.

If G, the adjudicating party, believes that the accusatory hypothesis H ("T killed C with a knife") is true, on the basis of a number of evidentiary findings E1 we are faced with Bayes' quotient, the ratio of P(E|H) to P(E| -H).The plausibility of the accusatory hypothesis appears, therefore, directly proportional to the Bayes ratio, which becomes an index on which to base and quantify the belief in a hypothesis in the light of evidence. If 0 (corresponds to the total lack of confidence in the hypothesis H), and 1 (the unattainable certainty of its truth) as the Bayes quotient increases, the probability of H (truth) increases, where the value 1 is the threshold above which the accusatory hypothesis H is more probable than -H (falsehood).

Following Bayesian reasoning, there is greater belief in H on the basis of the single piece of evidence E1 only if E1 supports the accusatory hypothesis[12]: P(E1|H)>P(E1|-H).

Carnelutti recognised a certain usefulness to algebraic functions as "heuristic devices", able to bring out the tendency prevalence or not of the hypotheses of guilt and non-guilt (in the usual form H and -H) without, however, adopting any mathematical criteria for the precise weighing of the probability of each hypothesis[13].

The risks connected to the theoretical adoption of demonstrative procedures structured according to the scheme, proper to formal truths, affirmation/negation

[10]Allen (1997).
[11]Allen (2011).
[12]Tribe (2004).
[13]Carnelutti (1963) at 9; Carnelutti (1961a) at 338; Carnelutti (1961b) at 29.

have shifted the attention to the dialectical conception of truth, where the principle of the right to cross-examination is no longer considered only as a limit and a control of the activity of the prosecutor or the judge, but rather as a logical form of the investigation procedure and, ultimately, as a guarantee of the reliability of its results[14]. In a causal sense, it seeks to calculate the probability of an event that is a consequence of another[15].

Clearly, the use of a scale of 0 to 1 does not allow for a full degree of conviction (100%) of the validity of charge H on the part of G. A very large amount of evidence, even in the case of strong disagreement, will stabilise the overall quotient, but will not raise the threshold of conviction[16]. In the case of 10 trials (E), of which, for nine of them, P(H|E1→9) is consistently at 90%, if even the last event gave Bayes' ratio a percentage figure of 90%, the overall (iterative) threshold would remain at 90%, but at the same time make the figure statistically more reliable.

Very rarely, in fact, does the degree of rational belief remain unchanged over the course of the survey. What we see, on the contrary, is the modification of H's degree of belief, either in terms of increase or decrease, so that evidential reasoning can be defined as a "progressive rational determination" of the probability of the accusatory hypothesis, continually recalculated as the complexity of the evidentiary framework increases.[17] The iterative approach to Bayes' theorem consists in repeating the calculation of the weight of P(H) with respect to the results acquired from time to time. It is fully probative of the proof E1 only when it is able to validate H, with a weakening of -H, or vice versa.

Thus, it can be said that Bayes' theorem is a logical-probabilistic function describing the correct procedure for revising confidence toward a hypothesis in light of a set of tests.[18] Thus, a method of calculating P(H) quantifies not only the preponderance of evidence canon of the civil trial, but also the far more ambiguous beyond a reasonable doubt canon[19]. In the specific context of the criminal trial, the application of a Bayesian model allows one to test whether the "personal probability that the prosecution's version [Ha] is true compared to the defence's

[14]Williams (2002) at 101.
[15]Viganò (2013).
[16]Allen (1994).
[17]AA.VV. (2006) at 113. The abduction of H is followed by the deduction of all possible consequences of H, to be sought at the crime scene. Given H for true, if the subjective probability of observing E1 is almost identical to that found in the case of the truth of -H, then E1 is irrelevant. In the case of irrelevant evidence, the coefficient on the ratio result is 1 due to the equivalence of P(E|H) and P(E|-H) while evidence that is statistically not in agreement with H generates a coefficient of less than 1 by substantiating -H, (the numerator being smaller than the denominator). If the probability of observing E1 given H is 0.8 on the 0→1 scale, the corresponding probability of observing E1 if the defendant is innocent (-H) must necessarily inform the remaining 0.2. Under this assumption, the odds ratio is much higher than 1, namely equal to 4, denoting a much higher probability of H with respect to E than -H. The statistical probability of observing E1 in the truth case of the charge hypothesis H [P(E1|H)] is higher than the statistical probability of observing it in the -H case [i.e. P(E1|-H)].
[18]Black (1984); De Finetti (1970).
[19]Allen, (1981).

version [Hd]", but at the same time imposes, the verification that the critical probability threshold P (reasonable doubt) is exceeded[20].

The Failure of Jurimetrics

It is intimately immoral to convict a man by calling him a criminal, saying to oneself, 'I believe there is a probability of one to twenty that this accused is innocent, but "I am willing to take the 1/20 risk of sacrificing him wrongly, in the interest of public safety and my own personal safety[21]." Immoral is setting a threshold of reasonable doubt once and for all, which means admitting a certain threshold of risk of convicting an innocent person. Doubt is said to be unreasonable when the probability of the accusatory hypothesis based on the available premises is separated by only one for a negligible interval[22].

Legal Bayesianism which presents itself as a theory that is not only "true" but capable of solving almost all problems in the evaluation of evidence, has suffered considerable criticism. Even Italian jurisprudence[23] has set this threshold at a limit value of 1, basically 99% or 99.999%. However, the numerical identification of the critical threshold does not seem to be within the reach of mathematical interpretation, especially since in itself, as recalled, the existence of a threshold that allows the judge to convict the accused even knowing that there is a certain margin of probability of his innocence is a cost of precision intimately immoral.

The new legal Bayesianism has sought to resist this through the inclusion of an evidentiary gap figure in Bayes' theorem. Based on these considerations, in a model of judgment that perceives the need for completeness or, at least, sufficiency of evidence, one should compare the data found. In the logic of reasonable doubt, the proof of H (innocence) does not work simply because it is not necessary.

On the contrary, such an application exposes the judgment to unwanted efforts, since the proof beyond a reasonable doubt of the falsity of a hypothesis does not differ, in terms of methods of ascertainment and difficulties, from the proof of its truth with the difference that, while for the purposes of conviction such an intellectual and economic effort is reasonable, the proof of innocence appears completely unnecessary and uneconomical, since the trial is called to examine only the propositional truth of the charge[24].

[20]Pardo & Allen (2008).
[21]Taroni, Bozza & Vuille (2018).
[22]Masera (2007).
[23]Cass., Sez. I, 3 marzo 2010, Giampà, in Ced. Cass., n. 247449. 65 V. Cass., Sez. IV, 8 luglio 2010, n. 36343, in Dir. pen. proc., 2010, p. 1427. 66 V. Cass., Sez. III, 15 aprile 2010, n. 21396, in dejure. Cass., Sez. II, 11 gennaio 2007, Messina, in Ced. Cass., n. 235716. 67 V. Cass., Sez. feriale, 27 luglio 2010, n. 30576, in dejure. Corte Cost., 24 gennaio 2007, n. 26,. Cass. Sez. Un., 30 ottobre 2003, Andreotti and others, est. Canzio. Cass., Sez. I,18 aprile 2006, n. 22023, in dejure. Cass., Sez. II, 21 aprile 2006, Serino, in Ced. Cass., n. 233785. Cass. Sez. IV, 17 giugno 2011, Giulianelli, in Ced. Cass., n. 250903. Cass., Sez. IV, 4 aprile 2013, n. 19749, in dejure. Cass. Sez. III, 20 giugno 2013, n. 37373, in Dir. giust. online, 2013, 13 Cass., Sez. I, 21 aprile 2010, Erardi, in Dir. pen. proc., 2011, p. 203; Della Torre (2014).
[24]Ubertis (2009).

The failure of Bayesian theory is also due to the attempt of the Swedish EVM model to explain reasonable doubt. The Evidentiary Value Model (EVM) was developed independently to resolve the doubts raised by the codification of the concept of free and rational belief of the judge. On the Bayesian concept, the Swedish model maintains the idea that belief in a hypothesis H is quantifiable and that Bayes' theorem represents the basic model for calculating the evidentiary weight of an individual piece of evidence[25].

However, we rule out that belief formation resides in a mere statistical determination of the probability of observing H in light of E, but EVM proposes to define judgment as an assessment of the "evidentiary relationship" between the accusatory hypothesis and the acquired compendium of evidence. Thus, the judge is not primarily concerned with establishing the truth of the *factum probandum*, but with establishing that there is an adequate "evidentiary relationship" as to the presence, or possible presence, of a causal or logical link between the evidence and the subject since even a high degree of conviction of the truth of an accusatory proposition "beyond a reasonable doubt" has judicial value only if it is established on the basis of an "adequate" evidentiary relationship that justifies it[26].

Evaluating the evidence would then mean estimating the probability that individual pieces of evidence from time to time "prove" the hypothesis. In dynamic terms, the Evidentiary Value Model allows one to combine the different values of the evidentiary ratio (A) of the individual pieces of evidence acquired with respect to the hypothesis H, through an expression of the type: where the relationship between each individual evidentiary value is disjunctive and independent since the question is not "whether all the evidentiary facts prove the [H] issue, but whether some of them do.

The justification, however, of a belief placed at the heart of the argument must never result in a mere identification of the causal law capable of explaining the greatest number of similar hypotheses. One must think that the evidence has been supported by further evidence, also because, otherwise, the reasonable doubt that a health damage has had other causes (or concomitant causes) appears difficult to overcome if one considers each specific case[27].

In other words, the doubt about the conduct of the crime must be compatible with the conviction, if it is in any case certain that the defendant has committed the crime in question would otherwise be an abnormal expansion of responsibility, in violation of the guarantee of responsibility for their actions[28].

