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Jl. Dharmawangsa Dalam Selatan, Surabaya, 60286 Indonesia

Email: info@bhrlawply.org

Website: https://bhrlawply.org/

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BUSINESS AND HUMAN RIGHTS LAW & POLICY
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Buried Childhoods: Uncovering Illicit Child Labour in Madagascar's Mica Mines

Ramalina Ranaivo Mikea Manitra [a], **Andriamiandrisoa Hoby Nasandratra** [b], **Andrianjafimalala Harifia Domoinaniaina Claudia Valerine** [c], **Lanja Manohisoa Epifaniah** [c]

[a] Head of Legal Affairs, ASTA Research Center, Madagascar. Corresponding Author. Email: manitraramalina@asta.co.mg;
[b] Graduate Student at Faculty of Social Sciences, Universitas Internasional Islam Indonesia, Indonesia;
[c] Graduate Student at Department of International Relations, Faculty of Social and Political Sciences, Universitas Indonesia, Indonesia.

ABSTRACT
Around the world, child labour in the mining sector remains a grave human rights issue, disproportionately affecting impoverished communities in resource-rich yet economically marginalised regions. Madagascar is no exception, where thousands of children are engaged in hazardous mica mining under exploitative and unsafe conditions. This paper aims to critically examine the systemic use of child labour in Madagascar's mica industry by analysing the findings of the NBC News documentary "Children Labor for Pennies Mining Mica in Madagascar" against the backdrop of relevant national and international legal frameworks. Employing a socio-legal method, the study assesses legal norms, policy instruments, and their implementation gaps to understand how legal obligations fail to translate into meaningful protections for children. The findings reveal widespread breaches of labour, mining, and child protection laws, including violations of the right to education, the prohibition of hazardous child labour, and the duty of state oversight. Despite the existence of robust legal provisions in the Labour Code, Child Protection Law, Mining Code, and Mining Permit Law, enforcement remains weak, particularly in informal and artisanal mining zones. Drawing from comparative policy experiences in countries like the United Kingdom, Burkina Faso, and the Democratic Republic of Congo, this paper recommends the adoption of binding corporate due diligence, formalisation of artisanal mining, and the establishment of cross-sectoral enforcement mechanisms to ensure that children are protected from exploitation across the mining value chain.

KEYWORDS: Child Labour, Good Governance, Business and Human Rights, Madagascar, Mica Mining.

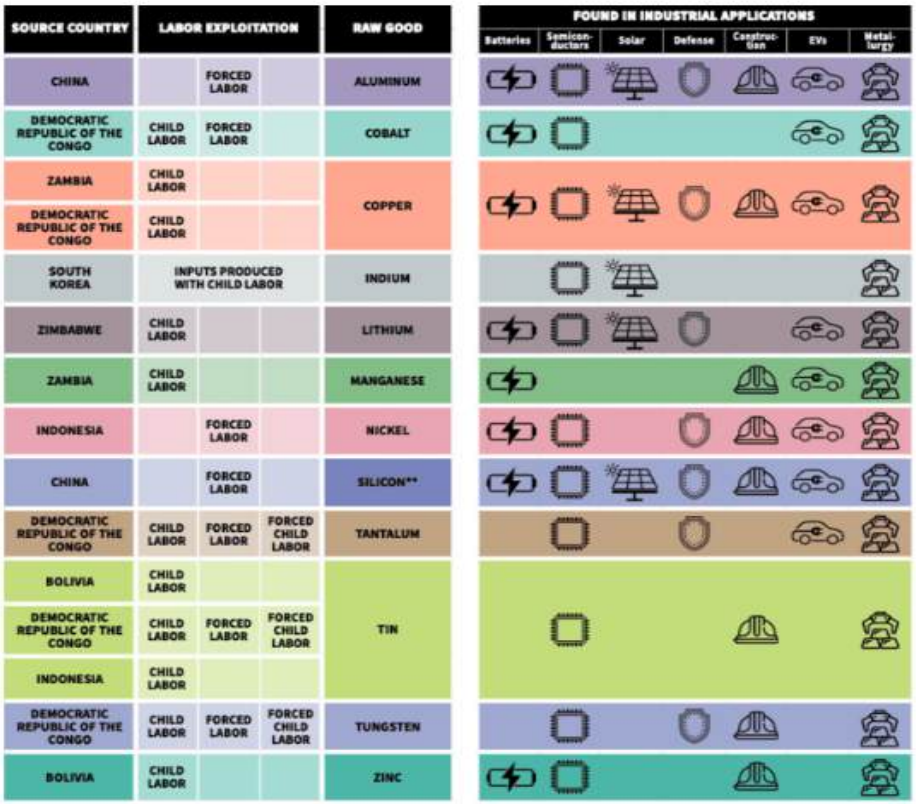
1. Introduction

Mining plays a crucial role in the global economy, providing raw materials essential for modern technology, infrastructure, and manufacturing.[1] However, mining activities often intersect with complex human rights challenges,[2] including environmental degradation (e.g.,

[1] *See, e.g.,* VS Litvinenko, 'Digital Economy as a Factor in the Technological Development of the Mineral Sector' (2020) 29 *Natural Resources Research* 1521; Sergey Zhironkin and Dawid Szurgacz, 'Mining Technologies Innovative Development: Industrial, Environmental and Economic Perspectives' (2022) 15 *Energies* 1.
[2] *See, e.g.,* Sandra Cassotta, Vladimir Pacheco Cueva and Malayna Raftopoulos, 'Australia: Regulatory, Human Rights and Economic Challenges and Opportunities of Large-Scale Mining Projects: A Case Study of the Carmichael Coal Mine' (2021) 50 *Environmental Policy and Law* 357.

lithium extraction),[3] displacement of communities,[4] and exploitative labour practices.[5] The extraction of minerals, especially in developing regions, raises urgent questions about ethical sourcing and sustainable development within international supply chains (see Figure 1).[6]

Figure 1. Labor Risks in Mineral Supply Chains



Source: Data from the US Department of Labor[7] processed by Vince Beiser[8]

A particularly pressing human rights concern within the mining industry is the widespread use of child labour, especially in artisanal and small-scale mining ("ASM") across the Global South. Despite international legal frameworks prohibiting the economic exploitation of children (see Table 1), thousands of minors continue to work in hazardous conditions to

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3 Rennie B Kaunda, 'Potential Environmental Impacts of Lithium Mining' (2020) 38 *Journal of Energy & Natural Resources Law* 237.

4 *See, e.g.,* Simbarashe Gukurume and Lloyd Nhodo, 'Forced Displacements in Mining Communities: Politics in Chiadzwa Diamond Area, Zimbabwe' (2020) 38 *Journal of Contemporary African Studies* 39.

5 *See, e.g.,* Maxime Ndanyuzwe Rushemuka and Muriel Côte, 'Artisanal and Small-Scale Mining through a "Labour Regime" Lens: Consolidating a Research Agenda on Labour Exploitation' (2024) 105 *Journal of Rural Studies* 103189.

6 An idea supported by, e.g., Alex G Stewart, 'Mining Is Bad for Health: A Voyage of Discovery' (2020) 42 *Environmental Geochemistry and Health* 1153; Nir Kshetri, 'Blockchain Systems and Ethical Sourcing in the Mineral and Metal Industry: A Multiple Case Study' (2022) 33 *The International Journal of Logistics Management* 1., and debunked by the findings of Massa Coulibaly and others, 'The Effects of Mining on Local Poverty in Developing Countries: Evidence from Mali' (2024) 180 *World Development* 106605.

7 US Department of Labor, List of Goods Produced by Child Labor or Forced Labor, 2024, p. 27, <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods> (accessed on 30 March 2025).

8 Vince Beiser, "Children and Slaves Are Mining Our Critical Metals (and Not Just Cobalt)" (*New Security Beat*) <https://www.newsecuritybeat.org/2024/12/children-and-slaves-are-mining-our-critical-metals-and-not-just-cobalt/>, (accessed on 30 March 2025).

extract valuable minerals such as cobalt, gold, and mica—often for minimal or no pay.[9] These children are routinely exposed to toxic substances, long hours, and physical danger, in environments lacking basic health and safety protections. Economic hardship, limited access to education, and weak enforcement of labour regulations drive many families to rely on children's income for survival.[10] While some corporate and international initiatives have emerged to promote responsible sourcing, their reach remains limited and often fails to address the structural causes that perpetuate child labour in mining regions.[11]

Madagascar is unfortunately no exception to the widespread and persistent exploitation of child labour in the mining sector, particularly within ASM, where informal practices and weak regulatory oversight create fertile ground for abuse. In regions like Alaotra and the south, entire families—children included—rely on ASM for survival, often working in hazardous conditions with little state protection or access to education.[12] Despite the existence of mining laws and recent reforms influenced by international actors, the state's limited enforcement capacity means that children continue to be engaged in physically dangerous and economically exploitative mining activities.[13] Moreover, structural poverty, combined with erratic market conditions and lack of viable alternatives, pushes households to normalise child labour as a means of livelihood, embedding it deeply within local economies.[14] In some cases, children are even trafficked into mining areas through informal recruitment channels, revealing a critical failure of both labour governance and child protection systems.[15] Together, these factors underscore the entrenched and complex nature of child labour exploitation in Madagascar's mining industry.

Building on this context, this paper examines the severe exploitation of children in Madagascar's mica mining sector through the lens of the investigative documentary "Children Labor for Pennies Mining Mica in Madagascar", reported by Cynthia McFadden for NBC's TODAY programme in 2019.[16] The documentary offers a rare and powerful visual account of the conditions in which Malagasy children mine and process mica—a mineral crucial to

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9 Kenneth Joseph Bansah and Obed Adonteng-Kissi, 'Child Labor in Artisanal and Small-Scale Mining: Implications for Health, Development and Poverty' (2025) 21 *The Extractive Industries and Society* 101577; Lucia Mancini and others, 'Assessing Impacts of Responsible Sourcing Initiatives for Cobalt: Insights from a Case Study' (2021) 71 *Resources Policy* 102015.

10 John M Ulimwengu and Blandine Sanginga, 'The Complex Economics of a Complete Ban on Child Labor in the Cobalt Supply Chain: The Case of the DR Congo' (2025) 23 *The Extractive Industries and Society* 101687.

11 Isidore Murhi Mihigo, Guillaume Vermeylen and Bugandwa Munguakonkwa, 'Does the Education System Matter? Exploring in-Depth Joint School Attendance, Hazardous and Non-Hazardous Activities in Artisanal and Small-Scale Mining in the Democratic Republic of the Congo' (2024) 10 *Heliyon* e30771.

12 Natasha Stoudmann and others, 'A Double-edged Sword: Realities of Artisanal and Small-scale Mining for Rural People in the Alaotra Region of Madagascar' (2021) 45 *Natural Resources Forum* 87. *See also* Laurent E Cartier, 'Livelihoods and Production Cycles in the Malagasy Artisanal Ruby–Sapphire Trade: A Critical Examination' (2009) 34 *Resources Policy* 80.

13 *See, e.g.,* Remy Canavesio, 'Formal Mining Investments and Artisanal Mining in Southern Madagascar: Effects of Spontaneous Reactions and Adjustment Policies on Poverty Alleviation' (2014) 36 *Land Use Policy* 145; Bruno Sarrasin, 'The Mining Industry and the Regulatory Framework in Madagascar: Some Developmental and Environmental Issues' (2006) 14 *Journal of Cleaner Production* 388.

14 Christelle Dumas, 'Market Imperfections and Child Labor' (2013) 42 *World Development* 127.

15 Jérôme Ballet and Augendra Bhukuth, 'Recruitment Patterns of Child Trafficking in Madagascar: An Analysis Based on Missing and Recovered Children' (2016) 2 *Journal of Human Trafficking* 235.

16 Cynthia McFadden, *Children Labor for Pennies Mining Mica in Madagascar* (NBC News 2019) <https://www.youtube.com/watch?v=9BCe3MtO1Oo>.

modern technology yet sourced through deeply unethical practices.[17] Focusing on the daily struggles of families like Marella's, who labour long hours in dangerous environments for negligible pay, the documentary reveals the brutal intersection of poverty, corporate indifference, and international demand.

Previous studies have offered useful perspectives on Madagascar's mining sector, particularly regarding its socio-economic impacts on vulnerable groups, including children. Natasha Stoudmann and others. demonstrate that ASM provides seasonal income to rural families, yet due to its informal nature and lack of oversight, it exposes children to hazardous and exploitative labour conditions.[18] Agathe Randrianarisoa examines the broader effects of large-scale mining (LSM), showing that while some nearby communities benefit economically, others—especially the poorest—face worsening living conditions, with vulnerable populations such as unskilled migrants, including children, becoming increasingly marginalised.[19] However, these studies do not specifically interrogate the legal dimensions or rights violations related to child labour within Madagascar's mining economy. This paper will fill that gap by critically analysing the findings of an investigative documentary through the lens of national and international legal instruments to identify violations of law and children's rights in Madagascar's mica mining industry.

This study is structured into three main sections to explore the issue of child labour exploitation in Madagascar's mica mining industry. First, we analyse the legal framework of child protection and prohibition of child labour in mining sector in Madagascar. Second, we identify the violations of law and children`s rights arising from the narrative in the documentary. Finally, the study presents policy and action-oriented recommendations for Madagascar, drawing on experiences from other jurisdictions to address the systemic exploitation and promote responsible, rights-based governance of the mining sector.

2. Methodology

This paper adopts a sociolegal research method, relying on the investigative documentary as the primary data of analysis to examine the human rights and legal issues associated with mica mining and processing in Madagascar. The authors carefully watched the documentary, read and analyses its transcriptions, structuring their analysis to reflect the documentary's factual narrative. Moreover, the authors also use normative approach to analyse the relevant laws and regulations in terms of child protection in Madagascar and to identify the violations of law and rights that happened in the documentary. Finally, the authors engage in a comparative approach to find and analyse the other jurisdictions` experiences on how to tackle the issue of child labour in mining sector, in order to provide insights and policy recommendations for Malagasy Government.

3. The Legal Framework of Child Protection in Mining Sector

3.1. Legal Framework under International Law

[17] Zhironkin and Szurgacz (n 1); Litvinenko (n 1).
[18] Stoudmann and others (n 11).
[19] Agathe Randrianarisoa, 'Large-Scale Mining in Madagascar: An Interdisciplinary Assessment of Economic and Social Impacts at National, Regional and Local Levels' (RMIT University 2021) <https://research-repository.rmit.edu.au/articles/thesis/Large-scale_mining_in_Madagascar_an_interdisciplinary_assessment_of_economic_and_social_impacts_at_national_regional_and_local_levels/27599595/1/files/50795442.pdf>.

The international legal architecture governing child protection and the elimination of child labour, particularly in hazardous sectors such as mining, is extensive and robust. Grounded in a range of binding conventions and persuasive soft law instruments, this framework reflects the global consensus that children must be safeguarded from exploitation, guaranteed the right to education, and protected from conditions that jeopardise their health, development, and dignity. Foundational treaties such as the International Labour Organization (ILO) Conventions No. 138 and No. 182, the United Nations Convention on the Rights of the Child (CRC), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) collectively enshrine prohibitions against child labour and affirm positive obligations on States to uphold child rights.

Complementing these instruments, soft law standards such as the UNICEF Child Rights and Business Principles and the UN Guiding Principles on Business and Human Rights articulate the duties of corporate actors to respect and protect children's rights within global supply chains. Together, these instruments form a multidimensional framework that not only prohibits child labour but demands proactive efforts from States, companies, and the international community to eradicate it (see **Table 1**)—particularly in sectors as high-risk and underregulated as artisanal mining.

Table 1. Legal Framework of Child Labour under International Law

International Legal Instruments	Legal Provisions	Explanations
ILO Convention No. 182 on the Worst Forms of Child Labour (1999)	Article 3(d)	Defines the worst forms of child labour to include "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children"
	Article 1	Requires Member States to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency."
ILO Convention No. 138 on Minimum Age (1973)	Article 3(1)	Sets the minimum age for hazardous work at 18 years.
	Article 2(3)	States that the minimum age for admission to employment "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years."
UN Convention on the Rights of the Child (CRC) (1989)	Article 32(1)	Recognises "the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."
	Article 28	Requires State Parties to "recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity."
	Article 24	Affirms that children have the right to "the enjoyment of the highest attainable standard of health," relevant to the dangers posed by mining activities.
International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)	Article 10(3)	Requires that "children and young persons should be protected from economic and social exploitation."
	Article 7(b)	Guarantees the right to "safe and healthy working conditions," applicable to all persons, including child workers.
UNICEF Child Rights and Business Principles (2012)	Principle 1	Meet their responsibility to respect children's rights and commit to supporting the human rights of children."
	Principle 2	Contribute to the elimination of child labour, including in all business activities and business relationships."
	Principle 3	Provide decent work for young workers, parents and caregivers," helping reduce reliance on child labour.

	Principle 4	Ensure the protection and safety of children in all business activities and facilities
	Principle 5	Ensure that products and services are safe, and seek to support children's rights through them
	Principle 6	Use marketing and advertising that respect and support children's rights
	Principle 7	Respect and support children's rights in relation to the environment and to land acquisition and use
	Principle 8	Respect and support children's rights in security arrangements
	Principle 9	Help protect children affected by emergencies
	Principle 10	Reinforce community and government efforts to protect and fulfil children's rights
UN Guiding Principles on Business and Human Rights (UNGPs) (2011)	Principle 12	Asserts that businesses should respect internationally recognised human rights, including "the rights of the child," and avoid infringing on them.
	Principle 13	Requires business enterprises to prevent or mitigate adverse human rights impacts directly linked to their operations, products or services by their business relationships.
Sustainable Development Goals (SDGs), UN Agenda 2030	Goal 8, Target 8.7	Calls for the immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking, and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.
Global Compact Principle 5 (UN Global Compact)	Principle 5	Asks businesses to uphold the effective abolition of child labour in their operations and supply chains.

Source: Author`s analysis

The legal provisions set out in Table 1 create a comprehensive and coherent regime for the protection of children from the worst forms of labour and exploitation. They compel both governments and business enterprises to ensure that children are not placed in circumstances that endanger their physical, mental, or moral integrity. Importantly, these standards extend beyond formal prohibition and require affirmative measures—such as access to education, decent work for adults, and the transformation of economic structures—to effectively eliminate child labour. As the following sections will demonstrate, Madagascar's legal framework has taken significant steps to incorporate many of these standards.

3.2. Legal Framework under Malagasy Law

The protection of the child is a primary duty of the State and all individuals in Madagascar, as enshrined in the Constitution. Article 21 of the 2010 Constitution of Madagascar provides that "The State shall ensure the protection of the family for its free development as well as that of the mother and the child through appropriate legislation and social institutions,"[20] and Article 23 affirms that "Every child has the right to instruction and education under the responsibility of the parents, with respect for their freedom of choice."[21] These constitutional provisions reflect the foundational role of the State in safeguarding children's rights and well-being. In line with this constitutional mandate, Madagascar's legal framework provides a strong formal basis for the protection of children, particularly in the

[20] Constitution of the Republic of Madagascar 2010 (Fourth Republic), JO No 3350, 20 January 2011, p. 85 ("2010 Constitution"), Article 21.
[21] 2010 Constitution, Article 23.

context of employment and labour within hazardous industries such as mining. The Labour Code of Madagascar sets the minimum legal age for employment at fifteen years, with a strict link to the age at which compulsory schooling ends.[22] This provision underlines the State's recognition of the primacy of education in a child's development and affirms that child labour must not interfere with the right to schooling.[23] Moreover, any employment of minors must be expressly authorised by a parent or legal guardian.[24] The requirement of parental authorisation serves to introduce an additional safeguard, though it alone cannot replace State oversight or protection mechanisms in highly exploitative environments like artisanal mining zones.[25]

Reinforcing these protections, Article 150 of the Labour Code stipulates that children under fifteen cannot be employed in any enterprise—even as apprentices—without the express permission of the Labour Inspectorate. This authorisation is conditional on the nature of the work and its potential impact on the child's health and development. Notably, the law prohibits employment in any tasks deemed harmful to the child's health or normal development.[26] These protective barriers are meant to be preventative, ensuring that the State plays a gatekeeping role.[27] Further institutional control is expressed in Article 151, which empowers Labour Inspectors to request medical examinations by accredited physicians to determine whether the work assigned exceeds the child's physical capacity. If deemed unfit, the child must be reassigned or released, and the contract may be terminated with proper notice.[28]

The legal regime is equally strict regarding the conditions and duration of work permitted for minors. Under Article 149 of the Labour Code, children and apprentices under eighteen years of age must not be subjected to more than eight hours of work per day and forty hours per week. Night work and overtime are strictly prohibited. Additionally, a daily rest period of twelve consecutive hours is mandatory.[29] These temporal and protective limits are intended to shield children from both physical and psychological exhaustion, safeguarding their growth and allowing time for rest, education, and play—fundamental components of childhood development.

In parallel, Madagascar's Child Protection Law further reinforces these rights by affirming the universality and inalienability of children's rights. Article 1 of the law declares its purpose to be the protection of all fundamental rights of the child, and to establish procedures for protecting children from all forms of abuse.[30] Article 4 categorically prohibits any form of

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[22] Law No. 2024-014 on the Labour Code, JO No. 4237, 4 November 2024, p. 8159 ("Labour Code"), Article 147.

[23] *See* (n 20)

[24] Labour Code, Article 147.

[25] While parental authorisation may function as a legal safeguard, its effectiveness is undermined in cultural contexts where child labour is normalised and perceived as essential to a child's socialisation. As Adonteng-Kissi observes, many parents view children's work as a means to instil responsibility and prepare them for adulthood, often disregarding formal education and children's rights. Consequently, parental consent in such settings may perpetuate rather than prevent exploitative labour. *See* Obed Adonteng-Kissi, 'Parental Perceptions of Child Labour and Human Rights: A Comparative Study of Rural and Urban Ghana' (2018) 84 *Child Abuse and Neglect* 34.