For this reason, the statistical data on which Baianism is based must be belied by the peculiarities of the concrete case, whose probative force does not seem to be numerically quantifiable[29]. The rule of sharing the burden of proof requires that the prosecution, in formulating its reconstructive hypothesis, must present evidence that excludes any reasonable doubt of innocence.

[25]Taruffo (2009).
[26]Iacoviello (2006) at 3869
[27]Piemontese (2004) at 740; D'Alessandro (2012).
[28]Centonze, (2001) at 287.
[29]Simon & Mahan (1971); Kageghiro & Stanton (1985).

Only if this result is obtained, the presumption can be said to be won; in the opposite case, that is, in the case in which there is a reasonable doubt that the accused is really guilty, the judge cannot do anything but acquit. If, as it seems, these considerations are generally valid, it follows that the criterion of "reasonable doubt" cannot be quantified. In essence, the reasonableness of the doubt cannot be "weighed" in percentage terms: to say that it "counts" more than 5%, or more than 10% (or more than 0.1‰) ends up being a meaningless statement.

The numerical result of the Bayesian procedure also depends on subjectively fixed elements (think of the choice of the population of individuals who may have left the organic trace from which it was extracted a certain DNA profile), which only at a later stage can be processed according to the canons of logical-probabilistic schematism[30].

Bayesian theory does not offer mechanical rules of calculation to be applied automatically, but sets the boundaries within which the decision of the judge must move, requiring, as any logical rule, an explanation of those premises that are often more or less inadvertently concealed when making judgments[31].

The Epistemological Theory

Traditionally, in the Anglo-American context, this is referred to as the rule of decision, meaning that jurors are instructed to acquit if there is a reasonable doubt of guilt, and to convict if the evidence leaves only unreasonable doubt[32].

In fact, B.a.r.d. also establishes a standard of evaluation, insofar as the reasonableness of the doubts must be evaluated on a reasonable basis. More recent American theory focuses on the error distribution function.

The norms of evidence have this function in that they distribute the possible errors of the decision makers, favouring in the case of the criminal norm the false negatives (acquittal of the guilty) over the false positives[33] (conviction of the innocent).Reasonable doubt is sufficient to falsify the description of the fact, even in the presence of total evidentiary confirmation and its truth: this must be able to be extrinsic in a motivation that is explained through logical categories and that is respectful of the principle of non-contradiction a state of doubt understandable to any rational person[34]. Reasonable doubt must be a qualified doubt. And because it is a rule of judgment, the reasonableness requirement does not have to be motivated. So there is an identification of an evaluative threshold of reasonable doubt in motivation through logical categories.

Above this threshold, the gradations of intensity of doubt all go toward the certainty of innocence; in the opposite case, we are in the presence of an irrelevant doubt that leaves the field to the procedural certainty of guilt. For the law of evidence to be truly regulatory, it must regulate the interaction between what is

[30]Callen (1982).
[31]Tillers & Green (2003) at 275
[32]Laudan (2003) at 297; Minhas (2003) at 127
[33]Fassone (1997).
[34]Ramadan (2003) at 233.

given at trial and the resulting inferential process that depends on the knowledge and beliefs of the investigator through the evidentiary process that manifests that interaction. Beyond a reasonable doubt, then, is a principle of prudence and seriousness that should guide the formation of the judge's belief about the facts[35].

The B.a.r.d. does not express a real legal rule but an ethical principle on the basis of which the judge can condemn only if he is certain of the guilt of the accused. Reasonable doubt exists when, faced with the description of the fact that establishes guilt, it is nevertheless possible to formulate a reasonable alternative hypothesis around the same fact.

Thus, one can have either the hypothesis contrary to the starting hypothesis or one or more hypotheses different from the starting hypothesis. A reasonable hypothesis is defined as a narrative of the fact that appears normal or more properly plausible[36]. The concept of verisimilitude does not imply probability, much less proof, of the fact, but implies something other than mere theoretical possibility. It is based on reference to the normal course of events or, if you like, to the maxims of experience.

It is a criterion of practical reasonableness: if it is not possible to imagine a plausible alternative version of the fact, it can be said that the proof of it does not meet any reasonable doubt. If, on the other hand, at least one possible alternative version can be hypothesised, then whatever the evidence for the fact, conviction cannot be pronounced.

The problem lies in justifying reasonable doubt with respect to the foundation of the starting hypothesis. In this way, the meaning of the standard depends on criteria that vary over time and space, as the cultures from which the criteria of normality and verisimilitude are drawn change. The purpose of the trial is to try to explain why that fact (that crime) happened.

The law of evidence must regulate the interaction between what is given at trial and the resulting inferential process that depends on the knowledge and beliefs of the investigator through the evidentiary process that manifests that interaction[37]. This allows for the testing of whether the story finds corroboration in other facts that were ignored or not considered significant in the immediacy, but which assume relevance in the case of choice.

The strategy for the balance between science and law consists in shifting the decision-making primacy of the judge, entrusting him with the task of assessing the reliability and relevance of the scientific evidence presented by the expert witness, by means of a grid of evaluation criteria[38]: (i) whether the theory or technique employed at the basis of the evidence has been tested and is falsifiable; (ii) whether the theory or technique has been peer reviewed and published; (iii) the rate of error, known or potential, associated with the theory or technique; and, finally, (iv) whether the theory or technique has been generally accepted by the relevant scientific community.

[35]Ramadan (2004) at 64.
[36]Chinnici, (2006).
[37]Blaiotta & Carlizzi (2018).
[38]Haack (2015) at 39.

These criteria emphasise the autonomy of the judge with respect to scientific knowledge, the conception of science as functional to the ascertainment of truth in the trial, that is, of science referring to the trial context[39]. Scientists must increase confidence in the evidence they present during a proceeding, through ethical behaviour that excludes scientifically unsound methods and recourse to bad science; they must also be able to present their knowledge in a coherent and comprehensible way for legal practitioners. Legal professionals must accept and understand that science is rarely absolute: confidence and comprehensibility inherently rely on a symbiotic relationship between science and its scientists and the law and its jurists, and on adherence to guidelines and standards that distinguish what is accepted and incontrovertible from topics open to debate and investigation.

The Logical Theory

The subjectivity of the decision must be based on the arguments of the statement "x is proven beyond a reasonable doubt"[40].The Daubert judgment of 1993 provoked Popper's theory of falsifiability, according to which science proceeds through falsification of statements, and Hempel's logical positivism, according to which a scientific theory must have empirical verifications that confirm it[41].

The risk, underlined by many, of using junk science (bad science) in trials, consisting of knowledge that, although presented as tested and scientific, escapes any assessment of scientificity[42]. In Daubert there is a paradox. The judge appoints the expert precisely because he is not able to make a scientific assessment himself, and the judge is expected to evaluate the outcome of the expert evidence in order to determine whether it is worth using it to decide on the facts[43]. Therefore, it is assumed that the judge can make an ex-post evaluation of scientific knowledge that he did not possess ex ante. North American jurisprudence, on the other hand, highlights Daubert's weaknesses in the case of criminal judgments[44].

According to these considerations, "logical probability" can be defined as the relationship between a hypothesis and the elements that confirm its reliability[45].In fact, in light of the trial results, the case must be framed in the area of operation of the law of coverage or in the field of validity of the maxim of experience, so that

[39]Laudan (2006) at 35
[40]Copi & Cohen (1999)*;* Zaza (2008).
[41]Welch (2006); Neufeld (2005).
[42]Berman & Mcclennen (2012).
[43]Caprioli (2008) at 3529.
[44]*Coffin* v. *United States* 154 U.S. 432 (1895); *Woolmington* v. *Dpp*, A.C. 462,473-481(1935); *Johnson* v. *Louisiana*, 406 U.S. 356 (1972).
[45]Haack (2007). Cass. sez. un. 11 settembre 2002 n. 30328, Franzese. It is not allowed, especially from the epistemic point of view, «to deduce automatically and proportionately from the statistical probability coefficient expressed by the law of coverage the confirmation of the hypothesis», especially when it comes to the use of a «notion "weak even if always of a statistical test per sample, therefore the doubts about the correctness are not groundless (rectius, justification) of the inference which led to the finding that the causal link of an injurious event was established from the incidence of the case in similar cases.

there is the certainty of beyond a reasonable doubt, regardless of the statistical validity of the scientific law or the abstract convertibility of the maxim.

The common denominator is the standard of trial certainty which means logical probability beyond a reasonable doubt. If there are relevant facts that only make sense under the innocence hypothesis, then acquittal is required. In short, this proposed standard requires that a conviction is warranted if and only if: (a) The hypothesis of guilt can explain most of the relevant facts of the case; (b) The hypothesis of innocence cannot justify any important evidence that is unexplained on the hypothesis of guilt. Evidence is literally incomprehensible without rules of language and logic, but it is simply accepted that an investigator can process information and deliberate on it[46]. However, it frequently happens that in the attempt to find confirmation of the reconstructive hypothesis formulated, new facts are discovered from which the need for modification or some adjustment of the proposed "story" arises.

Therefore, the selection of the relevant conditions of the event is the result of a circular process, which ends when all the elements acquired have been used to confirm the hypothesis[47]. The last stage is the attempt to falsify the hypothesis: considering the alternative hypotheses and proving their unfoundedness. Thus, refutation increases explanatory power. Relative plausibility theory is the best explanation of legal evidence to date[48]. Differential diagnosis involves the elimination and inclusion of hypotheses based on the differentiation of data points. To some extent this is like forming a story, but the conceptual gaps involving the nature of the evidence and the unique context of scientific endeavours are remarkably unresolved.

Criminal Trial or Statistical "Trial"?

The most recent analyses by scholars of epistemology identify the cause of the uncertainty emerging from post-Daubert jurisprudence and doctrine precisely in the lack of coherence of the Daubert rules themselves on the philosophical-scientific profile[49]. The Court in the Daubert case has improperly referred to Popper's theories, which do not provide the judge with the criteria to establish either if an element of evidence is truly scientific or if it is reliable[50]. Even more serious is how the Court has erred in its claim to explain what distinguishes a scientific method from a non-scientific method and in having identified the concept of "scientific" with "reliable"[51]. The better the evidence with respect to a theory, the more likely it is that this theory is true: scientific evidence should not be treated in an exclusively formal and logical way, but it is necessary to take into account that science is also about our interactions with the world and, therefore, the context. A

[46]Tarski (1969) at 31.
[47]Haack (2006).
[48]Haack & Sallavaci (2014).
[49]Popper (1969).
[50]Popper (2002); Popper (1963); Cohen & Nagel (1934).
[51]Jasanoff (2001) at 372.

reasonable solution is to show that, however improbable, this hypothesis is still possible in a pragmatic sense, i.e. in the context of what actually "could happen".

The fundamental principle, at the basis of all procedural systems, developed and consolidated since Daubert establishes that the evidence provided by the expert is not binding for the judge and that, however complex it may be, the judge has the burden of interpreting and reworking the information content independently[52]. Particularly in the European context, especially in the criminal field, important normative bases for the discipline of scientific evidence in the distinct moments of the admission, the assumption and the use of the evidence contribute to define the role of science in the process; moreover, several sentences establish criteria for the validation of non-established scientific knowledge[53]. If, on the other hand, one was to fall below this minimum standard, one would be faced with a doubt that does not exist, because in reality there is a certainty: the procedural certainty of guilt. Can the criminal justice process be reduced solely to a statistical hypothesis test? The answer is still evolving. For now, the following considerations can be made.

The reliability of a theory depends on the studies that support it; the factual basis on which they are conducted; the breadth, rigorousness and objectivity of the research; the degree of support that the facts give to the thesis; the critical discussion that accompanied the elaboration of the study. Finally, from the judge's point of view, the identity, unquestioned authority, and independence of the person handling the research, and the purposes for which he or she is moving, are of pre-eminent importance. In summary, the criminal process is like a test of statistical hypotheses (statistical process) because its purpose is to collect evidence to prove a thesis, (the burden of which is initially the impulse of the prosecutor who then the defence refutes) and because the prosecutor wants to falsify the innocence of the accused and then prove his guilt. It is well known that the way to prove a hypothesis is not through corroborating evidence, but through falsifying alternative evidence.

Scientific research, in fact, shows that even a large amount of data in favour of a theory are not sufficient to prove it, while one against can be decisive to make it fall, emphasizing the importance of a "falsifying look" in the critical evaluation of the facts. However, our mind is built on the principle of verification: in front of a hypothesis that seems plausible, and therefore in front of a story, a plausible story, the common attitude is to look for evidence that supports it[54]. It is anything but an "irrational" proceeding of the human mind, the unusual, the improbable is always lurking. We cannot but take note of this reality: in practice, the most probable hypothesis can be false and the one that appears most unlikely to be true. However, it is not only the accusation and the story linked to it that takes the form of a narrative. The criminal trial also possesses within itself, constitutively, a narrative structure: in all judicial systems, a trial begins with a charge presented by the prosecutor, that is, a hypothesis of guilt. The defence presents an alternative hypothesis, but only as a second hypothesis. This order of presentation, guilt and

[52]Arcieri (2017).
[53]Corte e.d.u., 4 giugno 2013, Hanu c. Romania; Corte e.d.u., 9 aprile 2013, Flueras c. Romania; Corte e.d.u., 5 marzo 2013, Manolachi c. Romania; Corte e.d.u., 5 luglio 2011, Dan c. Moldava.
[54]Haack (2012); Fuselli (2008) at 52.

innocence, has a significant impact on the formation of the judgment, because the consideration of a first hypothesis makes the acceptance of an alternative hypothesis less likely. This is the so-called inertia effect: once a hypothesis has taken root in the cognitive system, it becomes difficult to modify it with information that, presented first, could have been influential.

Of course, the order of presentation cannot be changed, and therefore the narrative plausibility of the story hypothesised by the prosecution always precedes the presentation of that hypothesised by the defence, for this reason it dominates it and needs, in order to be true, a smaller number of evidentiary elements than the defence thesis needs. The accusation, after having been subjected to the procedures of confirmation or falsification of the reconstructive hypotheses of the fact put forward by the parties, brings with it, before the final decision of the judge, also the argumentative sequence foreseen by the procedural structure. The judge's problem is not to seek an impossible certainty, but to increase the degree of probability and reduce the margin of error to a rationally and socially acceptable threshold. It is debated whether statistical frequencies (when they exist, which in most cases they do not) can provide proof of a fact, to the widely prevailing opinion is in the negative, since it is said that statistics serve to make predictions by measuring the possibility of the occurrence of an event (or the frequency of a risk) in a given context but do not serve to determine the probability that an unknown event has already occurred[55]. In any event, the percentage in which a statistical frequency is expressed indicates the tendency frequency of an event, but does not correspond to the degree of evidence about the occurrence of that event[56]. The judicial body must therefore obtain a degree of confirmation fixed by law in order to consider the reconstructive hypothesis put forward by the party as proven[57]. It is always up to the judge to ultimately determine the probative value of the facts and therefore to establish whether in the concrete case the 'degree' of proof required by law has been reached[58].

Conclusion

The differences between science and law, as far as evidence and evidentiary procedures are concerned, can be addressed with the tools of epistemology, but a "legal epistemology", that is, an epistemology that investigates the relationship between evidence, scientific research and litigation-driven research that addresses the relationship between probability and justice; and that clarifies the role of expert scientific testimony in the difficult balancing act between inadmissibility and completeness. However, it has also been argued that the adjective "reasonable" means "plausible" and is not equivalent to "logical" or "rational," since otherwise a

[55]Saini (2009).
[56]Picinali (2018).
[57]Lempert (1977).
[58]Bona (2014).

conviction would never be reached. In fact, one can never exclude the existence of a doubt understood in a logical-rational sense, because one could always assume the innocence of the accused, even in the presence of an overwhelming probative picture of guilt. Although it cannot identify a unitary conception of reasonableness, it can certainly recognise the existence of a sort of minimum threshold, above which we must guide us, inevitably, in the direction of innocence.

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Corporate Social Responsibility in Developed as opposed to Developing Countries and the Link to Sustainability

*By Revantha Gajadhur**

This article reviews and incorporates the findings of academic Corporate Social Responsibility (CSR) and sustainability studies to guide hotels in achieving sustainability through CSR initiatives. To date, limited empirical research on CSR in developing countries is available. A triple-bottom-line approach employs companies to balance the needs of stakeholders, allowing them to give back to society while still prospering. Organisations follow CSR activities for a number of reasons, including enhancing the organisational image and strengthening relationships with consumers and stakeholders. CSR is most widely used in developed countries, such as the USA, Canada, and the UK. Consequently, given the lack of progress in CSR implementation in the developing world, this article illustrates some of the gaps identified in developing countries. This is significant because, for the first time, scholars in developing countries are exploring deeply into the concept of CSR. Thus, the article clearly sets the stage for businesses to participate in CSR activities by identifying the return and advantages of making investments for CSR activities within its relevant sectors. In other words, investigating the relationship between CSR and company performance. This article fills the gap and is unique in that it analyses existing CSR practices and offers guidance to business organisations.

Keywords: *Corporate Social Responsibility; Company Performance; Sustainability; Circular Economy; Hospitality industries*

Introduction

The concept of CSR developed in the Western world since the early 1950s and is unique to developing countries. Various CSR principles, standards, frameworks and indicators have expanded significantly as researchers developed the concept in the business and academic fields. The practice of the concept is similar in both the developed and developing worlds. Chambers, Chapple, Moon and Sullivan noted that the practice of CSR has been adopted by developed countries, such as the United States of America and the United Kingdom.[1] but it is not evident or clear whether it translates easily into developing or non-western countries. Researchers have identified that differences of culture, management perspectives, and geographical locations differs. Researchers have concluded that existing CSR in the developed world cannot be employed in developing countries due to the many

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[1]Chambers, Chapple, Moon & Sullivan (2003).

challenges. It is therefore, necessary to define the responsibilities for organisations towards society and the environment in terms of the economic, legal, ethical and discretionary expectations that society has on organisations at a given point in time.[2]

This article aims to share the practice of CSR in developed countries and how developing countries need to be aligned to these requirements in order to remain sustainable. Legislative controls, cost savings, gaining a competitive edge, meeting customer demand, enhancing environmental efficiency, building employee awareness, managing risks, and improving investor relations are some of the primary reasons for organisations to engage in sound environmental practices was further enhanced by Graci & Dodds; Kang, Lee & Huh; Rahman, Reynolds & Svaren.[3]

There is a moral obligation for organisations to ensure that CSR initiatives are implemented and adopted. In order for this moral obligation to be achieved, organisations need to work collaboratively with other stakeholders like the government and its suppliers in terms of enforcing stringent adherence to CSR initiatives and using supplies that contribute to conservation savings.