[26] Labour Code, Article 150.

[27] *See, e.g.,* Michael Saini, Taina Laajasalo and Stacey Platt, 'Gatekeeping by Allegations: An Examination of Verified, Unfounded, and Fabricated Allegations of Child Maltreatment Within the Context of Resist and Refusal Dynamics' (2020) 58 *Family Court Review* 417.

[28] Labour Code, Article 151.

[29] Labour Code, Article 149.

[30] Law No. 2007-023 on the Rights and Protection of Children, JO No. 3163, 28 January 2008, p. 158 ("Child Protection Law"), Article 1. It is important to mention that the prohibition of child labour under Child Protection Law is not absolute in nature. There exist some exceptions under its operational

neglect, discrimination, exploitation, violence, cruelty, or oppression against children.[31] These provisions, though broad, directly encompass exploitative labour practices, particularly in mining where the physical and mental toll on children is extensively documented.[32] Articles 6 and 10 further confirm the child's right to life, survival, and holistic development—physically, intellectually, morally, spiritually, and socially.[33] This comprehensive framework supports a vision of childhood far removed from the dangerous realities faced by children working in unregulated Mica mines.

The enforcement component of this framework is equally important. Articles 69 to 74 of the Child Protection Law outline mechanisms for reporting abuse, including obligations for teachers, social workers, law enforcement, and even neighbours to alert the authorities.[34] This mandatory reporting duty is critical for addressing widespread abuses that might otherwise remain invisible.[35] Particularly relevant is Article 69, which allows even the child to report abuse, and removes the constraint of professional confidentiality for medical personnel in such cases.[36] These provisions form a crucial link between law and enforcement and highlight the role of the State as the ultimate guarantor of children's rights.

In the context of the mining industry, additional legal protections are laid out under Madagascar's Mining Code and Mining Permit Law. Article 265 of the Mining Code strictly prohibits child labour across the mining value chain, except under the conditions already defined by labour legislation—which itself limits permissible work to light tasks for children over fifteen years old.[37] The Mining Permit Law provides further specificity: Article 179 explicitly bans children from participating in underground mining, artisanal gold panning, stone breaking, or the handling of minerals. It clearly states, "It is strictly prohibited for any child under the age of fifteen (15) to perform any paid or unpaid work at mining sites".[38] This provision reinforces the absolute ban on child labour in mining and reaffirms the role of State monitoring in enforcing compliance.

For children above the age of fifteen, Article 180 of the Mining Permit Law provides a narrowly defined list of acceptable light work: collecting fossiliferous substances without handling, packaging of precious stones or metals, and administrative tasks. Even these roles

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regulations, namely Decree No. 2007-563 concerning child labour, JO No. 3163, 28 January 2008, p. 182 *juncto* Decree No. 2018-009 amending and supplementing certain provisions of Decree No. 2007-563 of 3 July 2017 concerning child labour, JO No. 3823, 2 July 2018, p. 3080.

31 Child Protection Law, Article 4.

32 The physical and mental toll referenced is further supported by research conducted by Schwartz and others indicating that children in artisanal mining are exposed to hazardous substances such as mercury and cobalt, often without medical screening or protective equipment. These exposures have been linked to neurological damage, kidney dysfunction, and significantly higher toxin levels in children than adults, underscoring the long-term health risks of exploitative child labour in mining. *See* Franklin W Schwartz, Sangsuk Lee and Thomas H Darrah, 'A Review of Health Issues Related to Child Labor and Violence Within Artisanal and Small-Scale Mining' (2021) 5 *GeoHealth* 1.

33 Child Protection Law, Article 6 and 10.

34 Child Protection Law, Article 69–74.

35 Mandatory reporting laws serve a critical function in detecting and preventing child abuse, particularly where children themselves are unable to recognise or report their victimisation. *See* Beverly Chia Chi Liu and Michael S Vaughn, 'Legal and Policy Issues from the United States and Internationally about Mandatory Reporting of Child Abuse' (2019) 64 *International Journal of Law and Psychiatry* 219.

36 Child Protection Law, Article 69.

37 Law No. 2023-007 reforming the Mining Code, JO No. 4157, 2 October 2023, p. 4516 ("Mining Code"), Article 265.

38 Law, Decree No. 2024-1464 on Mining, Fossil and Quarry Permits Regime, JO No. 4242, 2 December 2024, p. 9220 ("Mining Permit Law"), Article 149.

must be performed under healthy and sanitary conditions.[39] Article 181 adds further safeguards, echoing the Labour Code's provisions on working hours, rest periods, and the prohibition of night work or overtime.[40] This consistency across legal instruments reinforces the national consensus on child protection and restricts any legal ambiguity that might otherwise be exploited.

Moreover, the supervisory authority of the Labour Inspectorate is reaffirmed under Article 182 of the Mining Permit Law, which allows for exceptional authorisation of child employment only under stringent conditions, including a medical evaluation to assess whether the work is appropriate for the child's physical condition.[41] This provision offers a direct means for State intervention to prevent abuse and reaffirms the importance of professional oversight in child labour scenarios.[42] Article 183 also envisions a binding Code of Conduct for mining permit holders, developed jointly by the Ministries of Labour, Population, and Mines, to ensure the protection of children's rights and gender equality.[43] While the implementation of such codes remains uneven, their legal foundation signals a progressive institutional commitment.

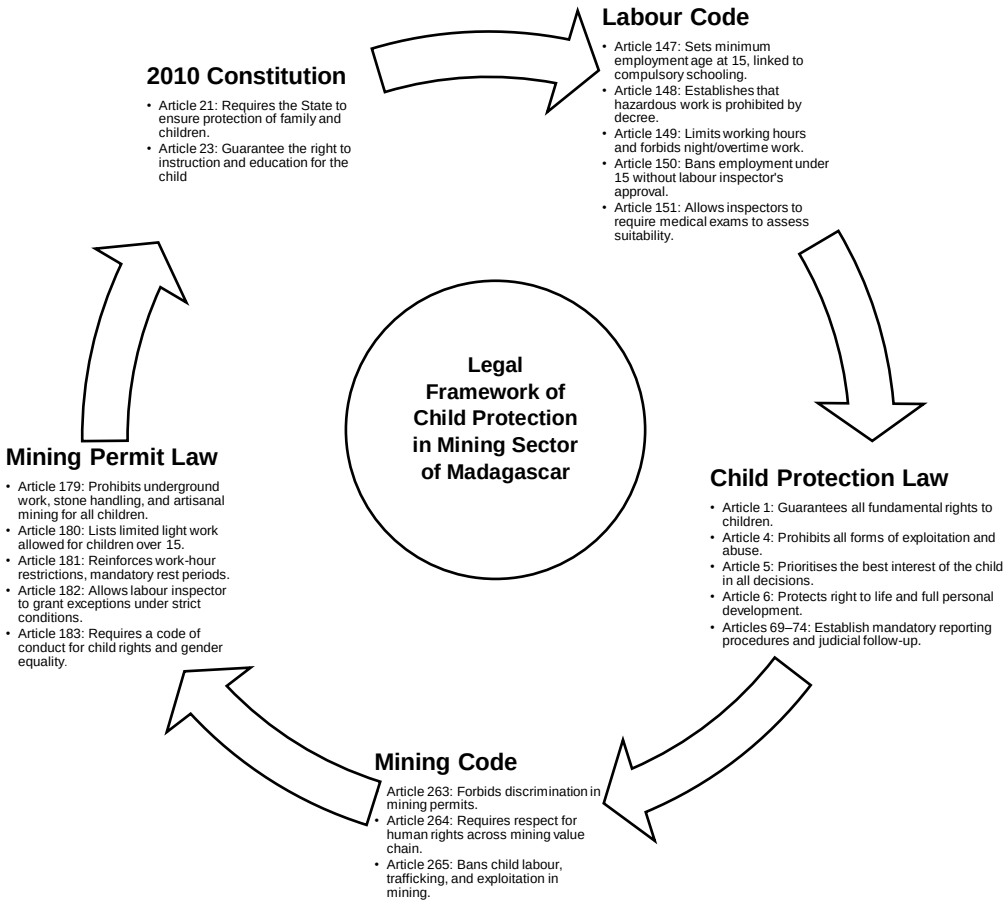
Lastly, the Mining Code extends corporate responsibility to all actors in the mining value chain, obligating them to uphold human rights and promote diversity, non-discrimination, and equality. The requirement to "ensure the respect for human rights throughout the entire value chain"[44] is especially important given the exploitative dynamics of international mica supply chains.[45] The same article mandates equal treatment for all personnel and condemns all forms of abuse, including those targeting vulnerable populations such as children.[46] This provision aligns with international standards (See Table 1) and implies that the private sector has a legal role to play in the protection of children—not just moral responsibility.

Taken together, these national laws form a comprehensive framework that prohibits child labour in mining, protects the health and development of working children, ensures access to education, and establishes reporting and enforcement mechanisms (see Figure 1). Yet, despite the clarity and strength of this legal corpus, the practical reality falls dramatically short. Children continue to toil in dangerous conditions, and enforcement remains patchy, often undermined by poverty, remoteness, and institutional weakness.[47] Nonetheless, from a legal standpoint, Madagascar has codified substantial protections for children. The challenge lies not in drafting stronger laws, but in effectively enforcing the ones that already exist— an analysis we will see in the next section.

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[39] Mining Permit Law, Article 180.
[40] Mining Permit Law, Article 181.
[41] Mining Permit Law, Article 182.
[42] It is an idea well-explained by Róisín Hennessy, 'Exploring the Role of Social Protection Interventions in Preventing Child Labour: Reinforcing the Case for a Human Rights-Based Model of Intervention' (2023) 15 *Journal of Human Rights Practice* 262.
[43] Mining Permit Law, Article 183.
[44] Mining Code, Article 264.
[45] *See, cp.,* Susan Bliss, 'Natural Resources: Child Labour in India's Mica Mines: The Global Beauty Industry' (2017) 49 Geography Bulletin 23 <https://search.informit.org/doi/10.3316/informit.010166360342440>. *See also, generally,* Franklin W Schwartz, Sangsuk Lee and Thomas H Darrah, 'A Review of the Scope of Artisanal and Small-Scale Mining Worldwide, Poverty, and the Associated Health Impacts' (2021) 5 *GeoHealth* 1.
[46] Mining Code, Article 264.
[47] *See, e.g.,* Stoudmann and others (n 11); Randrianarisoa (n 18); Ballet and Bhukuth (n 14); Canavesio (n 12); Sarrasin (n 12); Cartier (n 11).

Figure 1. Legal Framework of Child Protection in Mining Sector of Madagascar



Source: Author`s analysis

4. Identification of Violations of Law Arising from the Use of Child Labour in the Documentary on Madagascar`s Mica Mining

4.1. Documentary Summary

The NBC News documentary titled “Children Labor for Pennies Mining Mica in Madagascar” reveals the disturbing reality behind a mineral essential to modern technology—mica. Mica, which is used in products ranging from airplanes and electronics to cosmetics and cars, is mined in extreme conditions in Madagascar, the world’s largest exporter of sheet mica. Through a year-long investigation by NBC reporter Cynthia McFadden and a collaboration with a leading child rights group, the documentary exposes the severe exploitation of children, who work in narrow, airless pits for little to no compensation. “This is the first time anyone has told their story,” the reporter notes, underscoring the invisibility of these children's suffering.[48]

The documentary introduces viewers to Marella, a young girl who mines mica with her mother, Solange, and five siblings. They spend their days digging for mica and their nights guarding it to prevent theft. “We’re left here overnight so they don’t steal the mica,” Solange explains. The work begins early, often before dawn, and takes place under sweltering heat. Children are seen labouring alongside adults in nearly every pit. The documentary documents

[48] McFadden (n 15).

how entire families are entrapped in a vicious cycle of poverty, earning meagre wages that barely sustain them. Solange and her family, after two and a half months of backbreaking labour, receive $240 for six tons of mica—half of which is deducted for food costs.[49]

This unjust system is perpetuated by middlemen and international supply chains. One buyer, Joseph, openly deducts costs and controls payment to the miners. Mica's value to industries is vast—just the automotive industry alone reportedly uses mica in over 15,000 components per car. Yet, the families mining it earn barely enough to eat. "They don't have any choice," a community member remarks about the miners' lack of alternatives. Over 10,000 children work in Madagascar's mica mines, part of a broader estimate of 265,000 child labourers in the country. Much of the mined mica—over 90%—is exported to China, raising questions about global complicity.[50]

Children are not only working in mines but also in processing centres where they split and sort mica. Their tiny fingers are described as being ideal for the task, a chilling example of how child labour is rationalised. One mother and her four children work from 5 a.m. to 6 p.m., sharing only one cup of rice a day. "One cup of rice for five of them," the reporter says, stunned. These conditions demonstrate that poverty and exploitation are deeply intertwined, and simply boycotting mica products might worsen their plight. "If the consumers stop buying, they don't have anything to eat," states the reporter.[51]

The documentary's final segments stress the importance of accountability. The mica mined by Solange's family is sold to a company called Tri-H. When confronted, the company's manager admits children are working in dangerous conditions but shifts blame to the parents. "Yes, the kids used to working… it's not their problem or their fault, it`s the fault of the parents," he claims, highlighting a systemic refusal to accept corporate responsibility. As he furthermore puts it, "The only way these children will have a shot at a life outside of the mines is if companies are held accountable."[52]

In conclusion, this documentary sheds urgent light on a hidden humanitarian crisis driven by global demand for a mineral most people use unknowingly. Through compelling visuals and first-hand testimonies, it calls for consumer awareness, ethical reforms, and corporate action to end child exploitation in Madagascar's mica industry. "People overseas... should be thinking about getting a fairer price," Solange pleads. Without meaningful change, these children will continue to sacrifice their childhoods so the world can power its cars, phones, and planes.[53]

4.2. Identification of the Violation of Law in the Documentary

The documentary "Children Labor for Pennies Mining Mica in Madagascar" offers a rare and disturbing glimpse into the lives of children exploited within the artisanal mica mining sector. Despite Madagascar's extensive legal framework designed to protect children from hazardous labour, the evidence presented in the documentary points to systemic and widespread breaches of the country's own laws. From the employment of children under the legal minimum age, to the imposition of hazardous working conditions and excessive hours without rest or oversight, the lived realities of these children starkly contrast the protections guaranteed by the Labour Code, the Child Protection Law, the Mining Code, and the Mining

49 *Ibid.*
50 *Ibid.*
51 *Ibid.*
52 *Ibid.*
53 *Ibid.*

Permit Law. The table below provides a detailed mapping of the specific legal provisions violated, illustrating the severity and scope of the human rights abuses documented.

Table 2. Violation of Law and Children`s Rights in Mica Mining Industry

Aspect of Violation	Explanation
Employment of children under 15 in mining activities	The documentary shows children, including Marella and her siblings, engaged in mica mining activities. This contravenes Article 179 of Mining Permit Law, which strictly prohibits any child under 15 from working, paid or unpaid, in mining sites. Article 147 of Labour Code sets the minimum legal age for employment at 15, aligning with the end of compulsory schooling.
Engagement of children under 18 in hazardous work	Children are depicted working in narrow, airless pits and processing mica, which are considered hazardous tasks. Article 179 of Mining Permit Law prohibits children under 15 from engaging in underground mining and handling minerals. Article 150 of Labour Code stipulates that children under 15 cannot be employed in any enterprise without express permission from the Labour Inspectorate, ensuring the work is not harmful to their health or development.
Excessive working hours for minors	The documentary reports children working from 5 a.m. to 6 p.m., exceeding the legal limit of 8 hours per day and 40 hours per week for minors under 18, as stipulated in both Article 181 of Mining Permit Law and Article 149 of Labour Code.
Lack of rest periods for child workers	Children are shown guarding mica overnight, violating the mandatory daily rest period of 12 consecutive hours required by Article 181 of Mining Permit Law.
Employment of children at night	The practice of children guarding mica overnight constitutes night work, which is prohibited for individuals under 18 by Article 181 of Mining Permit Law.
Absence of medical examination prior to employment	There is no indication that children underwent medical examinations to assess their fitness for the work, as required by Article 182 of Mining Permit Law and Article 151 of Labour Code.
Failure to obtain authorization from Labour Inspector for employing minors	The documentary does not mention any authorisation from the Labour Inspectorate for employing minors, which is a prerequisite under Article 182 of Mining Permit Law and Article 150 of Labour Code.
Non-compliance with Code of Conduct for mining permit holders	The documentary highlights corporate negligence and lack of accountability, suggesting non-compliance with the Code of Conduct mandated by Article 183 of Mining Permit Law for the protection of children's rights.
Exploitation of children through minimal compensation	Families, including children, receive meagre wages for their labour, indicating exploitation and a violation of Article 4 of Child Protection Law, which prohibits neglect, discrimination, exploitation, violence, cruelty, or oppression against children.
Violation of children's right to holistic development	The harsh working conditions and lack of access to education impede children's physical, intellectual, moral, spiritual, and social development, contravening Articles 6 and 10 of Child Protection Law.

Lack of reporting and enforcement mechanisms	The documentary does not indicate any reporting of these abuses to authorities, suggesting a failure in the enforcement mechanisms outlined in Articles 69 to 74 of Child Protection Law, which mandate reporting of child abuse and exploitation.

Source: Author`s analysis

This compilation of legal violations highlights the stark gap between Madagascar's formal legal commitments and the on-the-ground enforcement in its mica mining sector. While the country's legal instruments are, on paper, aligned with international standards for child protection, their ineffective implementation allows exploitative practices to persist with impunity. The abuses exposed in the documentary are not isolated incidents but indicative of deeper systemic failures in governance, corporate accountability, and social protection. These findings reinforce the urgent need for the Malagasy government to move beyond legislative formalism and toward robust, coordinated action to protect its most vulnerable citizens—its children.

5. Policy and Action Recommendations for Madagascar: International Standards and Best Practices

In light of the widespread child labour documented in the Malagasy mica mining sector, it is crucial to draw inspiration from the various policy responses implemented around the world. Table 3 summarises a range of international strategies and interventions adopted by countries and organisations to address child labour in mining. These examples serve as practical and policy-oriented recommendations that Madagascar could consider as it seeks to reform its mining sector, protect vulnerable populations, and align national practices with global standards.

Table 3. Global Policy Approaches to Combat Child Labour in Mining

Aspect	Stakeholders	Actions Taken
Legal Frameworks	Burkina Faso; European Union (EU); International Labour Organization (ILO)	Burkina Faso ratified and implemented ILO Convention No. 182, prohibiting the worst forms of child labour, including in mining. The EU has integrated ILO core labour standards into its bilateral trade agreements, reinforcing fundamental worker rights as a trade condition.[54]
Economic and Welfare-Oriented Strategies	Democratic Republic of the Congo (DRC)	In the DRC, conditional cash transfers and educational subsidies have been introduced to tackle household poverty and reduce the indirect costs of schooling, aiming to alleviate economic pressures that force children into mining. Broader structural reforms are recognised as necessary to create sufficient adult employment opportunities.[55]

[54] Leslie Groves, 'Implementing ILO Child Labour Convention 182: Lessons from the Gold-Mining Sector in Burkina Faso' (2005) 15 *Development in Practice* 49; Ailish Johnson, 'EU–ILO Relations: Between Regional and Global Governance' in Jan Orbie and Lisa Tortell (eds), *The European Union and the Social Dimension of Globalization: How the EU influences the world* (Routledge 2009).

[55] Ulimwengu and Sanginga (n 9).

Community and Civil Society Engagement	Burkina Faso (COBUFADE and other NGOs); Tanzania (community-level stakeholders and households)	In Burkina Faso, local NGOs like COBUFADE have implemented projects funded by international organisations to remove children from mines, involve them in research, and advocate for policy changes. In Tanzania, policy interventions address the complex community and household dynamics driving child labour, emphasising the need for tailored, local-level solutions.[56]
Corporate Accountability and Responsible Sourcing	Democratic Republic of the Congo (DRC); Companies involved in cobalt and mica sourcing	In the DRC, responsible sourcing initiatives like the Mutoshi Cobalt Pilot and Better Mining aim to promote safe, regulated working environments and eliminate child labour. Scholars emphasise the need for binding corporate accountability and direct corporate engagement in formalising artisanal mining to ensure ethical supply chains.[57]
Trade Policies and International Cooperation	International stakeholders; Global governments and corporations	Some advocate trade sanctions or boycotts against goods linked to child labour, while others warn these may harm vulnerable communities by removing livelihoods. Effective policy change increasingly depends on collaborative efforts among governments, businesses, and international bodies to develop sustainable solutions that balance economic needs with child protection.[58]
Public Awareness Campaigns	International Labour Organization (ILO); Sub-Saharan African countries	The ILO has led public awareness campaigns in sub-Saharan Africa, aiming to change social norms around child labour in mining and build support for policy reforms. Community-based solutions are promoted to reduce the prevalence of child labour and protect children's rights.[59]
Modern Slavery Legislation	United Kingdom (UK); Companies sourcing from the DRC	The UK's Modern Slavery Act imposes due diligence and transparency requirements on companies sourcing minerals like mica and cobalt, including from the DRC, to combat child labour and strengthen ethical sourcing practices in global supply chains.[60]

Source: Processed data by the author

By examining the diverse approaches outlined in Table 3, it becomes clear that no single strategy is sufficient to eradicate child labour in mining. A combination of legal

[56] Groves (n 54); Martin K Malima and Elliott P Niboye, 'Institutional Bottlenecks Stifling Efforts for Monitoring and Preventing Child Labour in Small-Scale Gold Mines in Tanzania' (2022) 2 *SN Social Sciences* 108.

[57] Mancini and others (n 8); James McQuilken, Zahra Shirgholami and Dylan McFarlane, 'Understanding and Addressing 'Modern Slavery'in DRC-UK Cobalt Supply Chains' in Edmund Nickless and Natalia Yakovleva (eds), *Routledge Handbook of the Extractive Industries and Sustainable Development* (Taylor & Francis 2022); Ulimwengu and Sanginga (n 9).

[58] Matthias Doepke and Fabrizio Zilibotti, 'International Labor Standards and the Political Economy of Child-Labor Regulation' (2009) 7 *Journal of the European Economic Association* 508; Biswajit Chatterjee and Runa Ray, 'Impact of Trade Restriction on Child Labour Supply and the Role of Parents' Utility Function: A Two Sector General Equilibrium Analysis' in Malabika Roy and Saikat Sinha Roy (eds), *International Trade and International Finance* (Springer India 2016); Ulimwengu and Sanginga (n 9).

[59] Gavin Hilson, '"A Load Too Heavy": Critical Reflections on the Child Labor Problem in Africa's Small-Scale Mining Sector' (2008) 30 *Children and Youth Services Review* 1233.

[60] McQuilken, Shirgholami and McFarlane (n 57).

enforcement, economic incentives, community engagement, corporate accountability, international cooperation, and public awareness is essential to create meaningful change. In this context, the government must prioritise strengthening the enforcement of existing child protection and labour laws, investing in educational initiatives and social services to tackle poverty-driven reliance on child labour, and developing a national framework for responsible mineral sourcing. Furthermore, the government should collaborate with local communities, civil society organisations, and private sector actors to ensure that interventions are culturally and socially appropriate and support sustainable livelihoods. Enhancing transparency and accountability in supply chains, engaging in regional and international dialogues to align with global standards, and promoting public awareness campaigns to shift social norms are also crucial. By integrating these strategies into a comprehensive policy and regulatory framework, Madagascar can work towards eliminating exploitative practices in its mining sector and upholding the rights and dignity of every child and community involved.

6. Conclusion

The findings of this paper expose not merely isolated incidents of child exploitation in Madagascar's mica mining industry, but the enduring failure of the Malagasy state to enforce its own legal obligations. Despite a comprehensive domestic framework that explicitly prohibits hazardous child labour and demands rigorous oversight by state authorities—including the Labour Inspectorate and child protection services—implementation remains grossly deficient. The state's visible absence from zones of exploitation, especially in remote artisanal mining areas, has fostered a culture of impunity where children like Marella are left to labour in dangerous pits with no realistic recourse to justice or protection. This is not a gap in legal drafting—it is a governance failure, rooted in institutional weakness, lack of political will, and disregard for rural populations. In failing to monitor, prevent, and remedy child labour, Madagascar has not only violated its domestic laws but also defaulted on its international obligations to uphold the best interests of the child, as mandated by treaties such as the CRC and ICESCR.

To redress this failing, Madagascar must urgently reinforce its inspection mechanisms, ensuring regular monitoring and accountability in all mining zones, particularly those operated informally. Beyond administrative reforms, the state should adopt and enforce a legally binding Code of Conduct for permit holders, as envisaged under Article 183 of the Mining Permit Law, mandating strict human rights due diligence throughout the value chain. Coordination between the Ministries of Labour, Mines, and Population must be institutionalised to allow for cross-sectoral enforcement and data sharing. International cooperation and technical assistance—particularly through partnerships with organisations like the ILO—will also be essential for training local inspectors, strengthening social protection programmes, and promoting ethical sourcing frameworks. Madagascar can no longer afford to remain complicit in an industry that trades children's futures for mineral profits.

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Addressing Offshore Oil Rig Development by Companies in Areas Pending Maritime Boundary Delimitation

Alvin Limy

Ph.D Student, Postgraduate School, Universitas Airlangga, Indonesia.
Email: alvin.limy-2024@pasca.unair.ac.id

ABSTRACT
Due to the depletion of onshore oil and gas resources, there has been a growing effort to explore and extract oil and gas from offshore wells. This decline, in turn, catalyses the increase in number of offshore oil rigs worldwide. Such offshore exploration, however, carries inherent, present and real risk of catastrophic spills. An offshore oil rig, regardless of how meticulously it is constructed or operated, remains susceptible to disasters caused by human error, equipment and control failure, weak operating systems and procedures, hazardous materials as well as environmental phenomena. It is inevitable that every offshore hydrocarbon drilling operation carries the inherent risk of causing large-scale and far-reaching environmental pollution. Notwithstanding the growing number of offshore oil rigs worldwide, there is yet an international legal regime that establishes corporate liability for pollution resulting from offshore oil rigs. The current international legal regime which addresses corporate liability are confined to vessel-source oil pollution. The absence of any internationally agreed framework to properly regulate offshore hydrocarbon drilling creates substantial legal and environmental uncertainties, particularly in areas pending maritime boundary delimitation. This article will be addressing the legal status of offshore oil rigs whether it is fixed or mobile and what is the rights and obligations of countries in a pending delimitation over maritime boundary as well as the legal implication of oil and gas exploitation in disputed maritime area, including the corporate liability related to the offshore oil activities where the maritime area boundary is pending. The outcome of this article is to determine how effective is the current Law of the Sea in addressing such issues. This article finds that operation of offshore oil rigs in area pending maritime delimitation will cause difficulties to hold the oil rigs operator or companies liable for pollution caused by its activities. In particular, in areas pending maritime boundary, no state has jurisdiction over the exploration area. Most importantly, no international legal regime exists to hold companies or offshore oil operators liable in the event of pollution, let alone in areas pending maritime delimitation.

KEYWORDS: Offshore Oil Rig, Maritime Boundary, Corporate Liability, Law of the Sea, Maritime Delimitation

1. Introduction

Esmaeili mentioned that the increase of offshore oil rigs has led to numbers of international legal issues.[1] One of the many issues that arise in this situation is the legal status of oil rigs because offshore oil rigs can be categorized in different category with their own legal consequence.[2] For example, an oil rig can be categorized as ships, artificial islands, offshore installations and structures which can be separated into their own category.[3] There are several types of fixed offshore oil rigs such as jacket structures, ice-resistant structures, gravity structures, and deep-water design forms.[4] The international legal issue can came out from this situation because the oil and gas industry also recognized mobile oil rigs which is capable to

1 Hossein Esmaili, 'The Legal Status of Offshore Oil Rigs in International Law' (1997) 50 *Revue Hellénique de Droit International* 107, 108.
2 *Ibid*.
3 *Ibid*.
4 *Ibid* 110.

navigate and to be placed at different location from time to time.[5] Esmaili concern on this matter is what is the legal status of offshore oil rigs whether it is mobile or fixed within the scope of Law of the Sea.[6] Esmaili also mentioned in another article that offshore oil rigs legal rules are vague under international law.[7] Oxman mentioned that the subject to claim sovereignty over the sea has been done since long time.[8] Answers to such dispute may differ from time to time due to its development on the situation over time.

Ozdem mentioned that the subsea territory can hold energy resources worth millions of dollars and the disputes over maritime boundary delimitation frequently solved after several years.[9] Yiallourides mentioned that the *North Sea Delimitation Cases of 1969, Aegean Sea Case of 1976, Fisheries Jurisdiction Case of 1974* has not present substantial content of States obligation in pending delimitation of maritime boundary under present Law of the Sea.[10] This means that it is necessary to analyse recent case in order to reach a conclusion on how the current LOSC addressed the obligation of states in pending delimitation of maritime boundary. This essay will use several cases which among them will be analysed deeply to find the answer to the research question of this essay.

Due to the depletion of onshore oil and gas resources, there has been a growing effort to explore and extract oil and gas from offshore wells.[11] This decline, in turn, catalyses the increase in number of offshore oil rigs worldwide. Such offshore exploration, however, carries inherent, present and real risk of catastrophic spills.[12] An offshore oil rig, regardless of how meticulously it is constructed or operated, remains susceptible to disasters caused by human error, equipment and control failure, weak operating systems and procedures, hazardous materials as well as environmental phenomena.[13] It is inevitable that every offshore hydrocarbon drilling operation carries the inherent risk of causing large-scale and far-reaching environmental pollution.[14]

The potential environmental risks associated with hydrocarbon drilling operation were starkly demonstrated in 2010, with the explosion of the *Deepwater Horizon* oil rig (which was operated by BP). This catastrophic event led to the widespread spill of five million barrels of oil off the coast of the United States, in the Gulf of Mexico, marking one of the most devastating oil spills in history.[15] Accordingly, under U.S Federal Oil Pollution Act 1990 (OPA 1990), liability of a responsible party for removal costs and damages of an incident is generally limited. In the

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5 *Ibid* 109.

6 Hossein Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law* (Routledge, 2016) 4.

7 *Ibid*.

8 Bernard H. Oxman, 'Offshore Features Subject to Claims of Sovereignty' in S. Jayakumar, Tommy Koh, and Robert Beckman (ed) *The South China Sea Disputes and Law of the Sea* (Edward Elgar, 2023) 8, 8.

9 Berk Hasan Ozdem, 'Examination of the Overlapping Claims of Turkey and the Greek Cypriot Administration of Southern Cyprus on the Maritime Areas to the West of the Island of Cyprus' (2019) 77 (2) *Istanbul Law* Review 953, 953.

10 Constantinos Yiallourides, 'Oil and Gas Development in Disputed Waters under UNCLOS' (2016) 5 (1) *UCL Journal of Law and Jurisprudence* 59, 61.

11 Jin Yang, 'The Development and Prospect of the Offshore Oil and Gas Industry' (2021) 1 1.

12 Steven Rares, 'Biennial Mini Conference of the Maritime Law Association of Australia and New Zealand (NSW Branch).

13 Zubaidah Ismail and others, 'Evaluating Accidents in the Offshore Drilling of Petroleum: Regional Picture and Reducing Impact' (2014) 51 *Measurement: Journal of the International Measurement Confederation* 18.

14 Rares (n 12).

15 Stephanie Theodotou, 'Corporate Liability and Compensation Following the Deepwater Horizon Oil Spill: Is There a Need for an International Regime?' (2018) 6 *Groningen Journal of International Law* 161.

case of a discharge from an offshore facility, OPA 1990 sets a USD 75 million cap on liability for damages.[16] In respect of the *Deepwater Horizon* spill, however, BP had voluntarily waived its right to limit its liability under OPA 1990.[17] This waiver subjected BP to unlimited liability and highlighted the absence of an international regime in addressing large-scale transboundary pollution.

Notwithstanding the growing number of offshore oil rigs worldwide, there is yet an international legal regime that establishes corporate liability for pollution resulting from offshore oil rigs. The current international legal regime which addresses corporate liability are confined to vessel-source oil pollution.[18] The absence of any internationally agreed framework to properly regulate offshore hydrocarbon drilling creates substantial legal and environmental uncertainties, particularly in areas pending maritime boundary delimitation. As oil consumption and related technology progresses, offshore oil and gas activities have expanded into areas where delimitation agreements have not been concluded.[19] Consequently, in areas pending maritime boundary delimitation, states may unilaterally authorize oil operation to be carried out. In practice, states have unilaterally permitted exploration and exploitation in areas of overlapping maritime claims, as exemplified by the Somalia *v*. Kenya case before the International Court of Justice.[20]

This article will be addressing the legal status of offshore oil rigs whether it is fixed or mobile and what is the rights and obligations of countries in a pending delimitation over maritime boundary as well as the legal implication of oil and gas exploitation in disputed maritime area, including the corporate liability related to the offshore oil activities where the maritime area boundary is pending. The outcome of this article is to determine how effective is the current Law of the Sea in addressing such issues.

2. Methodology

This study employs doctrinal legal analysis. It examines primary sources, including international treaties, judicial decisions, and legal principles, alongside secondary sources such as scholarly textbooks, articles and reports. This essay will review the case on Hai Yang Shi You 981 between China and Vietnam near Xisha Island in 2014 to determine the legal status of mobile offshore oil rigs. Mobile offshore oil rigs are important in international law to be discussed because the difference between mobile offshore oil rigs and fixed offshore oil rigs is that mobile offshore oil rigs have the capacity to navigate at sea.[21] This essay will also use the dispute between Turkey and Greece which is still on going until this date to determine what is the obligation of states when the delimitation of maritime boundary between coastal states is still pending.[22] This essay will also use the dispute between Guyana and Suriname to determine the legality of oil and gas development in disputed maritime area as well as the

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16 33 U.S.C. § 2704(a)(3) 2006.

17 Sharmini Murugason, 'Cross-Border Pollution from Offshore Activities'.

18 Nicholas A Ioannides, 'The Legal Framework Governing Hydrocarbon Activities in Undelimited Maritime Areas (2019) 68 345.

19 Natalia Ermolina, 'Unilateral Hydrocarbon Activities in Undelimited Maritime Areas: The Only Certainty Is Legal Uncertainty?' (2018) 15 *Indonesian Journal of International Law*.

20 *Ibid*.

21 Shihui Cheng, 'Legal Guarantees for the Safety of China's Offshore Oil and Gas Facilities: Status, Defects and Countermeasures' (2021) 3 *The International Journal of Maritime and Coastal Law* 464, 465.

22 *Verbal Note Dated 20 February 2013 from the Permanent Mission of Greece to the United Nations to the United Nations Addressed to the Secretary-General,* ref: 389, *1*. (Note 20 February 2013)

legal implication of such action.[23] Further, the dispute between Japan and China will be used to determine the advantage and disadvantage of having a joint development agreement.[24] Moreover, the apparent absence of legal framework now calls for the international community to establish necessary laws and regulations to address corporate liabilities in the event of environmental pollution related to offshore oil activities, particularly in areas where maritime boundary delimitation is pending.

3. The Legal Status of Offshore Oil Rig

Esmaili mentioned that the legal aspects of oil rig as well as its installations can be crucial for an oil company and to its nationality because by determining the legal aspects of an oil rig, we can also determine the legal consequences of an oil rig installed inside a maritime boundary whether it is disputed or not.[25] Vaangal mentioned that discussing offshore oil rigs is not only about oil and gas development but also its safety and security measures which have been subjects to disputes over the past decades.[26] It is further explained by Vaangal that the existence of offshore oil rig(s) structure itself can be a threat to another nation's safety which is why the legal status offshore oil rig(s) structure is a significant issue in international law.[27] Based on the explanation above, a question can be drawn which is what is the importance of legal status of offshore oil rig. The question above is drawn because as it has been mentioned above that the existence of offshore oil rig itself can be a threat towards countries in terms of safety and security. Esmaeili mentioned that the increase of utilization of offshore oil rigs has led to numerous legal issue and one of the many legal issues that are raised is about the legal status of offshore oil rigs regardless of its form whether they are mobile of fixed offshore oil rigs.[28] Esmaeili further mentioned that it is also important to categorize offshore oil rigs based on its type whether the offshore oil rigs are mobile or fixed because both of them brings out different legal consequences.[29] There are 2 main focus in this section which is to examine how Law of the Sea Convention (LOSC) addressed the legal status of mobile and fixed offshore oil rigs. The current LOSC not yet defined what is offshore oil rigs within the convention. Article 56 paragraph 1 (b) of LOSC mentions that:

'*jurisdiction as provided for in the relevant provisions of this Convention with regard to:*

(i) The establishment and use of artificial islands, installations and structures;

(ii) Marine scientific research;

(iii) The protection and preservation of the marine environment.'[30]

Further, Article 81 of LOSC states that:

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[23] (*Guyana v Suriname) (Statement of Claim)* (Permanent Court of Arbitration, Case No 2004-04, 24 February 2004) [2]. (Guyana Statement of Claim)

[24] Clive H. Schofield and Ian Townsend-Gault, 'Choppy waters ahead in ''a sea of peace cooperation and friendship''?: Slow progress towards the application of maritime joint development to the East China Sea' (2011) 35 (1) *Marine Policy* 25, 26.

[25] Esmaili (n 1) 108.

[26] Kishore Vaangal, 'Legal Status of Offshore (Deep-Water) Oil Rigs: Coastal State Jurisdiction and Countering Oil Spills Threats' (2021) 7 (5) *Lex Portus (Online)* 42, 44.

[27] *Ibid*.

[28] Esmaeili (n 1) 108.

[29] *Ibid*.

[30] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 7 (entered into force 16 November 1994) art 56 para 1 (b).

> '*The Coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.*'[31]

Based on the article above, it is indicated that the current LOSC has not yet addressed the legal status of drilling with the use of offshore oil rigs. The indication above is made because the current LOSC only mentioned that coastal state has jurisdiction over their Exclusive Economic Zone (EEZ) to establish artificial islands, installations, and structures to exploit their own marine resources and protect as well as preserving marine environment over the use of such installations.[32] Article 81 of LOSC only mentioned that coastal states have jurisdiction to drill their continental shelf for all purposes.[33] From those articles, it is indicated that the current LOSC has not yet addressed the legal status of offshore oil rigs which upon its development, oil rigs can be categorized into mobile and fixed offshore oil rigs.

Fixed offshore oil rigs may cause disputes between countries when there is still pending delimitation on the maritime boundary. Esmaeili mentioned that fixed offshore oil rigs can be the cause of a dispute because there is no set of standard set in international law as to the qualification of such structure.[34] Esmaeili further draws the legal issue on fixed offshore oil rigs because even though fixed offshore oil rigs cannot normally be considered as ships, at some point, the oil rig still needed to be towed into the designated location.

Cheng mentioned that offshore oil rigs may cause disputes over countries if the oil rig disturbed another country oil operations.[35] Cheng further mentioned the Hai Yang Shi You 981 incident where China deployed mobile drilling rig which is named Hai Yang Shi You 981 in 2014 near Xisha Islands which then led into 2 months standoff between coast guards and fishing vessels of the two sides.[36] Hai Yang Shi You 981 is a subject that will be one of the main discussion in this section because based on article 56 and 81 of the LOSC above, LOSC only mentioned about artificial islands, installations, and structures which means that mobile offshore oil rigs is not included in article 56 and 81 however, the activity of exploiting marine resources is mentioned in article 56 and 81 which is to drill into the continental shelf and conduct research in the EEZ.[37]

Based on the explanation above, the main focus of this section is to define what is the difference between mobile and fixed offshore oil rigs which will be used to determine how LOSC addressed those oil rigs.

3.1 Mobile Offshore Oil Rig

Esmaeili draws the importance on defining the legal status of mobile offshore oil rigs because the purpose of having a mobile offshore oil rigs is to promote the effectiveness in exploiting marine resources.[38] One of the famous cases of implementation of mobile offshore oil rigs is Hai Yang Shi You 981 case as mentioned above.[39] Richards mentioned that the development of mobile offshore oil rigs increased the risk of accidents because of its

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31 *Ibid* art 81.
32 *Ibid* art 56 para 1 (b).
33 *Ibid* art 81.
34 Esmaeili (n 1) 116.
35 Cheng (n 21) 465.
36 *Ibid*.
37 LOSC (n 30) art 56 para 1 (b) and 81.
38 Esmaeili (n 1) 113.
39 Cheng (n 21) 465.

vagueness of the jurisdiction over the oil rig.[40] Vaangal mentioned that the legality of mobile offshore oil rigs has been a significant issue in international law because there is no clarity in international law about the legal status of such oil rig.[41] Vaangal then cites United States' action in solving such issue which is to consider all mobile rigs as vessels but then Vaangal disagrees with such concept from United States and deemed the concept as 'highly incongruous'.[42] Article 56 and 81 of LOSC also only mentioned the activity to conduct maritime scientific research in EEZ and to conduct drilling in the continental shelf, however, those articles did not mentioned anything about the legality of the oil rig that is used in those activities. Based on the explanation above, it is indicated that LOSC has not yet addressed the legal status of mobile offshore oil rig. However, the source of international law is not only hard law which means that in order to answer the issue in this subsection, more research on another hard law and soft law is necessary.

Although it is indicated above that the current LOSC has not yet addressed the legal status of mobile offshore oil rigs, the current LOSC addressed the activity of such oil rig which is to exploit marine resources in article 56 and 81 of LOSC. Article 56 paragraph 1 (a) mentioned,

> '*1. In the exclusive economic zone, the coastal State has:*
>
> *(a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;'*[43]

According to the article above, it is indicated that only the coastal state has the sovereign rights over the marine resources in their EEZ and in paragraph (b) of the same article, it is mentioned that coastal states have jurisdiction over their EEZ to establish the use of artificial islands, installations and structures.[44] Article 81 of LOSC also mentioned that only the coastal state have the exclusive right to authorize and regulate drilling in the continental shelf.[45] From the two articles above, it is indicated that LOSC did not regulate the legal status of mobile offshore oil rigs but LOSC regulates the activity of exploiting marine resources, however, upon the development of offshore oil rigs, drilling companies starts to develop mobile offshore oil rig which is also not regulated in the LOSC. Mobile offshore oil rig is not the same as fixed offshore oil rig because it has the ability to navigate through at sea.[46]

Vaangal mentioned that mobile offshore oil rigs shall be carefully studied using the principle of freedom of navigation in article 58 of LOSC.[47] Article 58 paragraph 1 of LOSC mentioned,

> '*In the exclusive economic zone, all states, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables*

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[40] Rebecca K. Richards, 'Deepwater Mobile Oil Rigs in the Exclusive Economic Zone and the Uncertainty of Coastal State Jurisdiction' (2011) 10 (2) *The Journal of International Business & Law* 387, 387.
[41] Vaangal (n 26) 45.
[42] *Ibid* 47.
[43] LOSC (n 20) art 56 para 1 (a).
[44] *Ibid* art 56 para 1 (b).
[45] *Ibid* art 81.
[46] Esmaeili (n 1) 114.
[47] Vaangal, (n 26) 47.

> *and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."*[48]

The title of the article above is about the rights and duties of other states in the exclusive economic zone.[49] This means that the EEZ is open to all states as mentioned in paragraph 1 of article 58 above because it is mentioned that whether coastal state or land-locked state have the rights to enjoy freedom of navigation in the EEZ.[50] From the paragraph above, it is indicated that mobile offshore oil rigs does not have the rights to drill in the EEZ and continental shelf as long as they do not have authorization from the coastal state who have jurisdiction over the EEZ and continental shelf. However, it is also indicated that mobile offshore oil rigs have the rights to freedom of navigation as stated in article 58.