Corporate Social Responsibility in Developed Countries

Carroll implemented a series of definitions and guidelines as a foundation for CSR which has been cited from 1950s to 1990s representing six decades of CSR developments.[4] He further stated that the sequence included CSR definitions, empirical research, and alternative themes described as social performance, stakeholder theory and business ethics theory. Further to these themes, Carroll identified the gaps that exist when trying to implement CSR in developing countries.[5]

Most organisations that have been classified and labelled as CSR compliant have been driven by investors, companies, campaign groups and consumers based in developed countries. CSR practices are largely practiced in developed countries and are then globalised and shifted to other organisations and social settings through international trade, investment and development assistance.

Organisations engage with various stakeholders i.e., shareholders, employees, customers, suppliers, governments, NGOs and international organisations which are usually important components of the CSR concept followed by developed countries.[6] Many CSR studies have depicted social initiatives as the major responsibility of CSR. According to Birch, social responsibility is more important than an organisation's economic or legal responsibility.[7] He further argued that

[2]Carroll (1999).
[3]Graci & Dodds (2008); Kang, Lee & Huh (2015); Rahman, Reynolds & Svaren (2012).
[4]Carroll (1999).
[5]Carroll (1999).
[6]Fontaine, Haarman & Schmid (2006).
[7]Birch (2017).

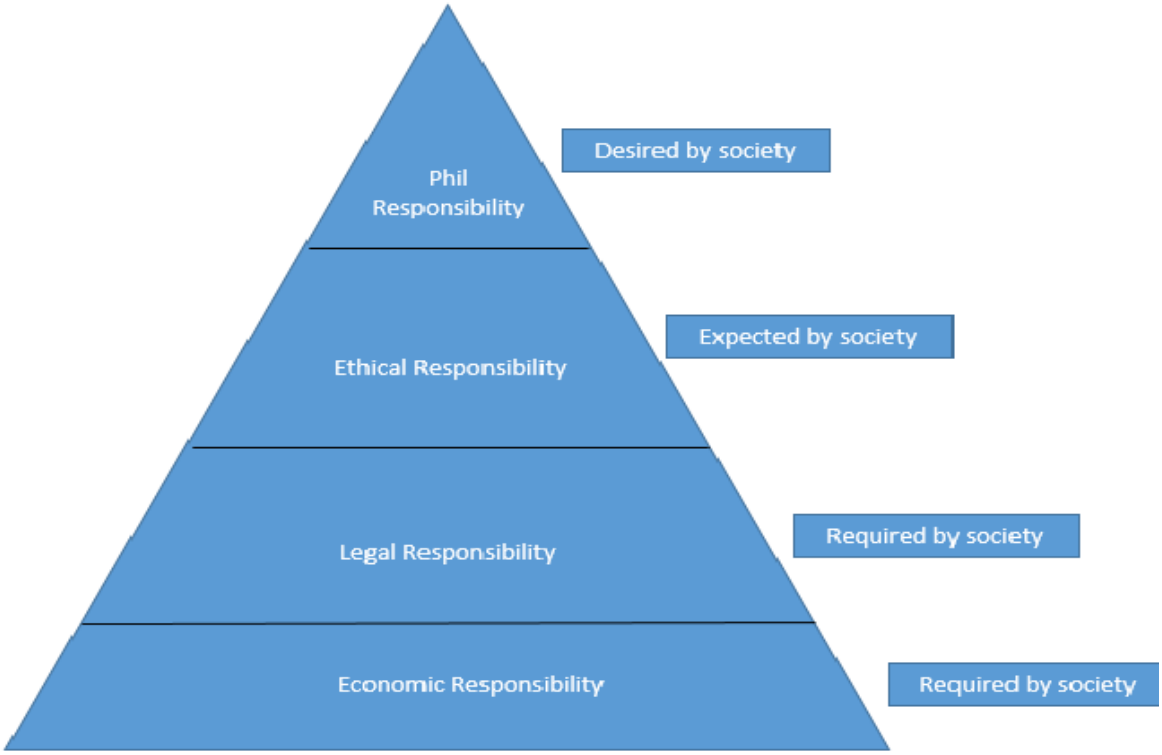
organisations must take an interest in community and social welfare, education and the wellbeing of its employees. McGuire first described the social activities of an organisation and showed that business organisations should act as corporate citizens.[8] In 1991, Carroll revisited his former four-part CSR definition and suggested that the discretionary component was corporate citizenship.[9] Table 1 and Figure 1 below depict the four-part CSR model and its definitions.

Table 1. *Carroll's 4-Part Definition*

Responsibility	Social Expectation	Elements
Economic	Required	Be profitable, maximise sales, minimise cost
Legal	Required	Obey laws and regulations
Ethical	Expected	Do what is right fair and just
Discretionary/ Philanthropic	Desired/Expected	Be a good corporate citizen

Source: Carroll (1991)

Figure 1. *Carroll's four-part model of CSR*



Source: Carroll (1991:42)

Research into the changing dynamics of CSR in developing countries have been relatively scattered across various fields of research. Most research on CSR in developing countries consists of country-specific case studies, while relatively

[8]McGuire (1963).
[9]Carroll (1991).

few comparative international analyses exist comparing CSR practices in developing countries across the world.[10] Carroll illustrated the CSR standards, principles, and codes which have developed and are still being developed in both developed and developing countries.[11]

In the early 2000s, there was little attention from scholars on the topic of CSR in developing countries[12], as the majority of studies on topics of CSR were focused on comparing the USA and Europe.[13] Evidence suggests that between Europe and the USA, there are substantive differences in the approach that business takes towards CSR-related issues, and that this can be traced back to institutional arrangements.[14] Globalisation has been accredited as one of the main factors in the increasing popularity of CSR around the world[15], including in Africa and Latin America.[16] Considerable evidence on differences between approaches to CSR across countries and regions around the world.[17]

Carroll identified four aspects of CSR: economic, legal, ethical and discretionary.[18] Based on these elements, a socially responsible company should strive to make a profit, obey the law, be ethical, and be a good corporate citizen. Many scholars have built on Carroll's work and developed these components further.[19] Carroll revisited his four-part definition of CSR in 1991 and depicted the notion of multiple corporate social responsibilities in a pyramid construct.[20] In this pyramid, economic responsibility forms the base, while legal, ethical and philanthropic responsibilities make up the higher levels of the pyramid. This is depicted in Figure 1 above.

The concept of CSR has been developed primarily in Western countries. There are numerous hurdles to achieving CSR, particularly in many developing countries where the organisations, standards and demand system, which are significant elements to CSR are fairly weak.[21] A study by Jamali highlighted the observation that there are various CSR plans developed in Western countries that can be modified to fit the context of developing countries.[22]

The practice of CSR has been adopted by developed countries, such as the USA and the UK[23] but it is not evident or clear whether it translates easily into developing or non-Western countries,[24] hence, the developing countries need to

[10]Welford (2005).
[11]Carroll (2016).
[12]Birch & Moon (2004); Chapple & Moon (2005).
[13]Maignon & Ralston (2002); Matten & Moon (2008).
[14]Gond, Kang & Moon (2011); Matten & Moon (2008).
[15]Scherer & Palazzo (2011).
[16]Higgins & Debroux, (2009).
[17]Williams & Aguilera (2008).
[18]Carroll (1979).
[19]Carroll & Brown (2021); Lu, Ren, Rong, Ahmed & Streimkis (2020); Lantos (2001); Masoud (2017) & Wood (1991).
[20]Carroll (1991).
[21]Kemp & Unies (2001)
[22]Jamali (2007).
[23]Chambers, Chapple, Moon & Sullivan (2003).
[24]Ertuna, Karatas-Ozkan & Yamak (2019); Jamali, Karam, Yin & Soundararaian (2017); Jamali, Makarem & Will (2019).

enforce stringent controls, policies and guidelines to ensure CSR is up to world standard if they wish to remain sustainable in the industry where they operate.

Canada, USA and the European Union (EU) are among the most developed nations in the world.[25] Their trade and developed industries put them on top of the world's list in terms of per capita income. Ironically, it also places them at the top in terms of pollution. However, it is difficult to get them to make concrete commitments to reduce environmental degradation because it will affect their industrial output. It is important for developed countries to take a good look at the harmful effects of environmental degradation in their organisation so that it becomes easier for them to comply. Manikum further stated that over a hundred million people in North America and the EU are exposed to unsafe air. Incidents of diseases like asthma are rising with coastal ecosystem disruptions due to excessive use of fertilisers in the developed world. These are some of the dangers arising from environmental degradation. Other threats result from biological contamination and trade associations with the third world. This is one of the reasons why it is important for trade and industry in the developed countries to pay greater attention to environmental issues. It will directly and adversely impact their societies and localities. There is, therefore, a need for governments and businesses to interact more closely to see better results environmentally. This implies determining whether all countries, both developed or developing, face similar issues which need to be closely monitored and best practices need to be adopted so that organisations remain sustainable in the industries in which they operate.[26]

Corporate Social Responsibility in Developing Countries

CSR agendas in developing countries have been less visible internationally and have often not been considered CSR-compliant. In the second decade of the 21st century, governments, companies and NGOs in many developing countries have included Organisation for Economic Cooperation and Development (OECD) driven initiatives into CSR agendas.[27] The OECD is an intergovernmental economic organisation with 36 member countries, founded in 1961 to stimulate economic progress and world trade. It is a forum of countries describing themselves as committed to democracy and the market economy, providing a platform to compare policy experiences, seeking answers to common problems, identifying good practices and coordinating domestic and international policies of its members. Most OECD members are high-income economies with a very high Human Development Index and are regarded as developed countries.[28] In many cases, these CSR initiatives have built on long-standing traditions of philanthropy and concerns have emerged about countries such as China, India, South Africa, the Philippines and Brazil. Governments of some developing countries facing major social challenges have engaged organisations in meeting these challenges, such as