From the explanation above, it is indicated that the current LOSC has not yet set the legal status of mobile offshore oil rigs. Esmaeili mentioned that the purpose of having mobile offshore oil rigs is to navigate the offshore oil rigs, however, even though it has the purpose to navigate at sea, mobile offshore oil rigs cannot be defined as same with ships.[51] Mobile offshore oil rigs still need clear explanation from the LOSC for its legal status because the legal status of such oil rig can directly affect the jurisdiction of any state towards such oil rig.[52]

3.2 Fixed Offshore Oil Rig

Different from mobile offshore oil rigs, fixed offshore oil rigs lack the capacity to navigate at sea.[53] Vaangal mentioned that the examination over the legal status of offshore installations revealed the troublesome areas in international law.[54] Vaangal further mentioned that the current LOSC lacks of regulatory framework towards offshore oil rigs.[55] However, even though there is still no clear explanation on the legal framework of offshore oil rigs in international law. the current LOSC still regulates the drilling activity or exploitation on marine resources in article 56 and 81 of LOSC as described in the above section. LOSC mentioned that the exploitation on marine resources in EEZ and continental shelf shall always be with the authorization of the coastal state.[56]

4. Rights and Obligations of States and Legal Implication on Maritime Boundary Pending Delimitation

Yiallourides mentioned that the current LOSC have mentioned the duties of states on maritime boundary pending delimitation.[57] Before the current LOSC was entered into force in 1982, the duties of states have not been determined in detail and the consequence of such status in international law is that states will have limited duties in time of pending delimitation

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48 LOSC (n 30) art 58 para 1.
49 *Ibid* art 58.
50 *Ibid* art 58 para 1.
51 Esmaeili, (n 1) 114.
52 Vaangal, (n 26) 47.
53 Esmaeili (n 1) 115.
54 Vaangal (n 26) 47.
55 *Ibid*.
56 LOSC (n 30) art 56 para 1 and 81.
57 Yiallourides, (n 10) 61.

takes place.[58] Based on article 57 of LOSC, every coastal state is entitled to enjoy the right to EEZ up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[59] With the EEZ, coastal states are entitled of sovereign rights to manage their marine natural resources whether living or non-living.[60] Along with the entitlement of EEZ of a coastal state, coastal state also enjoys exclusive rights to authorize and regulate drilling activities on the continental shelf for all purposes.[61]

However, there is a condition where some coastal states have adjacent coasts. This is mentioned in article 74 paragraph 1 of LOSC which is,

> '*The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.*'[62]

It is indicated in the article above that it is possible that coastal states to have an adjacent coast with another coastal state which means that there shall be an agreement between those states to determine their EEZ in order to avoid dispute in the future. However, agreement is not always reached between states because of many reasons, one of those reasons was natural resources that is in the area. One of the cases in this subject that can be studied is the dispute between Turkey and Greece. The case started on 27 April 2012 when the Government of Republic of Turkey gave authorization (Official Gazette Decisions 2012/2974 and 2012/2968) to Turkish Petroleum Corporation (TPAO) to explore and exploit hydrocarbon in Eastern Mediterranean which falls within the Greek continental shelf.[63] The Greece Government saw this as a complete violation to international law both customary and conventional.[64] Greece deemed that their territorial sea is 12 nm from the baselines in accordance with article 3 of LOSC.[65] However, Turkey states that their continental shelf extends to the outer limits of the island of Castellorizo up to 6 nm.[66]

After TPAO was given authorization to conduct hydrocarbon exploration, the seismic operation that was done by TPAO were always escorted by Turkish Naval Forces.[67] Based on the action of the Government of the Republic of Turkey, Government of Greece deemed the authorization granted by Turkey to TPAO to be null and void.[68] It is indicated from the explanation above that the delimitation on maritime boundary becomes inconclusive between Turkey and Greece even though there is an agreement made in 1995 which was made into a law which is law no.2289/1995 and amended with law no.4001/2011.[69]

However, on 12 March 2013, Turkey replied to Greece claims on Turkey's violation in giving authorization to TPAO to exploit hydrocarbon in Greece's continental shelf.[70] Turkey

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58 *Ibid*.
59 LOSC (n 30) art 57.
60 *Ibid* art 56 para 1 (a).
61 *Ibid* art 81.
62 *Ibid* art 74 para 1.
63 Note 20 February 2013 (n 22) 1.
64 *Ibid*.
65 *Ibid*.
66 *Ibid*.
67 Christian Schaller, 'Hardly Predictable and Yet an Equitable Solution: Delimitation by Judicial Process as an Option for Greece and Turkey in the Eastern Mediterranean' (2022) 35 *Leiden Journal of International Law* 549, 550.
68 Note 20 February 2013 (n 22) 2.
69 *Ibid*.
70 *Letter Dated 12 March 2013 from the Permanent Mission of Turkey to the United Nations Addressed to the Secretary-General*, ref: 389, 1. (Letter Dated 12 March 2013)

mentioned that the permit given to TPAO falls entirely within the Turkish continental shelf which is entitled for Turkey to exercise their sovereign rights.[71] Turkey also mentioned that Greece action by making a law to claim the continental shelf surrounding Castellorizo is unlawful and misleading because Greece's action in attempting to establish continental shelf and EEZ is in contradiction with the principles of international law.[72] Government of Turkey also mentioned that the creation of such delimitation cannot be instantly done just by writing a law in regard of EEZ and continental shelf.[73] Furthermore, the government of Turkey also mentioned that Greece's action is violating the principle of equity since the delimitation is not created on the basis of an agreement.[74]

> Article 83 paragraph 1 and paragraph 3 of the current LOSC mentioned,
> *'(1) The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve and equitable solution.*
> *(3) Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.'*[75]

Based on the paragraph 1 above, it is indicated that delimitation on maritime boundary shall be done with agreement between coastal states to achieve equitable solution.[76] According to the Government of Turkey's reply towards the Government of Greece's claims, the argument is in line with article 83 paragraph 1 regarding the condition where such delimitation on continental shelf is necessary. Greece's claim on the continental shelf is also not in parallel with article 83 paragraph 1 because the Government of Greece argued that the outer limit of their continental shelf is written in law No.2289/1995 and amended by law No.4001/2011.

Based on the explanation above on the condition between Turkey and Greece, it is indicated that there is no agreement that has been reached at that time, therefore, the obligation of both states is to comply to article 83 paragraph 2 which mentioned that if there is no agreement reached in reasonable period of time, both states shall refer to part XV of LOSC which is about the settlement of disputes.[77] Article 279 of LOSC about the obligation to settle disputes by peaceful means mentioned,

> '*States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3 of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.*'[78]

Based on the paragraph above and article 83 paragraph 3, it is indicated that coastal states in disputes of continental shelf delimitation shall take any effort to take action with peaceful purposes.

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71 *Ibid*.
72 *Ibid*.
73 *Ibid*.
74 *Ibid*.
75 LOSC, (n 30) art 83 para 1 and para 3.
76 *Ibid* art 83 para 1.
77 *Ibid* art 83 para 2.
78 *Ibid* art 279.

Based on the explanation of the situation between Turkey and Greece, it is indicated that when there are 2 or more coastal states that requires delimitation on their continental shelf, parties in dispute shall always refer to taking action with peaceful purposes as stated in article 83 paragraph 3 and article 279 of LOSC.[79] Based on the explanation above, it is also indicated that there are 3 obligations arise when there is delimitation in progress on the continental shelf between coastal states. The first obligation between states is to put an effort in reaching an agreement to avoid disputes in regards of the area of their claims on continental shelf based on article 83 paragraph 1 of LOSC.[80] The second obligation is when there is pending agreement between states, parties shall not jeopardize or hamper the reaching of the final agreement based on the principle of cooperation and understanding in article 83 paragraph 3 of LOSC.[81] The third obligation is to settle the dispute between states by peaceful means as mentioned in article 279 of LOSC.[82]

5. The Legality of Offshore Oil Rigs in an Area Pending Maritime Boundary Delimitation

As it has been mentioned above that one of the reasons why states decide to explore and exploit oil and gas resources in pending delimitation continental shelf is because the potential of marine resources contained in the area. One of the examples that has been discussed in the previous section shows that in the situation where the delimitation of continental shelf is still ongoing, three obligations will arise under the current LOSC. Those obligations are stated in article 83 paragraph 1, 2, and 3. The first obligation is to reach an agreement between coastal states.[83] The second obligation is to avoid jeopardizing or hampering with the final agreement based on the principle of cooperation and understanding.[84] The third obligation is to take dispute settlement by peaceful means.[85] Based on the explanation on the previous 2 sections, this section will discuss the legality of oil and gas development in pending delimitation continental shelf.

This section will use case-based discussion to enhance the understanding on the legality of oil and gas development in pending delimitation continental shelf. The main case that will be discussed in this section along with other several cases is the case between Guyana and Suriname. The case is used to enhance the explanation on this section because the case highlights the topic of hydrocarbon exploitation in pending delimitation continental shelf. The case on the previous section will also be used because the case between Turkey and Greece is also about oil and gas authorization on continental shelf which is still in delimitation.[86]

The dispute between Guyana and Suriname started because Suriname did not agree with Guyana's territorial claims and sovereign rights.[87] Suriname did not agree with Guyana's claim on maritime boundaries surrounding Corentyne offshore area, however, since 1958, Guyana has exercised peaceful, continuous, and uncontested jurisdiction over the maritime boundaries surrounding Corentyne offshore area.[88] There is also no agreement that has been reached by parties in dispute since the independence of Suriname in 1975 because Suriname

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79 *Ibid* art 83 para 3 and art 279.
80 *Ibid* art 83 para 1.
81 *Ibid* art 83 para 3.
82 *Ibid* art 279.
83 *Ibid* art 83 para 1.
84 *Ibid* art 83 para 3.
85 *Ibid* art 83 para 2.
86 Letter Dated 12 March 2013 (n 70) 1.
87 Guyana Statement of Claim (n 23) 2.
88 *Ibid* 3.

has consistently rejected all claims by Guyana regarding the claims on Corentyne offshore area.[89] Suriname also rejected Guyana's proposal in offering joint development in the disputed area and declaring the offshore area as Special Zone for Sustainable Development.[90] Guyana also mentioned that Suriname had neglected Guyana's uncontested jurisdiction over the offshore area by deploying their armed forces to expel a civilian rig on 4 of June 2000 who already hold Guyana's authorization in oil exploration.[91] Suriname demands that the hydrocarbon deposits in the zone to given to Suriname, however, this means that Guyana will not be entitled of the maritime zone over the disputed offshore area.[92] Guyana deemed the action from Suriname as a threat to international peace and security.[93] Guyana also claimed that Suriname's act is violating UNCLOS based on three reasons.[94] The first reason is that Suriname's act on violating territorial integrity and sovereign rights on territorial sea, EEZ, and continental shelf which has been peaceful, continuous, and uncontested as well as it is based on equitable delimitation in geographic context is causing the maritime boundary to be delimited.[95] The second reason is that Suriname used armed force in settling disputes in maritime boundary which is direct violation to article 279 of LOSC because Suriname neglected that principle of peaceful means.[96] The third reason is that Suriname rejected Guyana's proposal to enter into joint development where both states will be able to exploit marine resources in the area.[97] On the perspective of Guyana, Guyana proposed the joint development to Suriname because the reason why Suriname wanted to have jurisdiction over the offshore area is because the potential of hydrocarbon deposits.[98]

Guyana based their arguments on article 15, 74, and 83 respectively.[99] Article 15 mentioned,

> '*Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.'*[100]

Article 74 and 83 has been mentioned and explained in the previous section, however, the conclusion between those three articles is that when there are two states who have adjacent coasts, both states shall reach an agreement with measurement of territorial sea, EEZ, and continental shelf from the baselines which is geographically equidistant from the nearest point from the baseline.[101]

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89 *Ibid*.
90 *Ibid*.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.
94 *Ibid* 4.
95 *Ibid*.
96 *Ibid*.
97 *Ibid*.
98 *Ibid* 3.
99 *Ibid* 11.
100 LOSC (n 30) art 15.
101 *Ibid* art 15, art 74 para 1, and art 83 para 1.

Based on the dispute that was raised between Guyana and Suriname, the court gave explanation on the obligations provided by article 74 (3) and 83 (3). The court explained that there are two obligations that is important and appeared simultaneously within those articles.[102] However, those two obligations serve a different purpose in a disputed maritime area which is to promote as well as to limit activities in disputed maritime area.[103]

The first obligation is designated to promote activities in disputed maritime area which is to reach a provisional arrangements of a practical nature.[104] The court then explained that the obligation to reach such arrangement of practical nature shall always include the principle of good faith, understanding, and cooperation so that there will be no threat impose to the final delimitation.[105] However, although the current LOSC stated that there are obligation arise when there is coastal states raised a dispute about delimitation on maritime boundary, Ermolina mentioned that the current LOSC did not mention on what is the exact explanation on the phrase "during this transitional period" as stated in article 74 (3) and 84 (3).[106]

The second obligation imposed in article 74 (3) and 83 (3) is to not hamper or jeopardize with the final agreement.[107] Although there is no explanation in the current LOSC about what action can be categorized as hampering or jeopardizing the final agreement,[108] the court explained that the objective of the LOSC is to promote peace and friendly relations between nations and of settling disputes peacefully.[109] However, the explanation on the phrase above did not mean that there is no action that is permissible in a disputed maritime areas because the court explained that hydrocarbon exploration and exploitation is permissible as long as there is provisional arrangement that is reached by parties.[110] it is also important to note that unilateral act by a coastal state to explore and exploit hydrocarbon in an undelimited maritime boundary does not mean that the action is always deemed as hampering if it does not have any effect on the final delimitation.[111]

However, the court explained that the language that was used in the current LOSC can be multi-interpretated by concerned states since it leaves no limit to what action can be done by a state in reaching such dispute resolution.[112] The court also explained that the important aspect of an action by a coastal state is that the effect is not hampering or jeopardizing the final delimitation on a disputed maritime area.[113]

In conclusion, oil and gas development using offshore oil rig in disputed maritime area is allowed according to article 74 paragraph 3 and 83 paragraph 3 as explained above. Oil and development in disputed maritime area is allowed as long as the acting state is fulfilling the obligation set in those articles. In the case between Guyana and Suriname, the court found that oil and development in disputed maritime area is allowed as long as there the parties are putting effort on reaching provisional arrangements on practical nature.[114] The court also found

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[102] *Guyana v. Suriname (award)* (Permanent Court of Arbitration (PCA), Case No 2004-04, 17 September 2007) [152]. (*Guyana v. Suriname* award)
[103] *Ibid*.
[104] *Ibid*.
[105] *Ibid*.
[106] Natalia Ermolina, 'Unilateral Hydrocarbon Activities in Undelimited Maritime Areas: The Only Certainty is Legal Uncertainty?' (2018) 15(2) *Indonesian Journal of International Law* 156, 164.
[107] Guyana v Suriname award (n 102) 154.
[108] Ermolina (n 106) 164.
[109] Guyana v Suriname award (n 102) 154.
[110] *Ibid*.
[111] *Ibid* 155.
[112] *Ibid* 153.
[113] *Ibid* 155.
[114] *Ibid* 152.

that oil and development even though is done through unilateral act, is not always deemed as unlawful act because if it is done without hampering or jeopardizing the final delimitation then the unilateral act on oil and gas development is lawful according to the current LOSC.[115]

6. The Legal Implications of Offshore Oil Rigs in an Area Pending Maritime Boundary Delimitation

As has been explained in the above section, conducting oil and gas development activity in the disputed maritime area can be lawful and unlawful depending on how the acting state conducted the activity. Based on the explanation above, this section will be focusing on what is the legal implication when state parties decide to conduct oil and gas development activity in disputed maritime area. This section will use the dispute between Guyana and Suriname as the basis of argument in this essay to determine what is the legal implication of oil and gas development using offshore oil rigs in pending delimitation maritime boundary according to LOSC.

The court through the dispute between Guyana and Suriname stated that hydrocarbon exploration and exploitation in disputed maritime areas are not forbidden but the court encouraged the state to reach a provisional arrangement of a practical nature between state party in dispute so that both states can explore and exploit hydrocarbon resources within the continental shelf.[116] The court also mentioned that even unilateral act on hydrocarbon exploration and exploitation is not always a violation of LOSC.[117] However, the court further mentioned that such action is not in violation of the LOSC as long as there is no permanent physical change which is in the case of exploitation of hydrocarbon, there will always be permanent change of the seabed as a result of such activity.[118] Causing permanent change on the seabed as a result of unilateral action in hydrocarbon exploitation is a violation towards LOSC because article 83 paragraph 3 mentioned that “during the transitional period, not to jeopardize or hamper the reaching of the final agreement”, this means that because delimitation of maritime boundary is the final agreement between both states, state party may not cause permanent changes to the sea bed as it will also affect the final delimitation.[119] Basir and Aziz mentioned that the obligation imposed in article 74 paragraph 3 and article 83 paragraph 3 of LOSC is an obligation of conduct not of result.[120]

Therefore, it is indicated that oil and gas exploration and exploitation within disputed maritime area can is allowed whether it is unilateral or based on an agreement such as joint development. However, even though the nature of the conduct itself is allowed, state parties shall not cause permanent change of seabed or continental shelf because the change of the seabed means that the action is deemed as hampering or jeopardizing the final agreement between state in dispute.

Therefore, the legal implication of oil and gas exploitation in disputed maritime area can be varied whether it is lawful or unlawful. The action of the state can be deemed as lawful act if it does not violate the obligation stated in article 74 paragraph 3 and article 83 paragraph 3 which is to make every effort to engage in a provisional agreement of a practical nature and

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[115] *Ibid* 155.
[116] *Guyana v. Suriname award* (n 102) 153.
[117] *Ibid* 155.
[118] *Ibid*.
[119] *Ibid*.
[120] Salawati Mat Basir and Saidatul Nadia Abd Aziz, ‘Undelimited Maritime Areas: Obligations of States Under Article 74(3) and 83(3) of UNCLOS’ (2020) 18 (1) *Indonesian Journal of International Law* 63, 74.

not to hamper or jeopardize the reaching of the final agreement.[121] State action can also be deemed as violation toward LOSC if the action is hampering or jeopardizing the reaching of the final agreement if such state's action is causing permanent change to the seabed or continental shelf as stated by the court in the dispute between Guyana and Suriname.[122]

7. Responsibility for Companies Operating Offshore Oil Rig in an Area Pending Maritime Delimitation

The 2009 *Montara* oil spill highlights the legal and jurisdictional complexities associated with pollution from offshore oil rigs, particularly in the context of corporate liability under international law. On 21 August 2009, a substantial blowout occurred at the H1 wellhead platform of the *Montara*, which resulted in the discharge of oil for over 74 days.[123] Although the well was located within the maritime zones under Australian jurisdiction, the Government of Indonesia alleged that the resulting pollution extended into its waters and impacted its coastlines.[124] Subsequently, Indonesia's Government sought USD 2.4 billion in compensation from PTTEP Australasia as the operator of the *Montara* platform, which was rejected on the basis that it is not supported by scientific evidence.[125]

The *Montara* incident highlights flaws within the existing international regime concerning corporate liability over offshore oil rig operations. Accordingly, the *Montara* oil spill serves as a pivotal case study to examine the adequacy of instruments such as the United Nations Convention on the Law of the Sea, the International Convention on Civil Liability for Oil Pollution Damage, and the Bunker Oil Pollution Damage Convention in addressing corporate liability for pollution caused by Offshore Oil Rigs.

The United Nations Convention on the Law of the Sea, under Article 235 paragraph 1, mandates states to protect and preserve the marine environment. Moreover, under Article 194 of LOSC, states shall take all measures to prevent, reduce and control pollution of the marine environment from any source. These provisions however, place duties exclusively on states rather than on private corporate actors. The LOSC does not provide any mechanism for enforcement of liability, nor does it include specific provisions in addressing pollution originating from offshore oil rigs operated by private corporations. Article 235 paragraph 2 of LOSC does regulate that States Parties have the discretion to introduce national laws addressing compensation for marine environmental pollution, but this does not establish a supranational liability regime or define how transboundary harm caused by corporate operators should be addressed under international law. Furthermore, in areas of overlapping maritime claims, where delimitation is pending, Article 74 paragraph 3 and Article 83 paragraph 3 of LOSC call states to enter into provisional arrangements and refrain from activities that could jeopardize future delimitation. Both articles, however, are non-compulsory and do not prohibit State parties from unilaterally authorizing corporate oil exploration in pending maritime boundary areas, nor does it address corporate liability should such operations result in marine pollution.

The International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 1992) and its complementary agreement, the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992, represented a converted international

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[121] LOSC (n 30) art 83 para 3.
[122] Guyana v Suriname award (n 102) 155.
[123] RB Spies, M Mukhtasor and KA Burns, 'The Montara Oil Spill: A 2009 Well Blowout in the Timor Sea' (Springer Science and Business Media, LLC, 1 July 2017) 55.
[124] Murugason (n 17).
[125] *Ibid*.

initiative to facilitate consistent treatment of oil pollution damage claims across national legal systems.[126] Both the Conventions however only apply to ships carrying any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.[127] The CLC 1992 does not apply to fixed offshore installations, such as oil rigs and drilling platforms. Consequently, pollution incidents arising from blowouts or leaks from offshore oil rigs such as the *Montara* oil spill—fall entirely outside the scope of the CLC 1992. Such exclusion of offshore oil rigs is particularly concerning in pending maritime boundary areas, where states may unilaterally issue concessions to corporate operators.

The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention 2001), while expanding the scope of liability for oil pollution beyond that of the CLC 1992, does not account for corporate liability of offshore oil rigs pollution in areas pending maritime boundary. This Convention was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. The convention imposes strict liability on shipowners for pollution damages arising from bunker oil spills. [128] However, similar to LOSC and CLC 1992, the Bunker Convention does not extend its applicability to offshore oil rigs, leaving pollution caused by such installations in areas pending maritime boundary outside its scope.

8. Conclusion

With regard to the legal status of offshore oil rigs whether it is mobile or fixed and the legality of oil and gas development in disputed maritime area, it is indicated that the current LOSC has not yet addressed the legal framework of the offshore oil rigs itself, however, although the current LOSC did not addressed the legal framework of the oil rigs, the current LOSC addressed the activity of the oil rigs which is to exploit oil and gas as well as to drill on the continental shelf. It is also indicated from the explanation above on the obligation of states in a situation of pending delimitation on maritime boundary that states will have 3 obligations to follow that are imposed through LOSC in article 83 paragraph 1, article 83 paragraph 3, and article 279. The first obligation of state in dispute of maritime boundary is to put in effort to reach an agreement with another state to achieve an equitable solution.[129]

The second obligation is to not hamper or jeopardize the reaching of the final agreement.[130] The third obligation is to settle dispute between states by peaceful means.[131] It is also indicated that the legal implication of oil and gas development in disputed maritime boundary can be varied based on the conduct of the acting state because even though a state conducted unilateral oil and gas development in disputed maritime boundary, the action is not unlawful if it does not hamper or jeopardize the final agreement by causing further aggravation or causing permanent changes on the seabed. Based on the explanation above, in my opinion, the current LOSC has not addressed the legal status of offshore oil rigs, however, the LOSC

[126] Michael Mason, 'Civil Liability for Oil Pollution Damage: Examining the Evolving Scope for Environmental Compensation in the International Regime' (2003) 27 Marine Policy 1.
[127] Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage (adopted 27 November 1992, entered into force 30 May 1996) 1956 UNTS 255, art I(5).
[128] International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001, entered into force 21 November 2008) 2956 UNTS 79, preamble.
[129] LOSC (n 30) art 83 para 1.
[130] *Ibid* art 83 para 3.
[131] *Ibid* art 279.

has addressed the activity on exploration and exploitation of oil and gas even though it is still very broad upon its interpretation because there is no set of standards imposed in LOSC.

Also, the current LOSC has effectively addressed the issue of oil and gas development in disputed maritime areas and even though it is still a very broad subject, this will give room to development in the future to any coastal state. However, operation of offshore oil rigs in areas pending maritime delimitation will cause difficulties to hold the oil rigs operator or companies liable for pollution caused by its activities. In particular, in areas pending maritime boundary, no state has jurisdiction over the area of exploration area. Most importantly, no international legal regime exists to hold companies or offshore oil operators liable in the event of pollution, let alone in areas pending maritime delimitation.

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Hybridizing Due Diligence: Governing Human Rights Risks in Nigeria's Informal Economy Through Ground-Up Governance

Abubakar Muhammad Jibril [a], **Rabiu Abdulmudallib Bello** [b]

[a] LL.M Candidate, Faculty of Law, Universitas Indonesia, Indonesia. Corresponding Author. Email: abubakar.muhammad@ui.ac.id;
[b] Faculty of Law, Ahmadu Bello University, Zaria. Nigeria.

ABSTRACT
This article discusses how human rights due diligence can be operationalized in Nigeria's large informal economy using a hybrid governance approach. Applying a normative legal approach, we examine Nigeria's statute law, policy, and institutional stipulations (e.g., the 1999 Constitution and National Human Rights Commission Act), alongside recent policy documents like the National Action Plan (NAP) on Business and Human Rights (adopted in 2023) and attendant human rights strategies. We evaluate shortcomings of the existing top-down strategy, observing that formal business regulations and labour laws have the effect of excluding unregistered businesses and family enterprises, and outline the specific dilemmas of informal players. Pointing to examples such as the FIWON cooperative of street-level traders and local savings plans, we turn to "ground-up" governance institutions to complete state law. We discover that the presence of grassroots organizations and norms (e.g., workers' cooperatives, market associations, and local leadership structures) can enhance accountability in the presence of weak formal enforcement. The article ends with reform proposals: legal reform to bring informal workers within the ambit of protection, formal recognition and support to community-based organizations, and formal collaboration between state regulators and grassroots networks. These actions would assist in closing the gap between Nigeria's HRDD goals and the situation of its informal sector.

KEYWORDS: Human Rights Due Diligence; Informal Economy; Nigeria; Community Governance; National Action Plan.

1. Introduction

Nigeria has a large and deeply integrated informal economy within its social structure. More recent estimates place between 58% and 65% of Nigeria's GDP and over 90% of its workforce as being produced by informal enterprises.[1] Informal operations vary from street vending, artisanal production, smallholder agriculture, ride-hailing and food delivery, domestic work, and other unregulated enterprises.[2] Though vital to livelihoods, especially for women and youth, the informal sector is marked by high human rights risks.[3] For example, the majority of informal businesses lack any supervision for workers' safety, leading to hazardous working conditions; child labour is common in family businesses; and fundamental labour rights (minimum wage, hours, social security) available to formal sector workers are routinely

[1] K Meagher, *Identity Economics: Social Networks & the Informal Economy in Nigeria* (2010) <https://www.scopus.com/inward/record.uri?eid=2-s2.0-84940664158&partnerID=40&md5=418d5df3c44fb210505ba42b84ccdbd6>.
[2] Abigail Osiki, '"Esusu Cooperative" as a Means of Extending Social Protection to the Nigerian Informal Economy' (2020) 15 Contemporary Social Science 461 <https://doi.org/10.1080/21582041.2020.1766695>.
[3] Nkemdilim P Anazonwu and others, 'State Actors, Human Rights Violations and Informal Livelihoods during the Covid-19 Pandemic in Nigeria' (2022) 10 *Territory, Politics, Governance* 876 <https://doi.org/10.1080/21622671.2021.1976262>.

disregarded.[4] Environmental degradation (e.g., pollution by unregulated extraction or processing activities) and social ills (e.g., forced labour and discrimination) also result, but they evade official remedy mechanisms. In all, the informal economy "is deprived of regulation and legal protection," notwithstanding its "continuing growth" and its capacity to buffer massive unemployment issues.[5]

This context raises urgent questions of the law. Nigeria is beginning to elaborate human rights due diligence expectations by policy (most recently in its new Business and Human Rights NAP), but these are directed at the formal enterprise in the first instance. How do these systems reach informal players, vendors, artisans, and smallholder producers who are out of reach of existing enterprise law?

This study deals with two primary concerns: first, the sufficiency of Nigeria's existing legal and policy framework in addressing human rights concerns, even more so in the informal economy; secondly, the equilibrium between top-down regulatory frameworks and bottom-up community-based mechanisms for effectively managing these risks. The inquiry unfolds as follows. We begin by outlining the normative legal research method and the applicable instruments under study (such as the Constitution, statute law, and strategic documents like the NAP).

Next, in the section "Existing Frameworks," we contrast Nigeria's national laws, such as labour and human rights laws, with its constitutional provisions and evaluate their applicability or not to informal business. Next, we proceed to the section "Ground-Up Governance Strategies," where we discuss community-based models, such as local associations and worker cooperatives, and investigate the potential of leveraging local norms in formal human rights due diligence initiatives. Finally, we consolidate our findings and make practical suggestions for policy reform.

2. Methodology

This research adopts a normative legal research methodology with emphasis on legal norms, policies, legislative materials, and interpretations. It is an examination of Nigeria's written law (statutes, regulations, and policy statements) and international guidelines and applicable principles of law. This research specifically aims at the text of legal instruments such as the Constitution of 1999 and the National Human Rights Commission Act of 1995, and policy documents of the government, such as the National Action Plan on Business and Human Rights and the respective human rights policy documents.

Adopting analytical and conceptual approaches, we place the issues concerned within the framework established by the United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs formalize HRDD as an ongoing process through which businesses "identify, prevent, mitigate and account for how they address their adverse human rights impacts". This is the foundation of our case analysis of Nigeria's expectations and requirements for business. Along the way, we situate Nigeria's case in the context of wider trends (e.g., Europe's imminent required HRDD legislation) and identify comparative

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[4] Kate Meagher, 'Informal Economies and Urban Governance in Nigeria: Popular Empowerment or Political Exclusion?' (2011) 54 *African Studies Review* 47 2011;54(2):47-72. <doi:10.1353/arw.2011.0026>.

[5] Gyau Baffour Awuah Kwasi and Booth Colin Anthony, 'Evaluation of Equity in Informal Land Development Systems in Two Nigerian Cities' (2020) 146 *Journal of Urban Planning and Development* 4020037 <https://doi.org/10.1061/(ASCE)UP.1943-5444.0000609>.

instruments – e.g., Indonesia's latest Presidential Regulation No. 60 of 2023 establishing a national business and human rights strategy to identify potential models or inspirations.

Data were gathered from credible legal sources, such as the National Action Plan (NAP) of the Federal Government, alongside academic papers and credible reports. Specific policy reports employed include Nigeria's newly inaugurated NAP on human rights for 2024–2028, which contains a specific chapter on business and human rights, encompassing HRDD principles. These sources are referenced to support the analysis, where statutory and policy references are included as needed. Generally, this research employs a doctrinal method to identify prevailing norms, bring gaps to light, and systematically develop recommendations that are consistent with Nigeria's law and the UN Guiding Principles.

3. Analysis of Existing Governance and Legal Frameworks

3.1. National laws and institutional Mandates

Nigeria's legal framework provides several human rights guarantees, but they are primarily directed at state duties and formal business, rather than informal business.[6] The Constitution of 1999[7] professes a dedication to social justice and basic rights, However, most of these provisions (under Chapter II) are non-justiciable policy declarations. Chapter IV entrenches fundamental rights, including the right to life, personal freedom, and freedom from discrimination;[8] they bind "persons" and are enforceable against both the state and private parties.[9] In theory, the constitutional framework is supposed to cover all Nigerians, including informal workers. Yet, in the absence of specific implementing law or regulations, most rights, including the right to social security and the right to fair labour standards, are not realistically extended to the informal economy.[10]

Apart from the Constitution, Nigeria has an institutional mandate system for the enforcement of human rights. Most prominent is the National Human Rights Commission (NHRC), established by law in 1995 and functional since 1999[11] The Commission, under the NHRC Act, is mandated to "handle all issues relating to the protection of human rights as provided for in the Constitution… [and] international human rights treaties to which Nigeria is a party, “It monitors and investigates" alleged rights violations and assists victims in obtaining remedies. In practice, the NHRC may receive complaints of business-related abuses (e.g.,

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6 Women in Informal Employment: and Globalizing and Organizing, [WIEGO] "Enabling Social Protection within the Informal Economy : Lessons from Worker-Led Schemes in Nigeria, Uganda and Togo" (2020) <https://www.wiego.org/wp-content/uploads/2021/12/Enabling Social Protection within the Informal Economy for web (2).pdf#:~:text=but they still largely exclude,not explicitly address the specific>.

7 Habu Galadima, ‘Federal Republic of Nigeria National Action Plan2022 – 2026’ (2009) 6 *Local Government and Metropolitan Regions in Federal Countries* 235.

8 Celestina Ekene Chukwudi and Paul Chibuike Ezebuilo, ‘Jungle justice and rule of law in nigeria : the implications on achieving societal stability and sdg-16’ (2025) 5 *Journal of lifestyle and SDGs Review* 1.

9 Emuobo Emudainohwo, ‘Appraisal of the Protection of Informal Workers under Nigerian Labour Law' [2019] *Obafemi Awolowo University Law Journal*.

10 Cocoa Initiatives, ‘Analysis of Child Labour Legislation in Nigeria’ (2023) <https://www.cocoainitiative.org/sites/default/files/resources/Nigeria CL Legislation Analysis - Nov 2023.pdf> Accessed on 03/05/2025.

11 Federal of Nigeria Assembly, ‘The Constitution of the Federal Republic of Nigeria 1999 With the 1st, 2nd, 3rd Alterations (2010), 4th Alteration (2017) and 5th Alteration (2023) Updated’ [2023] *Policy and Legal Advocacy Centre Journal* (PLAC).

environmental harm or forced labour) and suggest redress or prosecution.[12] However, the NHRC's role is reactive and does not require private enterprises to take preventative measures; it relies on voluntary cooperation or referral from law enforcement. While the NHRC is a general rights watchdog, its mandate is not focused on business conduct or HRDD.

Juridically, Nigeria has several sectoral laws that address business and human rights concerns. For instance, there is the 1971 Labour Act, which governs the terms of employment for wage employees, and the Child Rights Act of 2003, which has been patchily implemented by states, outlawing exploitative forms of child labour.[13] These laws do not have the necessary provisions for governing informal employment. Specifically, the safeguards under the Labour Act (e.g., minimum age for light work) do not apply to children who work in self-employed or informal settings. That is, the majority of provisions by default assume a formal employer-employee relationship that is registered and exclude family businesses and petty traders from their scope. Similarly, while Nigeria has anti-trafficking and anti-forced labour legislation, enforcement has focused on formal enterprises and criminal networks. The other legislations, such as the Pension Act and other national social insurance schemes, either exclude self-employed individuals and small informal enterprises to a large extent. Further, recent social protection initiatives, as embodied in the 2017 National Social Protection Policy, fail to respond to the specific needs of informal workers, thereby highlighting a critical policy gap for this significant constituency.

Alongside statutory frameworks, Nigeria has established various policy and regulatory measures regarding business and human rights. In April 2023, the Federal Government, represented by the Attorney-General's office and the National Human Rights Commission, sanctioned the nation's inaugural Business and Human Rights National Action Plan (NAP). This NAP, which has been integrated into the overarching National Human Rights Action Plan for 2024–2028, mandates that businesses undertake human rights due diligence (HRDD) from the initiation of their operations. It delineates the Corporate Responsibility to Respect human rights as a binding expectation (rather than voluntary "Corporate Social Responsibility"). The plan welcomes every company to possess an explicit human rights policy and to train personnel on HR issues, and even to establish grievance mechanisms. The NAP thus represents a sophisticated move towards encouraging companies to manage human rights risks. However, it remains a policy document, rather than an enforceable law. Its language (e.g., "businesses will ensure…HRDD…from the outset") is aspirational, and no specific legislative sanctions for HRDD compliance (beyond general mentions of "sanctions" for a violation of rights) are present.[14]

At the institutional level, the government has created different forums and task forces.[15] For instance, the National Working Group on Business and Human Rights (NWGBHR) is expected under the National Action Plan (NAP) to ensure monitoring and reporting exercises.

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[12] Andreas Graf, 'Developing National Action Plans on Business and Human Rights' [2013] 2 *Business and Human Rights Journal* 1.

[13] E Emudainohwo, 'The Implementation of Treaties Related to Labour and Labour Relations in Nigerian Law: A Critical Appraisal' (2018) 44 *Commonwealth Law Bulletin* 548 <https://doi.org/10.1080/03050718.2019.1634609>.

[14] Obiora Chinedu Okafor, 'Remarkable Returns: The Influence of a Labour-Led Socio-Economic Rights Movement on Legislative Reasoning, Process and Action in Nigeria, 1999–2007' (2009) 47 *The Journal of Modern African Studies* 241 <https://www.cambridge.org/core/product/F9220B57CF3ADD75F072452D74A2C3E4>.

[15] Md Mahmudul Hoque, 'A Critical Review of Bangladesh's Child Labor Regulations and Policies' (2024) 5 *World Development Sustainability* 100177 <https://www.sciencedirect.com/science/article/pii/S2772655X24000557>.

In practice, national ministries (such as the new Ministry of Humanitarian Affairs and Poverty Alleviation) deal with labour and social issues, and agencies like the Corporate Affairs Commission enforce corporate registration and minimum compliance (albeit historically with no HR emphasis). The Nigerian regulatory agencies and judiciary, such as the Federal Competition and Consumer Protection Commission and other sector regulators such as the Nigerian Extractive Industries Transparency Initiative, could be the potential enforcers; yet, none of them has so far developed a formal mandate for human rights due diligence.[16] In general, although Nigeria has broad constitutional obligations and a variety of labour, child protection, and environmental legislation, these legal frameworks do not incorporate due diligence requirements as such and are only weakly enforced on unregistered or micro-scale operators. The new NAP articulates the corporate HRDD requirement (in line with the UNGP template), but operationalizing such standards into binding obligations for informal players is a remaining challenge.[17]

3.2. Limitations in extending HRDD to informal actors

Current governance mechanisms are massively stretched to be applied in Nigeria's informal economy. Firstly, policy and legal coverage are partial. As discussed, child and labour protection legislation exclude work in the informal economy.[18] Children working for family businesses or smallholder farms can be legally employed at a very early age, as the Labour Act explicitly excludes them. On the other hand, both international norms (ILO Convention 138) and Nigeria's minimum school-leaving age (15) imply far greater protection. The gap arises from excluding key HR risks – child exploitation, hazardous child labour, and unpaid family work from enforcement. Similarly, other labour rights (minimum wage, overtime, safety regulations) operate technically only for "employees" in the formal sector, not for self-employed artisans or street vendors.[19]

Second, enforcement capacity is lacking in the informal sector. Even where the law formally extends to informal practices, the authorities seldom inspect or regulate them. Labour inspectors can visit factories or large farms but not stall by stall in Lagos markets or artisanal mines.[20] The majority of informal businesses are not registered with any government agency and thereby avoid supervision. The result is that illegal practices (excessive hours, denial of breaks, harassment, discrimination) can spread uncontrolled. The NAP's annual reporting requirements and checklists, for example, depend on businesses being in the regulated sector; this will not capture thousands of sole traders.[21]

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16 Farkhanda Zia Mansoor, 'Exploitation of Child Domestic Labourers: The Limits of the Current Law' (2006) 8 International Journal of Discrimination and the Law 169.

17 Samson Adewumi and Patrick Bwowe, 'Child Labour Challenges and Security Implications in Selected Local Government Areas in Ondo State, Nigeria' (2024) 13 Social Sciences.

18 Olarinmoye A.W., 'Informal Sector Economic Organisations and Good Governance in Nigeria' (2017) 2 *The Online Journal of Arts, Management & Social Sciences* 52 <https://gojamss.net/journal/index.php/OJAMSS>.

19 International Labour Organization Standards, 'C138 - Minimum Age Convention, 1973 (No. 138)' (1973)<https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138>.

20 Lefapha La and Barekisi Ba, 'The Informal Sector in Urban Nigeria : Relections from Almost Four Decades of Research' [1986] SSB/TRP/MDM 65 <https://www.academia.edu/26615343/The_informal_sector_in_urban_Nigeria_Reflections_from_almost_four_decades_of_research>.

21 Jonathan Emenike and Ogbuabor Victor, 'Size and Causes of the Informal Sector of the Nigerian Economy: Evidence From Error Correction Mimic Model' (2013) 4 *Journal of Economics and Sustainable Development* 85.

Third, there is low capacity and awareness among informal actors. "Due diligence" is a technical, company jargon term unfamiliar to most micro-enterprises and small traders. These companies are concerned with survival daily (sales, access to credit, acquiring premises) and do not have the management hierarchies of larger companies. It is not realistic to anticipate that they will carry out systematic human rights risk analyses, as envisioned in the NAP, without outreach on a large scale. Moreover, since informal work is both normalized and transmitted culturally, several operators simply do not recognize certain labour conditions (e.g., working for extended periods without any pay) as human rights violations. Voluntary training or guidelines on HRDD hold little value in the informal setting without strong incentives or enforcement.[22]

Lastly, in policy terms, the NAP and related initiatives have not directly addressed the informal sector. The language of the NAP ("businesses operating in Nigeria") might technically include anyone selling goods or services, but implementation channels are directed toward registered firms. The government's social protection programs and labour programs have traditionally excluded informal workers. For example, Nigeria's 2017 Social Protection Policy does not make plans for the 92.9% of informal workers. In short, there is a governance blind spot: informal actors fall through the cracks of Nigeria's HR protection framework. These constraints imply that if unrevised, the potential of Nigeria's HRDD framework will not reach the most economically active actors who require it.[23]

4. Ground-Up Governance Strategies

4.1. Community-Led Governance Models

When official regulation is lacking, experience has demonstrated that community-based or bottom-up approaches can be essential to managing the informal sector[24]. Most Nigerian workers and informal businesses now rely on traditional networks and collective groups for reciprocity and dispute resolution. These endogenous institutions can be utilized to scale up compliance with human rights. A prime example is the Federation of Informal Workers' Organizations of Nigeria (FIWON).[25] FIWON was formed as an umbrella organisation for artisans, traders, transport operators, and other informal workers' associations across Nigeria. FIWON promotes solidarity and social justice for its members, who are drawn from numerous trades (carpenters, tailors, petty traders, motorcycle drivers, etc.). FIWON then established a registered cooperative under the Cooperative Societies Act, with Lagos and Osun state branches. Though there are merely some 800 direct cooperative members in each chapter, they speak for an affiliated parent association of approximately 25,000 informal workers nationwide. The FIWON cooperative provides tangible services – low-interest loans and savings plans, especially, which the informal members avail of. By doing this, FIWON demonstrates how a grassroots organization can introduce accountability and shared norms among informal actors. Its bylaws and membership standards officially establish internal

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[22] Gladys Ohazulike, 'Employment in the Informal Sector in Nigeria: Implications for Sustainable Economic Development' (2021) 4 *Unizik Journal of Business* 62 <https://doi.org/10.36108/UNIZIKJB/1202.40.0160>.

[23] *Ibid*.

[24] Imam M Alam, Shahina Amin and Janet M Rives, 'Occupational Choices of Working Children in Bangladesh' (2015) 47 *Applied Economics* 4982 <http://dx.doi.org/10.1080/00036846.2015.1039704>.