[25]Manikum (2010).
[26]Manikum (2010).
[27]United Nations (2007).
[28]OECD (2018).

with BBBEE in South Africa, or presidential encouragement of business efforts to tackle poverty in the Philippines.[29]

Governments of some major developing economic powerhouses such as China have undertaken a variety of initiatives to ensure the impact in their countries are tailored to international and social interests. The challenge is to do so in ways that actively support sustainable development. Chinese hotel industry has developed rapidly over the past three decades, largely as a result of it being one of the industries initially opened to foreign investments in the 1980s. CSR efforts are major concerns for hotels and have been addressed by many hotel operators in China.[30] It was further stated that organisations should devote CSR initiatives to stakeholder rather than environmental concerns and societal obligations, i.e., support for NGO operations, commitment to sustainable growth or contributions to social wellbeing. This recommendation differs as most organisations focus on green initiatives and environmental protection practices, e.g., pollution levels.[31]

In developed countries, there is an increasing recognition among companies that a 'one-size-fits-all' approach to CSR in operations around the world is ineffective in addressing organisational drivers for socially responsible behaviour. An adaptable approach assists in focusing on issues of greater importance in developing countries including the value of sustainable local initiatives and the role of business in poverty reduction and health services.[32]

Many studies have highlighted that developed countries like the USA, UK and many EU countries have strong concepts and theories of CSR.[33] These countries have developed CSR frameworks, standards, theories and principles internationally and have been adopted by organisations in the developed countries. These standards and principles have been criticised due to their limited international adaptability.[34] It has been argued that the accepted practice of CSR varies considerably between different countries. Chapple and Moon supported this argument by describing the discrepancies in CSR practices among seven Asian countries.[35] Their analysis of website reporting of CSR in these countries confirmed that there is no single pattern of CSR in Asia. Therefore, they suggested that CSR is dependent on factors relevant to each country and differs from country to country based on various elements i.e., culture, education around the topic of CSR and country laws and regulations.

An integrative approach, related to sustainability and stakeholder theories, deals not only with financial results, but also with employee satisfaction and meeting the needs of employees, clients, society and managers, which allows for a corporate image of social responsibility.[36]

[29]United Nations (2007).
[30]Liu, Wong, Shi, Chu & Brock (2011).
[31]Liu, Wong, Shi, Chu & Brock (2011).
[32]United Nations (2007).
[33]Crane & Matten (2007).
[34]Burrit, Christ Rammal & Schatlegger (2020); Lindgreen, Swaen & Campbell (2009); Sharma & Choudhury (2021).
[35]Chapple and Moon (2005).
[36]Crane & Matten (2007).

Cultural traditions strongly affect CSR implementation in organisations. CSR and philanthropy are closely related in developing countries largely due to their cultural traditions.[37] Culture is heavily dependent on the religion followed. Other authors have stated that cultural differences are the major factor behind these variations, while the level of development of a country may be a key indicator.[38]

A considerable amount of CSR literature has been published on international CSR discrepancies;[39] CSR applications[40] and the development of CSR frameworks for developed countries.[41] However, there is little evidence related to CSR frameworks, indices and standards for developing countries. Conversely, researchers have pointed out that CSR provides many intangible advantages such as market reputation, employee satisfaction, customer satisfaction, government support and growth and sustainability.

It can be argued that organisations that implement CSR programmes obtain business benefits[42] such as an enhanced corporate image and reputation,[43] increased sales and customer loyalty; increased productivity and quality; reduced complexity and costs; better control and management of risks; a better capacity to attract and retain employees; and higher employee motivation. These benefits have been seen in organisations in developing countries that have applied CSR concepts, and in the long term, this may enhance CP.[44] However, no direct evidence is available to prove that companies can benefit from implementing CSR plans in developing countries.

In addition to proving the benefits of CSR, companies in developing countries face a major problem for the implementation of CSR plans, in that they lack a reasonable framework to assess their effectiveness. There is little evidence to show that organisations in these countries have employed CSR plans based on international CSR standards, policies and principles which does not make for ease of comparison. Several studies have found that cultural differences are the major limitation to adopting international CSR standards in the developing world.[45] In addition, these authors have argued that there are many differences among the developing countries themselves, and hence framework development is a problem. Therefore, care and attention are needed when using the term CSR especially when discussed in the context of developing countries. Despite this, Visser introduced a common CSR framework for Asian and African countries based on Carroll's CSR pyramid concept. Accordingly, the organisation's first obligation is economic responsibility, the second is philanthropic, the third is legal and the fourth is discretionary responsibility.[46]

[37]Visser (2007).
[38]Burton, Farh & Hegarty (2000); Chapple & Moon (2005); Fiorentini (2020).
[39]Andersen & Høvring (2020).
[40]Carroll (1979); Jamali & Carroll (2017).
[41]Ali, Frynas & Mahmood (2017).
[42]Porter & Kramer (2002).
[43]Schwaiger (2004).
[44]Rais & Goedegebuure (2009); Ruf, Muralidhar, Brown & Janney (2001).
[45]Chambers, Chapple, Moon & Sullivan (2003); Iyer & Jarvis (2019); Welford (2005); Baughn, Bodie & McIntosh (2007).
[46]Visser (2007).

Environmental issues are basic problems in the developing world at present because countries have larger populations and more industries that pollute the environment than countries in the developed world. Dahlsrud stated that 97% of CSR definitions include different CSR dimensions.[47] Organisations should use these dimensions when they define CSR. Chand elaborated on the different dimensions of CSR that organisations can adopt.[48] The CSR agenda can be broadly divided into its internal and external dimensions as depicted in Table 2 below.

The dimensions depicted above should be embedded even in developing countries. Developing countries adopting external and internal CSR dimensions invite surprised reactions when it is questioned and yet there are countless examples of how developing countries are proving themselves highly adept at delivering the so-called triple bottom line of sustainability.

The ethical responsibilities enjoy a much higher priority in Europe than in the USA. In developing countries, however, ethics seems to have the least influence on the CSR agenda.[49] This is not to say that developing countries have been untouched by the global trend towards improved governance.[50] In fact, the 1992 and 2002 King Reports on Corporate Governance in South Africa both led the world in their inclusion of CSR issues.

CSR in developing countries is a rich and fascinating area of enquiry, which is becoming ever more important in CSR theory and practice. Since it is profoundly under researched, it also represents a tremendous opportunity for improving our knowledge and understanding about CSR. The focus on CSR in developing countries can be a catalyst for identifying, designing and testing new CSR frameworks and business models for future developments.

[47] Dahlsrud (2008).
[48] Chand (2006).
[49] Crane & Matten (2007).
[50] Reed (2002).

Table 2. *Internal and External Dimensions*

Internal Dimensions	
Human Resource Management	Human resource management is part of CSR. This will include all workplace-related issues such as levels of salaries, timely disbursal of wages, administration of benefits, issues related to working hours, and quality of work.
Health and Safety at Work	There is increasing pressure to recognise corporate responsibility towards worker's health and safety. This is of particular importance when workers are exposed to hazardous materials or when they have to work in potentially dangerous working conditions.
Adaptation to Change	We live in an ever-changing world and it is the responsibility of the employer to prepare the employees to meet and deal with the changes. When an organisation is going through a phase of rapid automation or change, the employer may be expected to help train its employees to meet the new challenges faced due to this change of technology.
Management of Environmental Impact and Natural Resources	Companies have to be very careful while utilising natural resources. Even when they have a license or mandate to use a particular resource, society does expect them to be judicious and restrained while using them. Entrepreneurs have to be particularly careful while using shared resources. For example, many factories may be using water from a river that is also the source of water for a nearby village or town. The factory might even be disposing its industrial waste into the very same river, which is compounding the problem.
External Dimensions	
Local Community	There is a very complex interrelationship between a corporate and the community around which its activities are centered. At the least, the company may be expected to be part of the local economy by providing jobs, consuming local products and services, and contributing to local taxes.
Business Partners, Suppliers, and Consumers	An organisation is expected to be fair and honest in its dealings with suppliers and consumers, it is also expected to promote an honorable code of conduct amongst its business partners and supplier. Nike had to face when the exploitative labour practices of its suppliers came to light.
Human Rights	The organisations record on human rights is very important for its positive public image. Very few entrepreneurs can afford to carry an image of direct abuse of human rights. Corporate world would avoid supporting an administration that has a past history of human rights abuses. That is one of the reasons why many large companies are wary of identifying themselves closely with the Chinese government.
Global Environmental Concerns	Many organisations are notorious for their adverse impact on the environment, are going out of their way to prove their environmental credentials. Chevron, British Petroleum, and other fossil- fuel companies constantly advertise their efforts to encourage the use of alternative clean fuels and sustainable technologies.

Source: Chand (no date)

Roles of Business Organisations

All organisations whether for-profit or non-profit have a role to play within society in the countries where they operate. Businesses are run by people to produce goods and services for society which they then sell to customers in order to make a profit. This profit is used as a return to investors, to invest in new technologies and new products, to meet the wage and career expectations of employees and pay taxes and make other contributions to government, as specified by legislation. In brief, without profit there is no business, and without business there is no wealth creation in society. [51]

Noeiaghaei (2009) mentioned that focus on CSR, environment and sustainability have been on rise.

Modern organisations are supposed to be aware of these issues. Most international and multinational companies have rules and regulations to comply with and are expected to meet society's expectations with regard to the environment and ethics. CSR is an important issue in developed countries and multinational companies that are choosing to become established in developing countries have realised the importance of CSR in global business platform. All the companies wanting to enter the international trading and business networks should act responsibly regarding the environment and society and adopt CSR initiatives.

Business organisations have many responsibilities to their societies which is important to promote community development. These include meeting the increasing societal expectations of business, reducing the power and scope of government, globalisation and heightened media reach. A sequence of corporate scandals has undermined confidence in the integrity of corporations, financial institutions and markets.[52] As a result, management may choose to implement CSR concepts even if they do not improve financial performance. Global organisations such as the UN expects to implement the goals of the "Millennium Development": a world with less poverty, hunger and disease, greater survival prospects for mothers and their infants, better-educated children, equal opportunities for women and a healthier environment.[53]

As a result, much of the CSR discourse and research in Africa is focused on ethics, anti-corruption measures and counteracting weak public service delivery in key sectors such as healthcare and education.[54] Legislation and enforcement are poor in developing countries.[55]

CSR in Africa is most often associated with medium to large organisations, and predominantly with international or large foreign investors. Given the absolute wealth of these organisations in comparison to the poverty of the countries and societies in which they are operating, CSR can be a way to counteract negative

[51]Noeiaghaei (2009).
[52]OECD (2004); Smith (2003); Van Driel (2018).
[53]United Nations (2006).
[54]Hamann, Woolman & Sprague (2008); Imani Development (2009); Visser, Mcintosh & Middleton (2006); Zimmer & Rieth (2007).
[55]Hagen-Zanker, Mosler Vidal & Sturge (2017).

perceptions of business, as well as a way to make a genuine difference to social and environmental challenges.[56] As a result, CSR is seldom related to the organisation's core business, but rather tends to be positive payback philanthropy with public relation benefits. Instead, CSR activities and projects in Africa are mainly focused on creating a positive corporate image, as well as addressing weak public sector service delivery in the areas of healthcare, mainly HIV/AIDS, education or labour skills development and the prevention of child labour.[57] CSR is a particularly prominent theme among mining, oil and gas companies in Southern Africa because of their significant social and environmental impacts, although telecommunications companies have gained a high profile more recently.[58] Defining a comprehensive model for CSR in Africa is problematic because of the many differences in culture and demands.

As per the report published by Näringsliv, good profitability, environmental accountability and social responsibility are all connected.[59] If profitability is ignored, it will be difficult in the long term to finance environmental improvements and responsibilities towards the community. If the environment is ignored, companies risk their reputation, customers and business options, all affecting profitability. If companies ignore their social responsibilities regarding human resources issues, for example, they may lose skills, which would also affect profitability. These efforts involve every segment of society. CSR is the way in which businesses work towards sustainable development.

Businesses have always played a key role in the economic and social development of the communities in which they operate.

Business firms try to develop their businesses using the business and corporate strategies such as product differentiation, cost focus and cost leadership. Moreover, they are interested in establishing CSR programmes as a business strategy.[60] Many companies in developing countries such as India, Bangladesh, Pakistan and Sri Lanka have established CSR programmes as a response to their frustration with the existing CSR activities. Sood and Arora, argued that the motivation for social responsibility activities depends on an organisation's leadership and the orientation of the organisation's senior management.[61] Therefore, CSR is becoming an important theme for improving the relationships between stakeholders and business organisations in the developing world and should be adopted more widely.

CSR relates to an organisation's obligation to be accountable to all of its stakeholders in all its operations and activities with the aim of achieving sustainable development not only in the economic dimension but also in the social and environmental dimensions.[62] Today, it is commonly known that sustainable development is more than just environmental conservation of a natural area, but

[56]Visser & Tolhurst (2010).
[57]Sorour, Boadu & Soobaroven (2020).
[58]Hamann & Kapelus (2004).
[59]Näringsliv (2004).
[60]Mohr, Webb & Harris (2001).
[61]Sood & Arora (2006).
[62]Tamvada (2020).

that is must also address the set of criteria or principles that define the conditions for its achievement as an organisation and it should address the following[63]:

- Protect and conserve sustainable resources
- Adopt a multi-stakeholder approach
- Be environmentally responsible
- Maintain the wellbeing and involvement of the local population
- Practice economic benefit
- Have a long-term view
- Adopt a triple-bottom line approach (environmental, social and economic); and
- Government must play a leadership role (i.e., impose a 'greater good' approach).

Business leaders and management in general understand CSR as a response to business failures that have accompanied the surprising growth in size, impact and power of modern organisations.[64] While modern management has created great efficiencies, it has also led to a weakening of individual responsibility that is generally only visible when business gets into conflict.

Business leaders deal with CSR issues through professional business organisations such as the GRI, the UN Global Compact and the World Business Council for Sustainable Development.

Cadez and Czerny stated that it is a consistent finding in survey research that better performing firms with respect to the object of enquiry are more likely to respond than lower performing firms.[65] CSR reporting in most jurisdictions is not mandatory and poses a potential problem.

The theoretical View of CSR in developing Countries

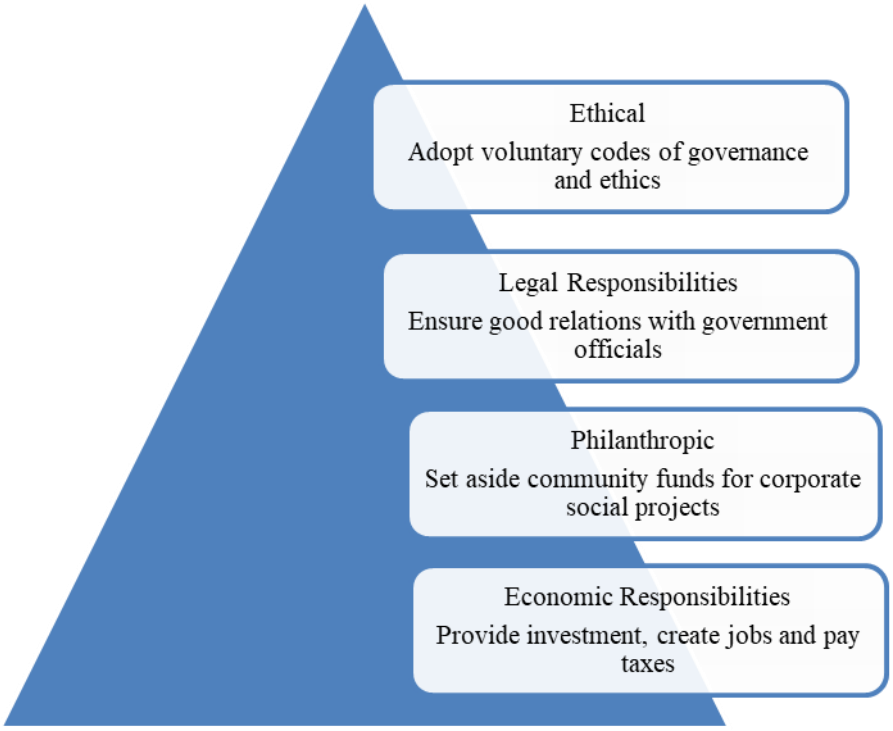
Carrol's CSR model was designed for the developed countries.[66] Visser researched the state of CSR in Africa, using Carroll's (1979) CSR pyramid in his analysis and suggested that the order of the pyramid does not apply in Africa.[67] Visser revised Carroll's CSR pyramid, as shown in Figure 2, and replaced discretionary responsibilities with philanthropic responsibilities. The basis of this revised pyramid was the economic grouping, forming the foundation on which the other three categories rest. Visser foresaw philanthropic responsibilities as following basic economic responsibility; only then could legal and ethical responsibilities follow, and he proposed several reasons why philanthropy should take precedence, namely, Africa's problematic socioeconomic conditions, its dependence on foreign

[63]Tuan (2011).
[64]Ali (2017).
[65]Cadez & Czerny (2016).
[66]Matten & Crane (2005); Visser (2006).
[67]Visser (2006).

aid, and the fact that CSR in Africa was still at an early stage.[68] Legal infrastructure is poorly developed in Africa; hence, it is a less demanding driver of CSR. Visser concluded that CSR could not be generalised to different countries according to the order originally proposed in Carroll's pyramid model, and that the relative priorities of the different types of CSR depended greatly on the local cultural context.[69] An increasing amount of evidence suggests that in developing countries, CSR practice is focusing on philanthropic responsibilities.[70]

Visser suggested ten major drivers that characterise CSR in these contexts and divided these drivers into two groups: internal and external, as shown in Figure 3 below.[71] He considered that internal drivers represent pressures from within a country, such as cultural traditions, political reform, socioeconomic priorities, governance gaps, crisis responses and market access. On the other hand, external drivers represent the international standards, investment incentives, stakeholder engagement and supply chains, which tend to have a global origin.

Figure 2. *CSR Pyramid for developing Countries*



Source: Adapted from Visser (2007)

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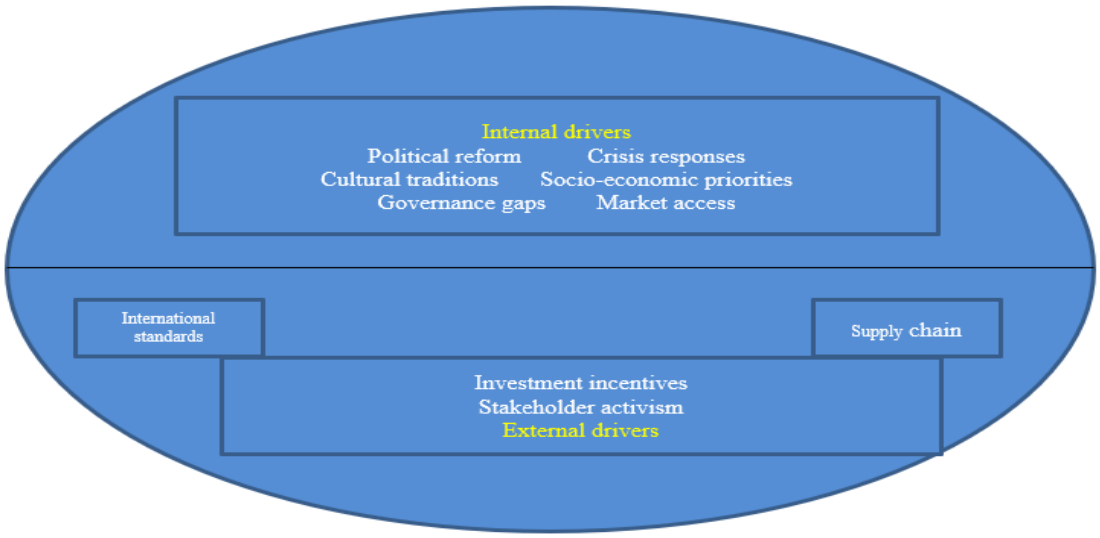
[68]Visser (2005).
[69]Visser (2006).
[70]Jamali & Mirshak (2007); Visser (2008).
[71]Visser (2007).