[25] FIWON, 'FIWON (Federation of Informal Workers' Organisations of Nigeria)' (2024) 1 <https://streetnet.org.za/organization/federation-of-informal-workers-organisations-of-nigeria-fiwon/> Accessed on 05/05/2025.

norms; i.e., members' payment and adherence to the cooperative's regulations are enforced by peer pressure and the possibility of collective services (loans, insurance schemes).[26]

A common example is the widespread organization of market associations and trade unions at the local level. Street vendors and market women in most Nigerian towns are usually organized (commonly along ethnic, religious, or familial lines) into associations that regulate market access, trading hours, and welfare schemes. for instance, local market associations take turns to provide security or set up pools to offer aid to members during times of need. Not officially human rights organizations, they are rather community enforcement organizations: members face local sanctions (fines, banishment from the market) if they violate association regulations or general social norms. There are equivalent informal networks among transporters (route unions) and artisans (craft guilds). These bodies can act as channels for principles of HRDD: if they are hired by NGOs or the government, they can spread human rights education and can monitor abuses within their ranks. For instance, a truckers' union can have an unofficial ban against employing children in their loading activities, or a marketplace cooperative can require all the owners of stalls to avoid utilizing child labour for hazardous work.[27]

They also act as a link between local reality and top-down policies. Non-governmental groups like the WIEGO alliance and Nigeria's Street Net chapter have worked to support the capacity of informal workers to self-organize and bargain for their rights. Also, in the development of Nigeria's NAP, stakeholders observe that institutions such as the African Centre for Corporate Responsibility (ACCR) and others facilitated "multi-dimensional consultations with community members and leaders" and government and oil industry stakeholders. This indicates that local stakeholders, for instance, leaders of oil-producing communities or market council leaders, had a role in setting business-and-human-rights agendas. While inclusion in consultation is not enforcement, it establishes precedent: community representatives (for example, women traders, youth representatives, and traditional rulers) were consulted in the shaping of the policy, making them familiar with formal HR norms.[28]

Briefly put, Nigeria's informal economy is already populated by self-organizing units, unions, associations, cooperatives, and communal groups that are offering day-to-day governance instead of the state. These can be leveraged to advance HRDD. To illustrate, formal regulators and NGOs can partner with FIWON or market associations to pilot HRDD training programs, or to jointly develop grievance mechanisms that informally sanctioned communities depend on. The Cooperative Societies Act exists in Nigeria, creating legal space for such initiatives: FIWON's cooperative is legally registered under the act, demonstrating that informal workers can create legally constituted organizations whose bylaws and elected leadership reflect collective norms. By supporting and working with such bottom-up initiatives, government and business find points of entry into the informal economy that top-down policy may not readily discover.[29]

4.2. Opportunities for Integrating Informal Norms into Formal HRDD Structures

There are genuine opportunities to hybridize Nigeria's HRDD governance by combining official regulations with unofficial norms, as demonstrated by community models.

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[26] *Ibid*.

[27] Oluchi Chukwu, ‘Full List of Trade Unions in Nigeria And Their Functions’ [2025] Nigerian Queries 1 <https://nigerianqueries.com/trade-unions-in-nigeria/> Accessed on 01/06/2025.

[28] *Ibid*.

[29] Masfi Sya’fiatul Ummah, ‘Chapter N98 Nigerian Co-Operative Societies Act’ (2019).

In the first place, this can be accomplished by state policy that specifically designates community-based organizations as partners in due diligence. To illustrate, the forthcoming issuance of implementation guidelines for the NAP can compel corporations to consult respective local associations or traditional councils in evaluating labour or land-use risks in a territory. This would legalize a connection between formal regulation and traditional governance. A good example is the inclusion of informal workers within national social schemes: as a gesture of intention, the state once invited FIWON to incorporate its members into the National Pension Scheme.[30] While this assurance is yet to be fulfilled, it illustrates how the state might legally bring informal workers (through their cooperatives) under national labour protections. The inclusion of such mechanisms in law or policy, e.g., a requirement that pension or health schemes extend to cooperative-affiliated informal workers, would advance HRDD by giving informal workers a more tangible stake in formal systems.

Second, there are already existing cultural norms of reciprocity and accountability that can be harnessed. The majority of business ethics in many Nigerian societies are transmitted through family apprenticeship and peer-pressure reputations. While not codified, such norms may be calibrated to be HRDD-compatible by encouraging a "social credit" system: companies that do business in small towns or markets can commit to adhering to some local norms (no child labour, no unfair treatment), and local associations can monitor compliance. When companies publicly advocate for community concerns (school construction, healthcare) in return for respect for human rights norms, they engage with old norms of reciprocity and common well-being. Although further study and discussion are needed, this is a source of harmonization: formal HR norms (e.g., in the UNGPs) are translatable into local vocabularies of justice and reciprocity, such that due diligence is not simply a compliance requirement but also a social norm.[31]

Third, official and informal channels might be combined in grievance and conflict systems. Although the NAP requires businesses to set up grievance procedures, unorganized workers might not have faith in state or company representatives. A hybrid mechanism may involve accredited mediators from community organizations or traditional rulers in complaint processes. For instance, if a farm supply chain worker is denied wages, she might be able to seek recourse through a community committee (maybe a labour subcommittee of a cooperative) that gets in touch with state inspectors. Inserting local normative actors into formal complaint mechanisms would provide informal workers with culturally consistent pathways to justice and pressure firms to develop legitimacy on the ground.[32]

Overall, Nigeria's informal group responsibility and public solidarity conventions can shape new modalities of HRDD. Formalizing collaboration with informal groups (i.e., integrating them into sector watchdogs or public consultations that are mandatory) and acknowledging their internal sanctioning (i.e., cooperative by-laws against certain abuses), policymakers can learn to build a hybrid governance system. This system combines the power of law with the reach and legitimacy of local-level networks and can result in better policing of human rights in Nigeria's informal economy.

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[30] Mark Uchenna Favour, 'Navigating Governance Challenges in Nigeria : Lessons , Impacts , and Paradigms' (2024) 9 *International Digital Organization for Scientific Research* 15 <https://doi.org/10.59298/IDOSR/JCE/91.1518.202411>.

[31] Renner Alpheaus Mba Doreen Kobani, 'Human Resources Management and Good Governance For Challenges of Insecurity in Nigeria' (2022) 13 *Approaches in International Journal of Research Development* 1.

[32] *Ibid*.

5. Conclusion

This analysis found that Nigeria's legislative and institutional frameworks for business and human rights are primarily focused on the formal economy, leaving the informal economy vulnerable to rights violations. Although Nigeria has a constitution and legislation providing general human rights guarantees, and its new National Action Plan on Business and Human Rights establishes lofty HRDD ambitions, these have little force in the unregulated, micro-enterprise environments in which the majority of Nigerians are employed. The main findings are: (1) Significant loopholes in the legal framework of current child and labour legislation de jure exclude much informal activity, and social welfare schemes exclude unregistered workers. (2) Lack of effective enforcement in the informal economy in the absence of targeted outreach by the regulators or legislative change, informal enterprises are, for the most part, beyond the scope of compliance programs. (3) The potential of current community governance certain institutions like FIWON and market unions already organize informal workers and can enforce norms among themselves. (4) Convergence with international norms, Nigeria's HRDD goals (as indicated in the NAP) are aligned with the UN Guiding Principles, but implementation must be customized to the local context.

To resolve these challenges, the paper offers a set of practical recommendations. Firstly, legal reforms must bring basic labour and human rights protection to the informal economy. For example, the Labour Act and Child Rights Act may be revised to cover self-employed workers and informal apprentices, closing loopholes that currently fuel exploitative child labour. Sectoral laws (e.g., transport and agriculture) may also contain minimum standards applicable to all workers regardless of formality. Second, Nigeria needs to formalize collaboration with grassroots organizations. The government and the private sector can formally recognize cooperatives and trade associations (under the Cooperative Societies Act or a new law) as stakeholders in HRDD. This may include providing such groups with representation on oversight committees and obliging companies to consult them in community risk assessments. Third, capacity-building and sensitization need to be localized: NGOs and state agencies must operate through networks of trust within the community if they are to reach informal entrepreneurs with human rights and due diligence principles. Fourth, pilot innovative hybrid mechanisms, like joint grievance committees comprised of company representatives and local elders, or certification programs through which companies collaborate with cooperatives to guarantee supply-chain integrity.

These reforms, if implemented, will establish a hybrid governance regime that mediates formal and informal realms. The state law may establish the threshold, for instance, requiring due diligence in law (as in the majority of states), but successful compliance in Nigeria will more likely be based on local acceptance. By enabling associations in the informal sector to engage in monitoring and redress, Nigeria can entrench the expectation that no economic actor is excluded from human rights responsibilities, despite their not being statutorily registered. In the longer term, aligning statutory law with Nigeria's strong traditions of communal accountability may provide the most encouraging way forward to manage human rights risk across the whole economy.

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Gender Equality in Australia: Challenging the Gender Pay Gap that Underpins Family Decisions on Paid Work and Unpaid Care

Christopher Wongsonegoro

Associate Attorney at Swandy Halim & Partners, Indonesia.
Email: cwongsonegoro11@gmail.com

ABSTRACT
The disparity in average salaries between men and women in the workforce is referred to as the gender pay gap. Usually, it is computed as the percentage difference between males and women's average hourly or yearly pays. The gender pay gap is a measurement of the differential in earnings across genders and is frequently used to identify systematic biases and inequities in the labour market. It is significant to stress that the gender pay gap examines average incomes of men and women across industries, occupations, and sectors rather than comparing people in the same jobs. Factors such as occupational segregation, in which men and women often work in distinct industries and occupations, variations in educational attainment, professional advancement, and elements like discrimination and bias can all have an impact on the gender pay gap. In general, women carry a greater share of unpaid caregiving duties, such as those related to child and elder care. As a result of juggling caregiving obligations and paid labour, women's pays may be impacted due to career pauses, part-time employment, or career disruptions. This article seek to analyse to what extent the gender pay gap affects women's position in the labour market and their role in the household. It is found that the gender pay gap significantly affects family decisions about who does paid work and who does the unpaid care. The women's employment choices are influenced by the gender pay gap which causes them to give up their careers in order to fulfil unpaid caregiving obligations. Women may be more inclined to work part-time, take career vacations, or select flexible working arrangements due to lower pay, in order to accommodate caring obligations. This article proposes that companies could promote shared caregiving duties by encouraging paid parental leave for both mothers and fathers. Moreover, companies could also encourage and support flexible work schedules, to let employees balance their job and caring obligations.

KEYWORDS: Gender Pay Gap, Discriminations, Workplace, Paid Work, Unpaid Care, Gender Equality

1. Introduction

Men and women have the same rights and obligations as human beings. They are free to develop personal abilities and make decisions without being limited by stereotypes, rigid gender roles and prejudice. This is called gender equality. Gender equality means that the differences in behavior, aspirations and needs of women and men are measured equally. This does not mean that women and men have to be the same, but that they have the same rights, obligations and opportunities. Gender equality means that there is fair treatment for men and women, measured by their needs.[1]

Gender gap occurs in almost every country in the world. In fact, since 2006, the World Economic Forum has begun to introduce what is called the Global Gender Gap Index (GGGI) to capture the size of gender-based disparities by focusing on national inequalities in terms of economy, education, health and politics.[2] As of 2024, Australia is ranked 24th for gender equality internationally.[3] The average weekly ordinary full-time pays for males in all sectors

1 International Labour Organization, *ABC of Women Workers' Rights and Gender Equality* (Geneva: International Labour Office, 2nd ed, 2007) p. 48.
2 World Economic Forum, *Global Gender Gap Report 2022* (World Economic Forum 2022).
3 World Economic Forum, *Global Gender Gap Report 2024* (World Economic Forum 2024).

and occupations in Australia is $2,072.70.[4] Meanwhile, the ordinary full-time weekly pay for Australian women is $1,826.40.[5] This means that women earn $246.30 less each week than males. According to Australian Bureau of Statistics (hereinafter, 'ABS') data on average weekly pays, women currently make 88 cents for every dollar earned by males.[6] Even though Australia's national gender pay gap has dropped, there is still a significant gap between pays of gender.

If there is a gender difference in the probability of promotion or the tendency to change bosses or employers, women will receive less pay development than men. Nonetheless, there is an important role for both gender-specific factors, like gender differences in qualifications and labour market treatment, as well as the overall pay structure, the labour market-determined prices for skills and jobs in particular sectors, in influencing the size of the gender pay gap. Women continue to face discrimination in the labour market, although this appears to be declining due to the trade union movement.[7] In addition, the pay gap also affects women's labour engagement through the impact on the strength of discrimination of responsibility because women are still considered to have primary responsibility for household work and childcare in most countries.[8]

However, this pattern has changed as families have responded to increased labour market opportunities for women increasing the opportunity costs of such arrangements. Furthermore, policies that facilitate the integration of work and family responsibilities, both voluntary and government-mandated, have become increasingly prevalent in recent years. Employers tend to continue to develop such policies when they respond to changes in the composition of the workforce and a desire to retain employees in whom they have invested substantially. In the long run, the increased availability of such policies will make it easier for women to combine work and family, and also for men to take on a greater share of household tasks. The gender pay gap is a persistent problem that penetrates society and influences not just people's work life but also the dynamics of their families and their decision-making.

This article seeks to analyse to what extent the gender pay gap affects women's position in the labour market and their role in the household. It is found that the gender pay gap significantly affects family decisions about who does paid work and who does the unpaid care. The women's employment choices are influenced by the gender pay gap which causes them to give up their careers to fulfil unpaid caregiving obligations. Women may be more inclined to work part-time, take career vacations, or select flexible working arrangements due to lower pay, in order to accommodate caring obligations. This article proposes that companies could promote shared caregiving duties by encouraging paid parental leave for both mothers and fathers. Moreover, companies could also encourage and support flexible work schedules, to let employees balance their job and caring obligations.

2. The Cause of Gender Pay Gap

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4 Australian Bureau of Statistics 'Average Weekly Earnings, Australia, November 2024' (*Australian Bureau of Statistics,*2024) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earnings-australia/nov-2024#cite-window2>.

5 *Ibid*.

6 Workplace Gender Equality Agency, 'Employer Gender Pay Gaps Report Acknowledgement of Country' (2025).

7 Antti Kauhanen and Sami Napari, *'Gender Differences in Careers*' (2015) 117-118 *Annals of Economics and Statistics, Special Issue on the Economics of Gender* (June), pp. 61-88.

8 Francine D. Blau and Lawrence M. Kahn, '*Gender Differences in Pay*' (2000)14(4) *The Journal of Economic Perspectives*, pp. 75-99.

When one worker receives a higher salary than another, there is a pay differential. There are pay discrepancies between men and women, individuals of different races, faiths, and ideologies, as well as those with different skin tones. The pay disparity may possibly be substantial. Differences in pay are common because workers with greater experience or who produce work of a higher calibre might command more rates than less educated workers or recent graduates.[9] The pay gap happens when two employees in the same organisation perform the same tasks at the same level of training or position but are paid differently. Such salary disparities are prohibited and are seen as discriminatory. However, there are still salary inequalities.[10]

The disparity in average salaries between men and women in the workforce is referred to as the gender pay gap. Usually, it is computed as the percentage difference between males and women's average hourly or yearly pays. The gender pay gap is a measurement of the differential in earnings across genders and is frequently used to identify systematic biases and inequities in the labour market. It is significant to stress that the gender pay gap examines average incomes of men and women across industries, occupations, and sectors rather than comparing people in the same jobs. Factors such as occupational segregation, in which men and women often work in distinct industries and occupations, variations in educational attainment, professional advancement, and elements like discrimination and bias can all have an impact on the gender pay gap. It is a significant indicator that is used to evaluate the degree of gender equality in a society and to pinpoint the issues that require attention in order to reduce inequalities and advance fair pay practises.[11]

The difference in average pays between men and women is the outcome of societal and economic variables that collectively lessen women's lifelong earning potential.[12] Gender pay gap is influenced by a few factors, one of which is occupational segregation.[13] Occupational segregation refers to differences in the distribution of demographic groups, such as men and women, across the units of establishments, such as industrial or occupational groups.[14] For instance, women are disproportionately sorted in lower-paying professions and fields, especially in the care sector.[15] This occupational segregation contributes to the pay gap, since the earnings in these fields are often lower than those in fields with a male predominance.[16] Moreover, women frequently encounter obstacles to job advancement, such as limited access to leadership roles and employment with higher salaries. Factors such as unconscious prejudice, preconceptions, and a lack of networking opportunities can prevent women from moving up the corporate ladder and cause them to earn less money than their male colleagues.[17]

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9 Fatma Abdel-Raouf and Patricia M. Buhler, *The Gender Pay Gap : Understanding the Numbers* (Routledge, 2020) p. 14.

10 Workplace Gender Equality Agency (n 6).

11 Workplace Gender Equality Agency, 'The Gender Pay Gap Explained' (*Wgea.go.au,* 2024) <https://www.wgea.gov.au/the-gender-pay-gap>.

12 *Ibid*.

13 Rebecca Cassells, Alan S Duncan and Rachel Ong, *Gender Equity Insights 2016: Inside Australia's Gender Pay Gap* (IDEAS Working Paper Series from RePEc, 2016) p. 28.

14 Muhammad Zaheer Khan and others, 'Measuring the Occupational Segregation of Males and Females in Pakistan in a Multigroup Context' (2023) 10 *Humanities and Social Sciences Communications*.

15 Ignacio González, Bongsun Seo and Maria S Floro, 'Gender Wage Gap, Gender Norms, and Long-Term Care: A Theoretical Framework' (2022) 28 *Feminist Economics* 84.

16 Janet Siltanen, *Locating Gender: Occupational Segregation, Pays and Domestic Responsibilities* (Routledge, 2020) p. 28.

17 *Ibid*, p. 120.

In general, women carry a greater share of unpaid caregiving duties, such as those related to child and elder care. As a result of juggling caregiving obligations and paid labour, women's pays may be impacted due to career pauses, part-time employment, or career disruptions.[18] Due to their obligations as carers, women are more likely than males to work part-time or under flexible conditions.[19] Moreover, working part-time frequently leads to few working hours, which means lesser accumulation of work experience, which results in fewer prospects for career progression and lower compensation.[20]

The gender pay gap may also be influenced by overt or covert discrimination and bias against women in the workplace. This includes practises including discriminatory hiring and promotion procedures, uneven remuneration for equal labour, and gender-based prejudices that downplay women's abilities and contributions. In addition, the gender pay gap may still be affected by historical circumstances, such as previous discriminatory practises. These include institutionalised discrimination, less educational and employment possibilities for women, and conventional gender norms.

3. Legislation: Workplace Gender Equality Act 2012 (Cth)

There are a few ways in which the Australian Workplace Gender Equality Act 2012 (Cth) seeks to challenge the gender pay gap that underpins many family decisions about who does paid work and who does the unpaid care.[21] Workplace Gender Equality Act mandates reporting on gender equality metrics by certain organisations, encouraging accountability and openness. Organisations covered by the act are required to report information under Section 19(1)(a) regarding the makeup of their workforce, including the representation of men and women at various organisational levels.[22] The act lays forth the metrics for gender equality that businesses must report on. Organisations, including governing bodies, management, and boards, are required to provide information on the gender mix of their workforce, according to Section 19(1)(b).[23] Additionally, they must include information on pay disparities, the availability of policies and practises to enhance gender equality, as well as access to and use of flexible work arrangements.

Organisations are permitted by the legislation to create and carry out Gender Equality Plans (hereinafter, 'GEPs'). According to Section 9(2), a company may decide to create a GEP outlining the plans and steps it will take to advance gender equality.[24] Although the creation of GEPs is optional, organisations that do so may be recognised for their dedication to gender equality, as regulated under section 9(4).[25] The Workplace Gender Equality Agency (hereinafter, 'WGEA') is in charge of monitoring adherence to the law. The WGEA has the authority, under Section 28(1), to oversee and guarantee reporting requirements compliance.[26] The WGEA has the authority to carry out audits, examine compliance reports,

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18 Paula England, 'Emerging theories of care work' (2005) 31(1) *Annual Review of Sociology* 381, 382.
19 KPMG, Diversity Council Australia (DCA) and Workplace Gender Equality Agency (WGEA), "She's Price(d)Less : The Economics of the gender Pay Gap" (2022) p.14 <https://www.wgea.gov.au/sites/default/files/documents/FINAL%20VERSION_She%27s%20Priced dless_2022.pdf>.
20 Lisa Toczek, Hans Bosma and Richard Peter, 'The Gender Pay Gap: Income Inequality Over Life Course – A Multilevel Analysis' (2021) 6 *Frontiers in Sociology*.
21 Fair Work Ombudsman, 'Gender Pay Equity Best Practice Guide' (2023).
22 *Workplace Gender Equality Act 2012* (Cth) s 19(1)(a).
23 *Ibid,* s 19(1)(b).
24 *Ibid,* s 9(2).
25 *Ibid*, s 9(4).
26 *Ibid,* s 28(1).

and enact sanctions for noncompliance (section 31).[27] The WGEA supports gender equality in the workplace through conducting research, offering education, and providing resources. One of the duties of the WGEA, according to Section 36(d), is to encourage and assist the public's understanding of gender equality issues. The WGEA's research and publications provide organisations working to advance gender equality insightful information and resources.[28]

Despite the fact that the act does not specifically address the gender norms that surround men's involvement in caring, it nonetheless offers organisations a framework for advancing gender equality and challenging established gender roles. The statute indirectly supports efforts to fight gender norms and prejudices that prevent males from providing care by supporting workplace flexibility, documenting gender equality, and fostering diversity and inclusion.

4. International Standards to Promote Gender Equality

Several international legal instruments regulate gender equality, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the main conventions of the International Labour Organization (hereinafter, 'ILO'), one of which is ILO Convention Number 100 concerning Equal Remuneration for Male and Female Workers For Employment and ILO Convention No. 111 concerning Discrimination in Employment and Occupation.

The International Labour Organisation (hereinafter, 'ILO') sometimes known as the ILO, is a department of the United Nations that brings together governments, employers and workers representatives, to set labour standards, develop policies and devise programmes promoting decent work for all women and men.[29]The ILO is devoted to promoting social justice and internationally recognized human and labour rights.[30]

Australia is a founding member of the ILO and one of its main allies in advancing the agenda for decent work. Australia is a member of the Asia-Pacific Government Group of ILO members and has ratified 58 ILO Conventions and 2 Protocols, including three Governance Conventions and eight of the ten Fundamental Conventions.[31] The ILO and Australia's Workplace Gender Equality Act 2012 (Cth) have the same objective of advancing gender equality in the workplace. The ILO is a specialised agency of the United Nations that establishes global labour standards while, the Workplace Gender Equality Act is only applicable to Australian law.

The ILO has developed several international labour standards that addresses gender equality and non-discrimination in the workplace. Key conventions include:

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27 *Ibid,* s 31.
28 *Ibid,* 36(d).
29 International Labour Organization, 'Mission and Impact of the ILO' (*Ilo.org,* 2024) <https://www.ilo.org/about-ilo/mission-and-impact-ilo>.
30 *Ibid*.
31 International Labour Organization, 'The ILO in Australia' (*Ilo.org,* 2021) <https://www.ilo.org/resource/ilo-australia>.

1. ILO Convention No. 100 (Equal Remuneration Convention, 1951): This convention encourages equal pay for equally valuable labour performed by men and women. It attempts to abolish gender-based pay inequality.[32]
2. ILO Convention No. 111 (Discrimination (Employment and Occupation) Convention, 1958): This convention addresses all forms of discrimination, including gender-based discrimination, in the workplace. It mandates that member nations advance equality of opportunity and treatment in the workplace.[33]

The Workplace Gender Equality Act in Australia aligns with the ILO treaties' principles and goals. It aims to address workplace gender disparities, such as pay discrepancies and gender-based discrimination. The legislation encourages organisations to construct gender equality plans,[34] promotes openness through reporting requirements,[35] and creates a compliance framework to track development.[36] In order to implement and promote gender equality policies, the ILO offers advice and help to its member nations, including Australia. It carries out research, creates regulations, and provides employees, businesses, and governments with technical support.

The ILO works to advance gender equality globally, and its standards and recommendations are used as a guide by other nations when they create their own laws and policies, such the Workplace Gender Equality Act.[37] The Workplace Gender Equality Act in Australian domestic law is significant because it demonstrates Australia's adherence to ILO-promoted gender equality ideals and global labour standards. The legislation and the ILO agreements both seek to develop equitable and welcoming workplaces where people of all genders may benefit from equal opportunity, treatment, and compensation.

5. The Challenge of Gender Pay Gap and Unpaid Care

There are far-reaching effects of the ongoing gender pay gap that go beyond monetary differences. It pervades cultural norms and expectations, influencing how unpaid care work is distributed among households. In general, women have lower incomes, lower pays and less favourable working conditions than men. However, in particular, the difference in men's and women's salaries apparently affects women's position in the labour market and their role in the household. Women who are paid low social security pays and benefits will result in lower pension payments. This inequality also determines other negative consequences. A lower pay rate for women can increase the unemployment rates because women tend to depend on a male partner for the economy, which can increase their vulnerability to domestic violence and increase the divorce rate.

The allocation of unpaid care work within families is significantly influenced by the gender pay disparity. Since women often make less money than men, they could decide to prioritize caregiving responsibilities over a paid job. This decision can lead to a lack of financial freedom, a stagnant job, and little prospects for skill growth. As a result, men could be less

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[32] International Labour Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (adopted 29 June 1951, entered into force 23 May 1953).
[33] International Labour Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (Adopted 25 June 1958, entered into force 15 June 1960).
[34] *Workplace Gender Equality Act* (n 22) s 9(2).
[35] *Ibid*, s 19(1)a.
[36] *Ibid*, s 28(1).
[37] International Labour Organization (n 33).

willing to perform unpaid care duties, which maintains the stereotype that women should be in charge of these responsibilities.[38]

The gender pay gap affects family decisions about who does paid work and who does the unpaid care. Family finances are severely impacted by the gender pay difference. Moreover, equal pay for equal effort between men and women might result in lower household income and financial instability. As a result, families may have to make challenging decisions about their spending, childcare costs, and educational costs. Additionally, whoever chooses to work full-time, part-time, or remains at home to offer unpaid care may be influenced by the economy.[39] Since men and women earn different amounts of money as a result of the gender pay gap, women who make less money tend to favour unpaid caregiving over paid labour because it makes more financial sense for them to do so.[40] This condition, in turn, reinforces conventional gender norms and restricts women's possibilities for job growth by feeding the perception that they are more suited or predisposed to caring responsibilities naturally.

Traditional gender roles within families are reinforced by the gender pay disparity. Men may be seen as the major breadwinners while women shoulder caregiving duties due to women's lower incomes. This division of labour may be maintained by societal prejudices and expectations, which also restrict women's possibilities for job progression and uphold prevailing gender stereotypes.[41] Caregiving responsibilities like raising children and doing domestic duties are frequently linked to femininity in society. This perception is further strengthened by the gender pay gap, which downplays women's economic contributions and emphasises their caregiving responsibilities. As a result, men are less likely to be expected or encouraged to take on unpaid care duties, thereby maintaining the idea that caring is primarily the responsibility of women.[42]

Women's job choices may be influenced by unequal pay, which frequently results in concessions to their professional objectives. Women may be deterred from fully engaging in the workforce or seeking higher-paying roles by limited financial benefits and a lack of recognition. As a result, there may be fewer women in leadership positions, which might widen the gender pay gap.[43] In addition, women's employment choices are influenced by the gender pay gap which causes them to give up their careers in order to fulfil unpaid caregiving obligations. Women may be more inclined to work part-time, take career vacations, or select flexible working arrangements due to lower pay, in order to accommodate caring obligations. This supports the myth that women are entirely in charge of taking care of the family while men are supposed to put their jobs first.[44]

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[38] Scott Barry Kaufman, 'Why Don't People Care That More Men Don't Choose Caregiving Professions?' (*Scientific American*, 4 February 2020) <https://blogs.scientificamerican.com/beautiful-minds/why-dont-people-care-that-more-men-dont-choose-caregiving-professions/>.

[39] Constantina Safllios-Rothschild, ' The role of the family in development' (1980) 17(4) *International Monetary Fund* 44-47, p. 44.

[40] Gaëlle Ferrant, Luca Maria Pesando and Keiko Nowacka, 'Unpaid Care Work: The missing link in the analysis of gender gaps in labour outcomes' (December 2014) *OECD Development Centre* 1.

[41] Anna-Lena Dicke, Nayssan Safavian and Jacquelynne S. Eccles, 'Traditional Gender Role Beliefs and Career Attainment in STEM: A Gendered Story?' (2019) 10(1053) *Frontiers in Psychology* 1-14, p. 2.

[42] *Ibid*.

[43] Naznin Tabassum and Bhabani Shankar Nayak, 'Gender Stereotypes and Their Impact on Women's Career Progressions from a Managerial Perspective' (2021) 10(2) *IIM Kozhikode Society & Management Review* 192-208, p.196.

[44] *Ibid,* p. 195.

The expectations and conventions of society that place distinct duties and obligations on men and women are at the basis of the gender pay discrepancy. People are socialised to believe in traditional gender roles from an early age, which helps to maintain the perception that women are inherently carers. These cultural expectations, together with the economic effects of the pay disparity, support the idea that taking care of others is a woman's primary duty.[45]

Stereotypes about unpaid care are influenced by the gender pay gap, which has important ramifications for gender equality. It hinders women's possibilities for job progression and reduces their level of economic independence. It fosters structural gender inequality and supports the idea that women's labour is devalued. Additionally, it impedes efforts to achieve an equal distribution of caregiving duties between men and women, strengthening gender disparities within households. These prejudices must be disproved in order to achieve gender equality, as must the underlying economic inequalities that support them.

6. Proposed Solution to Gender Pay Gap

To eliminate the obstacles preventing women from participating fully and equally in the workforce, a cultural shift is necessary to close the gender pay gap.[46] Additionally, implementing pay transparency and ensuring equal pay are essential to provide employees with access to information about pay ranges and scales within organisations, thereby promoting pay transparency. Consequently, companies should adopt measures and procedures that guarantee gender-neutral equitable compensation for comparable labour, while also conducting routine pay audits to identify and address any gender pay inequalities within its organisation.[47] Furthermore, enforcing equal pay laws and regulations is crucial to ensure that men and women are paid equally for equally hard work, which includes conducting routine pay audits and finding and closing any gender pay inequalities within organisations. Additionally, the government needs to encourage businesses to embrace open pay policies and advance pay equity.[48]

Companies could promote shared caregiving duties by encouraging paid parental leave for both mothers and fathers. Moreover, companies could also encourage and support flexible work schedules, to let employees balance their job and caring obligations. Encouraging men to utilize flexible work schedules can also help dispel the myth that such options are solely appropriate for women. Additionally, companies should implement policies and initiatives that provide chances for women to enhance their careers, such as mentorship, sponsorship, and leadership development initiatives as well as offering training on unconscious bias, diversity, and inclusion, which can help promote an equal workplace. Companies could also encourage and reward shared parental leave programmes that encourage men's active participation in caregiving duties while giving assistance to men who take time from work to care for their children. By honouring and normalising male engagement in caring responsibilities, there are going to be a societal transformation. While in practice, such occurrence is less likely to happen, as companies will focus more on profit.

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45 Gaëlle Ferrant (n 40).

46 Workplace Gender Equality Agency, 'What is the gender pay gap*?' (Wgea.gov.au,* 2024*)* <https://www.wgea.gov.au/the-gender-pay-gap>.

47 Michael Baker, Yosh Halberstam, Kory Kroft, Alexandre Mas, and Derek Messacar, 'Pay Transparency and the Gender Gap' (Working Paper No. 25834, National Bureau of Economic Research, May 2019) p. 9.

48 *Ibid*, p. 27.

The government could encourage educational and awareness initiatives to combat unconscious biases and gender stereotypes in the field of caring. Such initiatives encourage people to critically examine cultural expectations and conventions about gender roles as well as triggering honest discussions between individuals on how to balance job and caring obligations. They could advance gender equality and shared responsibility in caring by giving companies, employees, and society at large tools or facility and training. [49] The government also needs to raise awareness and educate people about gender stereotypes in caring. Men should be encouraged to take on caring responsibilities to eradicate preconceptions and advance equal chances for both genders, by offering training and courses on unconscious prejudice.[50]

The most significant part for the government is that they should play an active role by putting into place and upholding laws that address gender pay discrepancies and advance workplace equality (Promote legislation that supports both parents having flexible work schedules and shared parental leave). Moreover, the government should review and update laws and policies often to make sure they promote equality for all people and effectively address new problems. To monitor progress and identify areas needing improvement, governments could gather thorough information on gender pay disparities, unpaid caregiving, and related issues to monitor progress and pinpoint areas that need to be addressed. Also, monitoring and assessing policies and programmes that attempt to close the gender pay gap and dispel prejudices on a regular basis.

The government already collects data from the WGEA. The WGEA receives its statistics on the gender pay gap through the yearly Employer Census. A variety of metrics, including employee compensation, are reported to WGEA by non-public sector firms with 100 or more workers under the Workplace Gender Equality Act of 2012. In addition to employer-reported data, WGEA utilizes data from the ABS Average Weekly Earnings (hereinafter, 'ABS AWE') survey, which its results are published twice a year.[51] The ABS AWE survey intends to measure the level of average earnings in Australia at a point in time.[52] By integrating data both from the Employer Census and the ABS AWE survey, WGEA then determine the country's gender pay gap.[53]

To achieve long-lasting change, these solutions need cooperation between the government, employers, communities, and individuals. By tackling the gender pay gap and dispelling prejudices around unpaid care, we can build a more equal society where people have the opportunity to make decisions based on their talents and preferences, rather than preconceived gender roles. By putting these tactics into practise, we can start to address the gender pay gap and the decisions that families make about paid work and unpaid care. Building a more equal and inclusive workplace where people must make decisions based on their ambitions and talents rather than social expectations tied to gender roles, employers, politicians, people and society as a whole must work together.

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[49] Francesca Gino and Katherine Coffman, ' Unconscious Bias Training That Works', (*Harvard Business Review*, September-October 2021) <https://hbr.org/2021/09/unconscious-bias-training-that-works>.

[50] Yvonne Prinzellner, Danielle Drachmann, Mouna Ghanem, Lars Münter, and Stecy Yghemonos. ' International Journal of Care and Caring' (2023) *International Journal of Care and Caring* 1-7, p. 5.

[51] Australian Bureau of Statistics, 'Average Weekly Earnings, Australia' (*ABS.gov.au,* 2025) <https://www.abs.gov.au/participate-survey/business-survey/average-weekly-earnings-survey>.

[52] *Ibid*.

[53] Workplace Gender Equality Agency, 'What is the gender pay gap*?'* (n 46).

7. Conclusion

Decisions about paid work and unpaid care made by families are greatly impacted by the gender pay gap. Unequal pay reinforces the split of unpaid care work between men and women, limits employment options for women, and upholds conventional gender norms. The gender pay gap significantly influences how people see those who provide unpaid care for families. It reinforces the idea that caring for others is essentially a woman's job by underestimating women's economic contributions and supporting conventional gender roles. It is essential to combat these prejudices, advance equal pay policies, and support a more balanced split of unpaid caregiving duties in order to achieve gender equality. The government and society can work to eliminate gender disparities and foster a society where caregiving responsibilities are shared more equitably, enabling people to pursue their aspirations and contribute to both paid work and unpaid care on an equal basis, by recognising the impact of the gender pay gap on caregiving stereotypes.

The Workplace Gender Equality Act 2012 strives to establish a culture of gender equality in workplaces by mandating reporting, offering tools and guidance, and honouring organisations that excel in promoting gender equality. By addressing gender disparities, challenging prejudices, and fostering workplaces where all workers, regardless of gender, have equal opportunities and are appreciated for their contributions, it aims to change workplace culture. The Workplace Gender Equality Act 2012 aims to address the gender wage gap and its effects on decisions made by families about paid work and unpaid care through its provisions and methods. The Act aims to promote a more equitable and inclusive workplace where family decisions are not excessively impacted by gender-based pay discrepancies by promoting openness, supporting pay equity reviews, creating gender equality policies, and offering assistance. The Workplace Gender Equality Act in Australia is also in line with the ILO treaties' principles and goals. It aims to address workplace gender disparities, such as pay discrepancies and gender-based discrimination.

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How Regulatory Capture Which Prioritizing Private Sector Interests Exists in Indonesian Democracy

Ekawestri Prajwalita Widiati

Department of Constitutional Law, Faculty of Law, Universitas Airlangga, Indonesia.
Email: epwidiati@fh.unair.ac.id

ABSTRACT
Indonesia takes pride in its status as a democratic state. Democracy is a fundamental principle reflected in the nation's philosophical theory, deemed as Pancasila and embedded in its fourth principle, enunciating "democracy guided by the inner wisdom in the unanimity arising out of deliberations among representatives". Significant changes made to the legislation-making process have led to the expectation that this increased democratic framework will concurrently enhance public participation. However, its status quo begs to differ as Indonesia may be witnessing a parliament that is gradually transitioning back to the New Order regime. Although its legislative process has ostensibly become democratic, the parliament has seemingly functioned as a forum that represents interests that are increasingly business- and profit-oriented. Data collected by Yayasan Auriga Nusantara and Tempo further show that the names of Parliament members are recorded in 1.106 companies in several sectors. The composition of the current parliament, with some having close connections with businesses, entailing prioritization of private over public interests, illustrates the regulatory capture phenomena. Signs of regulatory capture, substantiated by the lack of public participation in Indonesia's legislative process, are paradoxical to its supposedly 'democratic' system. This paper, therefore, aims to demonstrate that Indonesia's current legislation-making process does not enhance public participation, despite it having been engineered into a democratic procedure through the amendments to the 1945 Constitution and relevant statutory laws. It is found that democracy does not guarantee increased participation but may be used to obscure oligarchy and private interests. This entails a legislation-making process that is inherently captured by business interests. A lack of public participation does not always indicate the absence of a particular group's involvement but can also denote that no genuine consideration is made towards its interests.

KEYWORDS: Regulatory Capture, Public Participation, Law-making Process, Private Sector Interest, Democracy.

1. Introduction

Indonesia takes pride in its status as a democratic state. Democracy is a fundamental principle reflected in the nation's philosophical theory, deemed as *Pancasila* and embedded in its fourth principle, enunciating "democracy guided by the inner wisdom in the unanimity arising out of deliberations among representatives". This principle was conceived before the archipelagic nation gained its independence, first introduced in the Jakarta Charter (*Piagam Jakarta)* by the Investigating Committee for the Preparation of Independence on 22 June 1945 and was then officially integrated in the Preamble of the 1945 Constitution.

Indonesia's current position as a democratic state was preceded by the New Order Regime, when power was vehemently centralized in the executive branch. The pre-reformation era was led by President Soeharto who was notoriously known for his authoritarian leadership, facilitated by the Constitution. It is important to note that since its independence on 17 August 1945, Indonesia has had four constitutions, which initially transitioned from authoritarianism to liberal democracy, and back to authoritarianism then ultimately, towards

liberal democracy again.[1] The Constitution applicable during the New Order Regime was of the one reinstated by Soekarno in 1959, which was unamended from 1966 to 1998.

Protests during the reformation era called for Soeharto's resignation and significant amendments to the Constitution. 1998 marked the conclusion of the New Order regime, allowing Indonesia to transition to its Reformation Era and was followed by the four annual amendment rounds that began in 1999. These amendments brought substantial changes to the Indonesian political system, progressing towards liberal democracy by redistributing power from the presidency to various national and subnational institutions. Changes made were designed and focused on ensuring the separation of power and checks and balances between the *trias politica*.

One significant change was the election and law-making process, where the 1945 Constitution transformed a previously President-centered procedure into a more participatory process. Prior to the amendments, the President was allowed to formulate laws with the approval of the House of Representatives (hereinafter, 'DPR').[2] Subsequently, members of the DPR were not elected through a process of public election, but rather were decided by statutory law.[3] This created room for the President's political manoeuvres, entailing the DPR at that time to be represented by a coalition consisting of three main parties namely *Partai Persatuan Pembangunan* (PPP), *Golongan Karya* (Golkar), *Partai Demokrasi Indonesia* (PDI). Through this coalition, the DPR acted in contrast to its job as representatives of the people, as it instead voiced the interests of the ruling government and oligarchs.

After Soeharto's exit on 21 May 1998, amendments were made to Article 5 and 19 of the 1945 Constitution. A public election to elect new members of the DPR was first held in June 1999, symbolizing Indonesia's transition to a democratic State. Nonetheless, to some observers, seats of the DPR still reflected the past oligarchy, ranging from Soeharto's to other powerful families.[4] According to Dimyati Hartono, during the start of the transition era, the parliament faced chaos as new regulations were no longer accepted, while at the same time new regulations were not made yet. They did not envisage a clear and ideal concept to conduct political reformation, causing them to fail to construct a better democracy and returning to fulfilling several of their private interests.[5] As such, Indonesia's transformation to a democratic country did not begin with a stronger and coherent legislative process – rather, the parliament at that time inherited the problems that were already entrenched in Soeharto's New Order regime. This is best explained by the fact that privatization of the legislative and bureaucratic process had rooted deeply in the nation, to the extent that it continued to remain despite the amendments.

However, amendments to the 1945 Constitution shall not be discredited. The unstable parliament did not last long, as significant changes in the legislative process were continually experienced up to 2004. One substantial difference was that the parliament was no longer seated by a few majority parties. The composition of the DPR varied and reflected a realistic version of Indonesia's political constellation.[6] Leaders of emerging political parties who similarly desired reformation, such as Abudurrahman Wahid, Amien Rais, and Megawati

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1 Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press 2018), p. 3.

2 Article 5(1) of the 1945 Constitution.

3 Article 19(1) of the 1945 Constitution.

4 Yuwanto, 'Parlemen dan Demokratisasi: Peran Dewan Perwakilan Rakyat Dalam Transisi Demokrasi di Indonesia' (2016) 2 *Jurnal Ilmiah Ilmu Pemerintahan* 2, p. 46.

5 *Ibid.*

6 *Ibid.*

Seokarnoputri, entered the parliament and it was beginning to actually execute its job as a legislation-making institution.

To develop and support an effective legislative process, Law No. 10 of 2004 on the Establishment of Legislation was promulgated. Such a law became the heart of the legislation-making process for the next few years, until it was removed by Law No. 12 of 2011 on the Establishment of Legislation (hereinafter, 'Establishment of Legislation Law') to fill in the gaps that existed in the previous law. Prior to this, People's Consultative Assembly decrees (TAP MPRS) were issued. Specifically, they were 1) TAP MPRS No. XX/MPRS/1996 on the Memorandum of the DPR-GR regarding the source and hierarchy of Indonesian laws along with 2) TAP MPR No. III/MPR/2000 which readdressed the hierarchy of Indonesian laws. Both of these decrees are no longer applicable, and the legislative making process primarily relies on the provisions contained in Establishment of Legislation Law. Ultimately, an emphasized concept introduced in the reformed legislative process was public participation, guaranteeing that the interests of the public will be heard and considered.

Significant changes made to the legislation-making process have led to the expectation that this increased democratic framework will concurrently enhance public participation. However, its *status quo* begs to differ as Indonesia may be witnessing a parliament that is gradually transitioning back to the New Order regime. Although its legislative process has ostensibly become democratic, the parliament has seemingly functioned as a forum that represents interests that are increasingly business- and profit-oriented. This correlates with the growing criticism from the public that there exists a lack of public participation in the making of several laws. One law that has attracted attention is the Job Creation Law, which excluded relevant community groups in the discussion of the academic draft and any of its substantial changes.[7] The idea to enact the Job Creation Law derived from President Joko Widodo, with the aim to harmonize contradicting statutory laws through an omnibus mechanism as a way to boost investments.[8] The law touches issues of labour as well, remembering their pivotal role in improving the economy.[9] However, the lack of genuine public participation during the formulation of the Job Creation Law, especially in the stages of planning and discussion, garnered criticisms.