Figure 3. *Drivers of CSR in developing Countries*



Source: Adapted from Visser (2007)

In an African context CSR is framed by socio-cultural influences such as communalism, ethnic-religious beliefs and charitable traditions.[72] Consequently, Visser suggested that the value-based traditional philosophy of African humanism is what strengthens much of the modern approaches to CSR in the African continent.[73]

There are numerous obstacles in trying to achieve CSR, particularly in many developing countries where the institutions, standards and regulatory demands, which give life to CSR in developed countries, are relatively weak.[74] Research conducted by Jamali highlighted that there are various CSR plans developed in Western countries that can be modified to fit the context of developing countries.[75]

Among the benefits arising from being socially responsible, one important argument for addressing CSR is its business case, or more specifically, the relationship between CSR and corporate competitiveness.[76] The implementation of CSR practices may increase the possibilities for profitability, reduce risks, and improve financial investing and commercial benefits for all stakeholders. However, available studies have focused on CSR in the developed countries rather than the developing countries[77] hence, the developing countries may not have the advantage in terms of extensive CSR implementation. Nicolaides conducted a study to examine the idea of ethically driven CSR in the context of stakeholder theory and sustainable development in the current digital world. The study focused on event businesses, which are often compelled to cultivate strong cultures of ethical CSR

[72]Burton, Farh & Hegarty (2000).
[73]Visser (2007).
[74]Kemp & Unies (2001).
[75]Jamali (2007).
[76]Porter & Kramer (2002).
[77]Belal (2008); Dobers & Halme (2009).

merely because it is the 'right' thing to do, rather than just to advance their strategic goals.[78] Ethical CSR should be motivated by real virtue and a desire to reflect society's moral ideals.

Skills development and basic education still remains a challenge and is a serious problem in Africa. Both these issues are important to economic growth and poverty reduction, but the monetary and administrative scope of African states to meet these goals is limited. The presence of HIV/AIDS and its damage to the labour force only serve to increase the problem.[79] According to Visser and the UNDP, developing countries are defined as less developed nations with a relatively low per capita income.[80] Many African, Asian and Latin American countries fall into this category and are trying to overcome these problems by improving their political, financial, education, labour and cultural systems.[81] Accordingly, the focus of most CSR studies in developing countries has been the Asian, African, Middle Eastern and Latin American regions.[82]

Since the theory of CSR was introduced in the developed world, it cannot be directly adopted by the developing world. CSR may also be seen as an enabler for companies in developing countries trying to access markets in the developed world. Nyuur.Ofori & Amponsah identified competitive advantage in international markets as one of the key drivers for CSR in Central and Eastern Europe and Asia.[83]

The Different Views on CSR

It is widely acknowledged that the study and practice of CSR is more advanced in developed countries as in the developing countries. Academically, very little is known on the practice of CSR in developing countries.[84] However, in developing countries CSR plays a role in philanthropy, which is identified by CSR scholars.[85] Uriarte demonstrated using data from 14 Asia-Pacific countries, which included the five South-East Asian developing countries of Indonesia, Malaysia, the Philippines, Singapore and Thailand. According to the Asia-Pacific Economic Cooperation report CSR in the APEC region, the following similarities were noted in CSR practices and activities carried out in the countries of the Asia-Pacific region.[86]

Despite the overall similarities, there are distinguished differences between the practices of the developed countries and those of the developing countries.

[78]Nicolaides (2017a).
[79]Johanson & Adams (2004).
[80]Visser (2008) and the UNDP (2006).
[81]Whitley (1999).
[82]Belal & Momin (2009).
[83]Nyuur, Ofori & Amponsah (2019).
[84]Jamali & Mirshak (2007).
[85]Uriarte (2008).
[86]APEC (2006).

Maignan and Ralston found that organisations in different countries differs in the extent to which CSR is reported.[87]

Baughn, Bodie and McIntosh compared CSR policies and practices in Asia with those of the U.S., Europe and Australia.[88] Based on Welford's study, they showed that fewer policies and practices were implemented in the developing world.[89] Their study highlighted the policy differences between European and Asian companies including those relating to fair wages, freedom of association and equal opportunities for employees. Further, Baughn, Bodie & McIntosh stated that philanthropic policies were common in North America, less popular in Europe and least used in the Asian region.[90] Ramasamy and Ting argued that CSR was less popular in the developing world than the developed countries.[91] They also reported that the level of CSR awareness in Malaysia was generally lower than in Singapore. Rathnasiri noted that many companies in Sri Lanka did not understand CSR but that philanthropic and community development were widely known and implemented in Sri Lankan organisations.[92] Baughn et al. further pointed out that the philanthropic and community development was not new to Asia and such CSR activities were conducted under a variety of names, including donations and social charity giving.[93]

It is generally acknowledged that CSR is more often implemented and studied in developed countries such as the USA, Canada, Australia and the UK. For this reason, the theory and practice of CSR in developing countries such as Asia, Africa and Latin America still needs to be discussed and debated.

Researchers in developing countries began to examine the concept of CSR in more detail. Of particular interest was whether, and to what extent[94], prevailing Western notions of CSR could be implemented in developing countries[95] and whether CSR had positive business benefits.[96] Although various stakeholders have pushed organisations to implement CSR in developing countries, it seems many organisations do not have sufficient knowledge to articulate it.[97] There are no accepted rules in developing countries to enforce stakeholder demands.[98] Other researchers suggest that senior management's lack of understanding about the benefits of CSR prohibits its implementation.[99] Blowfield and Murray agreed that there were no generally accepted rules in developing countries to enforce

[87]Maignan & Ralston (2002).
[88]Baughn, Bodie & McIntosh (2007).
[89]Welford's (2005).
[90]Baughn, Bodie & McIntosh (2007).
[91]Ramasamy & Ting (2004).
[92]Rathnasiri (2003).
[93]Baughn, Bodie & McIntosh (2007).
[94]Dober & Halme (2009).
[95]Jamali (2007).
[96]Dutta & Durgamohan (2008).
[97]Fernando (2007).
[98]Blowfield (2004); Chambers, Chapple, Moon & Sullivan (2003); Chapple & Moon (2005); Thorpe & Prakash-Mani (2006); Visser (2008).
[99]Agarwal (2008); Fernando (2007).

stakeholder demands; hence, it is difficult for organisations to adopt CSR initiatives when there is no legal enforcement.[100] There are expectations that business organisations need to find solutions to the main social and environmental challenges, such as water accessibility and affordable health care. Evidence of weak legal enforcement and issues around implementation by authorities at different levels abounds, yet at the same time, it is believed that the law by itself cannot define everything that society currently expects companies to take responsibility for. There is a need for greater collaboration between organisations, government and society in developed economies.

Stakeholders and organisations have poor and insufficient information about the applicability of many features of CSR in developing countries. Furthermore, this information comes from global institutions such as UN Global Compact, and GRI, which have supported the development of many CSR plans. The UN Global Compact has introduced ten principles (listed in Table 3 below), which are used in both developed and developing countries as a foundation for applying CSR in an organisation.

Table 3. *Ten Principles of the UN Global Compact*

UN Global Compact Themes	Principles
Human Resource	Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights Principle 2: make sure that they are not complicit in human rights abuses.
Labour	Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining. Principle 4: the elimination of all forms of forced and compulsory labour. Principle 5: the effective abolition of child labour; and Principle 6: the elimination of discrimination in respect of employment and occupation.
Environment	Principle 7: Businesses should support a precautionary approach to environmental challenges. Principle 8: undertake initiatives to promote greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies.
Anti-corruption	Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

Source: UN Global Compact (2018)

The study of the relationship between CSR and CP is significant because if it is found that the relationship is positive, then this will provide support to

[100]Blowfield & Murray (2014).

organisations considering adopting CSR initiatives. This will feature as an attractive means to entice more organisations to start adopting CSR practices.

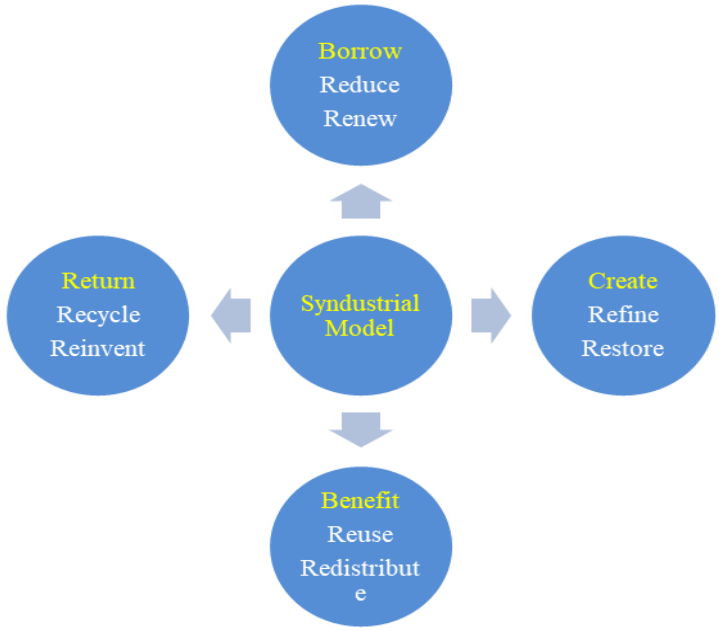
Pasquali stated that more and more organisations are requiring their stakeholders to provide proof of their CSR performance.[101]

Sustainability disclosure was once for a few unusually green or community driven organisations; today, it is a best practice employed by companies worldwide. A focus on sustainability helps organisations manage their social and environmental impacts and improve operating efficiency and natural resource ownership, and it remains a vital component of shareholder, employee, and stakeholder relations. It is clear that sustainability reporting is here to stay.

The benefits of sustainability reporting go beyond relating firms' financial risk and opportunity to performance along Environmental Social Governance (ESG) dimensions and establishing their license to operate. Sustainability disclosure can serve as a differentiator in competitive industries and foster investor confidence, trust and employee loyalty.

In an article, written by Visser called "cradle to cradle" means that organisations adapt, promote and mainstream a circular economy approach which relies on sustainable production as a key link in an organisation.[102] He described moving from an old industrial model, in which we take, make, use and waste, to a new "syndustrial" model (designed for industrial and ecological synergies), in which we borrow, create, benefit and return. This is illustrated in Figure 4 below.

Figure 4. *Syndustrial Model*



Source: Visser (2017a)

[101]Pasquali (2011).
[102]Visser (2017b).

In the old linear industrial model, business and consumers take, make, use and waste. Organisations take by depleting non-renewable resources, over-using renewable resources and by striving for limitless economic growth by producing any products and services that the market demands and persuading customers to buy and consume more. Organisations use by buying more than needed, leading to over-consumption and by individually owning what could be shared. Finally, organisations waste by turning consumed products into trash and pollution and by creating toxins and impacts that harm people and nature.

By contrast, in the new circular "syndustrial" model, in which we design for industrial synergy, business and consumers borrow, create, benefit and return. We borrow by conserving all natural resources and increasing renewable resource use; and we create by designing and making products with no negative impact and innovating products with positive impact. This new model illustrates the way forward.

Corporate Social Responsibility and Company Performance

CSR is predominantly considered a Western occurrence due to the strong institutions, standards and appeal systems of the developed nations, which are weak and misunderstood in the developing countries.[103] Such weak standards pose a considerable challenge to organisations practising CSR in developing countries. The relationship between CSR and CP has attracted much awareness and interest among researchers. However, there are few empirical research studies which have considered the relationship between CSR and CP in the context of developing countries.[104]

Mishra and Suar mentioned that the main problem of CSR studies in developing countries can be attributed to a lack of appropriate measures of CSR.[105]

A study by Rais and Goedegebuure examined CSP and CP in 101 Indonesian companies in the manufacturing industry.[106] They examined stakeholder relations as a solid measure of CSP[107] and its impact on CP. They found that the stakeholder relationship is a meaningful measure of social performance.

Su, Pan and Chen examined the effect of CSR on customers' attitude and behavioural reactions, two variables that are strongly associated with a firm's social and economic success.[108] Additionally, the authors examined the generality of such an effect across other customer groups. The findings indicate that CSR has a favourable effect on perceived company reputation and customer satisfaction, which in turn impacts consumer commitment and behavioural reactions substantially (i.e., loyalty intentions and word-of-mouth). Perhaps more significantly, CSR is not universally embraced by all consumer groups. Consumer income, in

[103]Chapple & Moon (2005).
[104]Mishra & Suar (2010); Rais & Goedegebuure (2009).
[105]Mishra & Suar (2010).
[106]Rais & Goedegebuure (2009).
[107]Clarkson (1995).
[108]Su, Pan & Chen (2017).

particular, seems to influence the connection between CSR and perceived reputation. The authors specifically stated that the favorable impact of CSR on perceived company reputation was particularly pronounced among higher-income individuals.

Furthermore, Florencio, Junco, Verdugo & Díaz conducted a study with the goal of highlighting the connection between CSR and trust, image, and loyalty, as well as analysing the mediating function of trust.[109] He found that CSR affiliation has an effect on just not customer loyalty and perceptions, but also on their trust. Additionally, this research demonstrated that the existence of trust as a mediator between CSR and brand image and loyalty resulted in greater guest loyalty and a more favourable image. Additionally, the study indicated that organisatons should engage in socially responsible activities and take steps to build trust in order to enhance their image and loyalty.

Liu, Wong, Shi, Chu & Brock performed three tests to ascertain customer reactions to the cessation of a CSR activity. The researchers examined the impact of start and cessation, self-serving vs public-serving cessation, and passive versus proactive cessation.[110] They found that contemplating CSR termination produces quantifiable findings that may be used to guide choices about whether to continue or discontinue a CSR activity. Additionally, they found that although participating in a public service CSR activity improves. Intentionally enhancing the corporate image via a short-term CSR activity without a strategy for its termination may have the unintended consequence of eroding image. This article analyses the correlation between CSR and CP for organisations and whether CSR initiatives contribute to the sustainability of the organisation.

The Research Gaps Present in the Literature

Based on the literature reviewed in this article, it is evident that CSR in developing countries is related to three major areas: the extent and level of CSR implementation, managerial perspectives and stakeholder's perspectives. Research has identified CSR as a win-win strategy for business and society as indicated in the preceding section. These benefits have been identified by the developed world, and while the benefits of CSR are being encouraged in the developing world, many of these countries still lack a clear understanding of CSR. Researchers have indicated that characteristics of CSR in developing countries are different from those in the developed countries.[111] In addition, Chapple and Moon reported that each developing country, even within the same region, tends to have different CSR patterns.[112]

Furthermore, Farrington, Curran, Gori, O'Gorman & Queenan, carried out a systematic literature review and evaluated the trends, and inconsistencies in the

[109]Florencio, Junco, Verdugo & Díaz (2018)
[110]Liu, Wong, Shi, Chu & Brock (2014).
[111]Visser (2007).
[112]Chapple & Moon (2005).

research on CSR practices.[113] The research identified that there are inconsistencies in the way the financial effect of CSR is reported. In other words, it was identified that more studies are necessary in order to re-evaluate the CSR idea for organisations in developing countries and to assess the efficacy of CSR operations in the context and availability of resources. Moreover, CSR is a value-creation approach that links businesses and society in a manner that ultimately results in a sustainable world.[114] Governments and society must make it difficult for environmental degradation groups to function. Businesses that choose to implement robust CSR policies and effective codes of conduct will gain a competitive edge whereas businesses that ignore CSR problems will eventually lose momentum and become unsustainable. The critical requirement is for CSR to be accepted at the highest levels of management.[115]

Conclusion

Although there is a lot of literature on the CSR issue in general, not much has been written on the state, effectiveness, and the sustainability of CSR of developing countries and the possible impact of those concerns on stakeholder organisational efficiency, credibility and image in a circular global economy. The importance of the study lies in the analysis of the effects and benefits of the adoption of CSR and its contribution to society and the environment. An increasing connection between sustainability and financial results is identified by the many drivers towards sustainability. CSR-practising companies gain better reputations, boost brand images, increase profits, increase investor visibility and increase customer loyalty. It can also contribute to improved public relations and other advantages, such as saving energy and water usage and increase the retention of the customer because consumers would like to be associated with CSR compliant businesses. Businesses that are considered to be good business citizens are more desirable to potential clients and employees.

Transparency and both internally and externally, are seen as critical for building stakeholders' confidence and corporate credibility. The triple bottom line encapsulates an organisation's economic, social, and environmental responsibilities including CSR. It is intrinsically linked to the concepts and goals of sustainable development and is a performance indicator for businesses that requires public disclosure of social, economic, and environmental indicators of organisational performance. It is also a concept that is closely related to social responsibility in general. Triple-bottom-line reporting is seen as a holistic approach to sustainability and includes a measure of CSR activity.

Historically, it was believed that CSR guidelines were insufficient and discouraged in developing countries from participating in CSR initiatives. The conclusion of this article provides a unique addition to the field of CSR in developing nations, as only a few studies have examined the impacts of CSR in

[113]Farrington, Curran, Gori, O'Gorman & Queenan (2017).
[114]Nicolaides (2017b).
[115]Nicolaides (2017b).

developing countries; hence, this study contributes to the body of research for developing countries in this area. CSR initiatives empower employees to leverage the corporate resources at their disposal to do good in communities. Formal corporate social responsibility programmes also tend boost employee morale, loyalty, and elevate levels of customer service and invariably also lead to greater productivity in the workforce.

In the future, a new approach to CSR, Systemic CSR or CSR 2.0, is required and it is gradually beginning to emerge. This approach aims at identifying and addressing the root causes of our current unsustainability and irresponsibility, usually by innovating business models, revolutionising systems, goods and services and campaigning for progressive national and international policies. It is a purpose-led, principle-based approach to CSR that the present study is furthering. Finally, this study is making a unique contribution in the domain of CSR in developing countries as only a handful of studies have tested the effects of CSR in developing countries in the various sectors of the economy and therefore it is required that more research and analysis needs to be conducted to further explore the benefits that CSR can offer.

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