Lack of actual representation could also be best described by the composition of the parliament. Data by Marepus Corner illustrates the dominance of business actors in the DPR, amounting to 55% of 575 members.[10] Data collected by Yayasan Auriga Nusantara and Tempo further show that the names of DPR members are recorded in 1106 companies in several sectors.[11] The composition of the current parliament, with some having close connections with businesses, entailing prioritization of private over public interests, illustrates the regulatory capture phenomena. Regulatory capture results from the behaviour of persons who hold regulatory power with narrow and self-interested goals[12] and is manifested as

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7 Constitutional Court Decision No. 91/PUU-XVIII/2020.

8 Riska Putri Wardani and Sunny Ummul Firdaus, 'Analisis Undang-Undang Cipta Kerja Dalam Koherensi Teori Pembentukan Undang-Undang' (2022) 1 *Jurnal Demokrasi dan Ketahanan Nasional* 4, p. 730.

9 *Ibid.*

10 ICW and Transparency International, *Memperkuat Regulasi Anti Konflik Kepentingan: Studi Kasus Pebisnis di Balik Pengelolaan Sumber Daya Energi* (2023), p. 36.

11 *Ibid.*

12 Levine ME and Forrence JL, 'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis' (1990) 6 *Journal of Law, Economics, and Organization*, p. 168.

regulators are faced with pressures and incentives, causing them to self-interestedly execute their task and deviate from their initial objective of fulfilling public interests.[13] It is indicative when a law or regulation gravitates towards the interests of the regulated industry[14] – as visible in several of Indonesia's laws.

Signs of regulatory capture, substantiated by the lack of public participation in Indonesia's legislative process, are paradoxical to its supposedly 'democratic' system. This paper, therefore, aims to demonstrate that Indonesia's current legislation-making process does not enhance public participation, despite it having been engineered into a democratic procedure through the amendments to the 1945 Constitution and relevant statutory laws.

2. Methodology

This article employs doctrinal legal analysis. It examines primary sources, including international treaties, judicial decisions, and legal principles, alongside secondary sources such as scholarly textbooks, articles and reports. This article utilizes statutory and conceptual approaches. It begins by looking into the concept of regulatory capture, discussing the law-making process of Indonesia after the reformation era, and will be concluded by an analysis on whether the current process is reflective of democracy.

3. Defining Regulatory Capture

Identifying regulatory capture is challenging due to the absence of a standard definition of public interest. The complexity in defining 'public interests' is particularly apposite amongst policies regarding natural resources, for instance. To put this into context, the management of natural resources is universally linked with the concept of public ownership. However, as each State is sovereign, it can regulate through the law to decide whether the natural resources are to be managed by the State or by individual owners.[15] The possibility for individuals to control and possess rights and responsibilities over natural resources, either individually or collectively, illustrates the concept of property rights.[16] An obstacle however emerges from the concept of property rights over natural resources, as governments are expected to find a balance between public interests and individual citizen's rights.

According to Yackee, capture manifests during the rulemaking process.[17] Capture may come in various forms and might arise because of conflicts of interest from the connections regulators have or past job experience, they had in the regulated industry (also known as the revolving door). Due to this, regulators adopt an actual internalized belief that a law coloured with business interests would significantly benefit the public. On this matter, Kwak notes that ongoing relationships maintained by regulators are important as they influence their perspective on a particular issue.[18] Furthermore, they will more likely reflect

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[13] Matthew D. Zinn, 'Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits' (2002) 21 *Stanford Environmental Law Journal* 81, p. 108.

[14] David Freeman Engstrom, 'Corralling Capture' (2013) 36 *Harvard Journal of Law & Public Policy* 1, p. 31.

[15] Afghania Dwiesta, 'Indonesia's Upstream Petroleum Governance Reform: Which Model Is Constitutional Enough' (2018) 3 *Indonesia Law Review*, p. 278.

[16] USAID, *Role of Property Rights in NRM: Good Governance and Empowerment of the Rural Poor* (2006), p. 1.

[17] Susan Webb Yackee, 'Reconsidering Agency Capture During Regulatory Policymaking' in Daniel A. Carpenter and David A. Moss, *Preventing Regulatory Capture* (2014), p. 293.

[18] Lawrence G. Baxter, 'Capture in Financial Regulation: Can We Channel It toward the Common Good' (2011) 21 *Cornell Journal of Law and Public Policy* 1, p. 184.

positions that are shared by the people within their social networks.[19] In connection to this, Davidoff notes that as regulators' decisions are influenced by those in their social networks, they may believe that they are doing their best, while in fact, their perspectives have been influenced and affected by the people they interact with.[20] Communication maintained by interest groups with policymakers provides them a chance to advance their objectives.[21] As lawmakers are already captured to begin with, their perspective will substantially lean more toward business interests throughout the rulemaking process. These phenomena demonstrate 'social capture' or 'cultural capture'.

If no conflict of interest is identified before the rulemaking process, the traditional regulatory capture theory may apply, which often links with acts of corruption and lobbying with members of the regulated industry throughout the rulemaking process.[22] Within this purview, regulators are deemed as individuals who are motivated by self-interests, such as the possibility of obtaining a higher-paying position in the regulated industry or receiving funds from the interest group to advance their political careers.[23] Obtaining acknowledgement from policy makers is viewed as a valuable asset for interest groups, as it may guarantee that their preferences will be considered, rather than being overlooked.[24] Hence, the laws made are influenced by their material self-interest rather than the public's. In the law-making process, this is facilitated by the lack of participation of the public and/or lack of quality or an imbalance of access to information.

According to Berry, public participation or the participation of a party representing the 'public interests' is essential in fighting capture.[25] Yackee assumes that a captured rule-making process would be evident by the active participation of the regulated industry during the lobbying process.[26] She further notes that if a process is captured, the interests of the regulated industry will remain influential across different stages of the rulemaking process. Consequently, it is pivotal to identify which stages of the law-making process necessitate public participation.

In the subsequent sections, this paper argues that the existence of regulatory capture can be further explained by assessing the condition of a state's democracy. A democratic system — although it promises the capability for citizens to participate in the law-making process — does not guarantee the absence of regulatory capture. In fact, a representative democracy with a parliament that has diverse members may still be prone to regulatory capture due to the power of a few people with strong influence, namely oligarchs.

4. Law-making Process Post-Reformation

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19 *Ibid.*

20 James Kwak, 'Cultural Capture and the Financial Crisis', in Daniel Carpenter and David A. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (2014), p. 77.

21 Joan C. Timoneda and Sebastián Vallejo Vera, 'How Do Shocks Realign Interest Group Lobbying in Congress? Evidence from Ecuador' (2021) 29 *The Journal of Legislative Studies* 1, p. 2.

22 Daniel Carpenter and David A. Moss, *Preventing Regulatory Capture Special Interest Influence and How to Limit It* (Cambridge University Press 2014), p. 13.

23 Levine ME and Forrence JL, *Loc. Cit.*

24 Bert Fraussen, Timothy Graham, and Darren R. Halpin, 'Assessing the Prominence of Interest Groups in Parliament: A Supervised Machine Learning Approach' (2018) 24 *The Journal of Legislative Studies* 4, p. 451.

25 Susan Webb Yackee, *Op. Cit.*, pp. 297-298.

26 *Ibid.*, p. 301.

4.1. The Indonesia's Law-making Process

Indonesia's legislation-making process is primarily mandated by the 1945 Constitution. As authorized by Article 5(1), the President is given the ability to submit a bill. To maintain checks and balances between the three branches of government, Article 20 of the 1945 Constitution mandates the legislative branch as the institution with the authority to formulate legislation. As a result of the national reformation in 1998, Article 19 (1) of the amended 1945 Constitution prescribes that the members of the legislation body are elected through a general election. This is further restated in Article 67 of Law No. 17 of 2014 on the National Parliamentary Assembly, DPR, Regional Representative Council and House of Regional Representatives. Due to a revision on the Law No. 7 of 2017 on General Elections (hereinafter, 'General Elections Law'), the election of the parliament members is now conducted simultaneously with the presidential election and occurred for the first time in 2019.[27]

The DPR is granted extensive rights by the 1945 Constitution. More specifically, Article 20A (1) of the 1945 Constitution subjects the legislative body to perform legislative, budgetary, and oversight functions. In regard to its legislative capabilities, Article 21 succinctly states that DPR members shall have the right to propose bills. Such bills are to be discussed by the DPR and the President to seek joint approval. If a joint approval is not reached, the bill will not be reintroduced within the same term of session. For the bill to pass as statutory law, Article 20 (4) of the 1945 Constitution regulates that the President is required to sign it and if one is unwilling to do so, Article 20 (5) of the 1945 Constitution exemplifies that the jointly approved bill will nonetheless be promulgated within 30 days following such approval.

Further specific steps of the legislation-making process are envisaged in the Establishment of Legislation Law. At its core, the legislation-making process shall adhere to the fundamental 'good law-making rules' which encompass "a) clear purpose; b) made by proper agency or officials; c) match between the types, hierarchy, and contents; d) can be implemented; e) versatility and result; f) clear formulation; and g) openness."[28] Subsequently, Article 43 of the Establishment of Legislation Law reaffirms that bills may derive from the DPR, the President, or the Regional Representative Council and shall be equipped with an academic draft. Indonesia's law-making process is divided into 5 (five) main stages:

1. *Planning*: the arrangement of the National Legislation Program (Articles 16 – 42 of the Establishment of Legislation Law).
2. *Formulation*: the bill is submitted by the DPR, the President, or Regional Representative Council for bills concerning regional autonomy (Articles 43 – 64 of the Establishment of Legislation Law).
3. *Discussion*: the bill is observed to decide whether it will be passed or rejected for further discussions. If it is approved, then it will proceed to Discussion Tier I and Discussion Tier II (Articles 65 – 71 of the Establishment of Legislation Law).
4. *Approval*: after the bill is approved by the DPR and the President, the latter must sign the bill (Articles 72 – 74 of the Establishment of Legislation Law).
5. *Enactment*: the law is published and promulgated in the State Gazette (Articles 81 – 87 of the Establishment of Legislation Law).

Prior to the Establishment of Legislation Law, the legislation-making process in the post-reformation era was governed by Law No. 10 of 2004 on the Establishment of Laws, as mandated in Article 22A of the 1945 Constitution. In contrast to the Establishment of Legislation Law, Law No. 10 of 2004 governed the law-making process in a simplistic manner.

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[27] Simon Butt and Tim Lindsey, *Op. Cit.,* p. 12.

[28] Article 5 of the Establishment of Legislation Law

To illustrate, Law No. 10 of 2004 contained only one Article regulating public participation, despite it being an indispensable component in a legislation-making process of a democratic nation. Article 53 of Law No. 10 of 2004 merely stipulates that the public has the right to provide suggestions verbally or in writing in the stages of planning or discussion of a statutory law and regulation. Fundamentally, the current Establishment of Legislation Law guarantees that the law-making process involves various parties, including communities and academicians who may express their insights on a particular bill.

4.2. Public Participation in Indonesian Law-making Process

Participation of groups and regulated industry shall be observed throughout the legislation-making process. Essentially, public participation refers to the "involvement of people in a problem-solving or decision-making process that may interest or affect them".[29] A meaningful public participation will entail pressure on legislators to consider various perspectives more than they usually do.[30] Public participation indicates the citizens' involvement and ability to partake in influencing the law-making process. Engagement with the public further allows individuals or civil society groups to deliver their ideas, interests, or preferences to the state, or advocate for the protection of individual rights.[31] Ensuring public participation is essential to fulfill the promise of a democratic state, namely that power is in the hands of the people.

Representative democracy goes hand in hand with public participation. In fact, a representative democracy that excludes public participation fails to serve its fundamental and teleological purposes to cater to the people's interests.[32] This further correlates with the need for sufficient representativeness, requiring political leaders to not only be responsive to the public needs, but also represent distinct political interests, values, ideas, and programmes – not only during election period. During the legislation-making process, public participation would ensure consultations with those affected by the legislation, including interest groups, non-governmental organizations, and citizens.[33]

Some scholars argue that public participation must be contained to a moderate amount; meaning that either too little or too much citizen participation is dangerous when making meaningful decisions. A limited amount of public participation allows members of the parliament to sway the legislation to feed their private interests, while an excessive amount of public participation may impact the quality of the decision that is being made as not every citizen has the capability to make substantive policy decisions. Some further argue that increased participation may slow the decision-making process.[34] However, democracy is not about efficiency, but rather surrounds itself on the need to balance social interests and develop good decisions rather than epistocratic or autocratic alternatives.[35] In an ideal representative

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[29] John M. Bryson and Anne R. Carroll, *Public Participation Fieldbook* (St Paul: University of Minnesota 2007), pp. 458-473.

[30] M Nurul Fajri, The Legitimacy of Public Participation in Lawmaking in Indonesia (2023) 20 *Jurnal Konstitusi* 1, p. 126.

[31] Hargens Bonifasius, 'Oligarchic cartelization in post-Suharto Indonesia' (PhD Thesis, Walden University 2020), p. 69.

[32] *Ibid.*

[33] OSCE, *Effective Participation and Representation in Democratic Societies*, p. 2.

[34] Russel J. Dalton, 'Is citizen participation actually good for democracy?' (*LSE*, 25 August 2017) <https://blogs.lse.ac.uk/politicsandpolicy/is-citizen-participation-actually-good-for-democracy/> accessed 7 September 2024.

[35] *Ibid.*

democracy, therefore, political leaders make the decisions for the citizens, while still opening the opportunity for those with interests in the regulated policy to convey their opinions.

The adoption of representative democracy by Indonesia is reflected in the fourth principle of the *Pancasila*, which stipulates that the people of the nation are "led by wisdom in deliberation/representation". Public participation in the law-making process is guaranteed in Article 96 of the Establishment of Legislation Law, allowing the public to provide suggestions through verbal and/or written means during the rulemaking process. The term 'public' in this provision is narrowed to only individuals or groups possessing interests in the substance of the bill. Moreover, to further ensure public participation, the bill must be easily accessible.

Within Indonesia's law-making process, public participation is pivotal in the stages of Planning and Discussion. In Planning, the involvement of stakeholders is expected when arranging the Academic Draft and the Bill. Subsequently, during the Discussion stage, the DPR arranges Public Hearing Meetings, visitations, seminars, and/or discussions to listen to the public's aspirations. The arrangement of the bill and any revisions that are needed to be made requires the DPR, as representatives of the public, to not only hear the interests of one side but also of other stakeholders outside of the business industry that may have concerns regarding the provisions that are to be enacted.

Article 96 of the Establishment of Legislation Law has been amended by Law No. 13 of 2022, which adds five new paragraphs to the provision. Article 96 (8), in particular, uses the word 'could' in explaining the lawmakers' ability to provide the public with an explanation on the results of the discussion on the suggestions provided by stakeholders. The way Article 96 paragraph (8) is crafted provides the discretion for the DPR to explain the results of the suggestions given by the public but does not oblige them to do so. Hence, it can refuse to further explain and generate an effective discussion, contradicting the two-way discussion that is integral in securing public participation throughout the law-making process. Essentially, public participation does not limit itself only to the right to be heard but also encompasses the right to be explained.[36] Without the suggestions of the public being considered and responded to, lawmakers may be predisposed to private and business interests. While the intent of this provision is to ensure public participation, it does not sufficiently guarantee an effective one and does not create adequate measures to protect the law-making process from the potential of being captured. Provisions such as this thus raise questions about the true nature of Indonesia's democracy.

5. Assessing Democracy and Regulatory Capture in Indonesia

5.1. Democracy and Public Participation

One characteristic that distinguishes the post-Soeharto era from the New Order regime is the former's greater emphasis on democracy. The amendments made to the 1945 Constitution focused on enhancing the legislative body as a democratic institution, tasked to represent the people. Theoretically, the notion of democracy is linked with various interpretations. Derived from the Greek word's *demos* meaning people and *kratos* meaning power, democracy is to be defined as 'power of the people'. The concept was developed in political philosophy (Plato, Aristotle) and practiced by the Athenians, *pólis* characterized by membership, autonomy and equality before the law.[37] This traditional meaning, however, can

[36] Constitutional Court in Decision No. 91/PUU-XVIII/2020.

[37] Günter Frankenberg, 'Democracy' in Michael Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law* (2012), p. 2.

no longer survive in the contemporary world. When utilizing the term 'democracy', one would envision its literal definition in which citizens are gathered and possess the control over policy by direct acts of will in the assembly.[38]

This is simply not the case, nor can it be implemented in the modern world. Democracy still refers to the power of the people, but such a power is transferred to political leaders. Rather than direct involvement, democracy is now associated with institutionalized popular influence, competitiveness of elites, representativeness of representation, control of bureaucracy, independence of judiciary, and freedoms of various kinds.[39] This is the form of democracy and citizen participation that is reflected in the 1945 Constitution – prompting a transfer of power entrusted from the people to political leaders that are elected through a general election.

The different perspectives in measuring public participation in a democratic state are essentially divided into two main schools of thought: 1) participatory school (endorsed by scholars such as Pateman, Gould, and Barber); and 2) realists (supported by the likes of Schumpeter, Sartori, and Nordlinger). Those of the participatory school argue that public participation should be measured by the "capacity to encourage its population to play an active role in its government."[40] Such a spirit is reflected in the Establishment of Legislation Law as it encourages public participation and provides avenues to ensure and increase it, as explained above.

On the other hand, realists believe that democracy begins when political leaders compete with each other to win peoples' votes and ends when the voting concludes.[41] Consequently, representation or elite responsiveness is not an aspect to be considered.[42] Public participation lies in the ability to participate in voting, not necessarily the public's capability to influence the legislative process. More specifically, Schumpeter's theory of democracy argues that participation has no special or central role and that it should be merely sufficient that citizens are able to participate in keeping the electoral machinery functioning.[43] Their chosen leaders are truly those who are responsible to actively make decisions.[44] On this matter, Dahl argues that an increased participation on the part of the ordinary man will shake the stability of the democratic system, particularly of one who is the least politically active.[45]

The pessimistic perception towards democracy as a constitutionalized regime for power would further add that it was reduced to electoral democracy and 'competitive elitism privileging expert government over popular sovereignty.'[46] This second interpretation underscores that democracy does not necessarily entail wide public participation in the legislative process. The heart of democracy is the ability to choose its leaders, and thus participation is limited within the realm of the electoral process. While the idea of the participatory school demonstrates the ideals that the Establishment of Legislation Law is trying

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[38] Geraint Parry and George Moyser, 'More Participation, More Democracy?' in Ricardo Blaug, *Democracy: A Reader* (2016), p. 386.

[39] *Ibid.,* p. 387.

[40] *Ibid.*

[41] *Ibid.*

[42] *Ibid.*

[43] *Ibid.*

[44] Carole Pateman, 'Participation and Democratic Theory' in Ricardo Blaug, *Democracy: A Reader* (2016), p. 397.

[45] *Ibid.,* p. 400.

[46] Günter Frankenberg, *Op. Cit.*, pp. 2, 4.

to manifest, Indonesia's reality leans more towards the theory of democracy proposed by the realists.

5.2. Democracy and Public Participation

The susceptibility of Indonesia's legislative process to regulatory capture can be pinpointed to the oligarchs inherent in its political system. Due to this, the function of democracy, especially in reference to public participation, is not fully effective. The term 'oligarchy' is conventionally defined as a government ruled by a few people in power, referring to elites, dynasties, and oligarchs of political parties.[47] Essentially, the main characteristic of oligarchy is the 'few' and 'the wealthy' that are equipped with the objective to sustain their wealth defense in order to increase their wealth and exclusive social position.[48] According to Winters, oligarchy in the context of Indonesian politics constitutes a political strategy by the few to obtain power through the control of access to material resources and capital power.[49] Ultimately, the oligarchs aim to concentrate their power to the small circle they are in and exert control over politics to be able to secure continual economic access.[50]

To a certain extent, an oligarchic system ensures an expeditious decision-making process. It only accepts a few views and restricts participatory rights but implicates the practice of democracy as demonstrated in the revolutionary time in Athens.[51] Regardless of efficiency, oligarchs are self-oriented, making decisions that align their interests and preventing the involvement of opposition powers. This form of representation was prominent in the New Order regime, which is further described as "a system of government with all powers in the hands of a small group of wealthy people who make public policy to their own financial gain, through a policy of direct subsidies to agricultural enterprises owned by them or other business endeavours, government work contracts of great value, also of protectionist measures of their business with the intent to destroy a rival business."[52] At that time, the industry policy was engineered to enrich state and private oligarchies, rather than as a tool to conquer global markets.[53] Additionally, an evident trait of oligarchy in the New Order regime was the evasion of public participation.

The post New Order regime is not any better. Despite the guarantee of public participation in the Establishment of Legislation Law, formal participation of the public is made ineffective or useless.[54] Opinions from various stakeholders may be conveyed throughout the legislation-making process, but at the end of the day, the result is ultimately decided by the oligarchs. In practice therefore, provisions on public participation are not genuinely implemented, and act as a mere formality. As stated by Tambuan, Soeharto's authoritarian New Order regime has been replaced by an 'undemocratic oligarchic political system' and that the legislative process is a 'collusive democracy'.[55]

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47 Derwin Tambunan, 'The intervention of oligarchy in the Indonesian legislative process', (2023) 8 *Asian Journal Comparative Politics* 2, 2023, p. 639.

48 *Ibid.*

49 *Ibid.*

50 *Ibid,* p. 640.

51 Hargens Bonifasius, *Op. Cit.,* p. 60.

52 *Ibid.*, p. 62.

53 Richard Robison and Vedi R. Hadiz, *Reorganising Power in Indonesia: The politics of oligarchy in an age of markets* (Routledge 2004), p. 41.

54 Hargens Bonifasius, *Op. Cit.,* p. 70.

55 Derwin Tambunan, *Op. Cit.*, p. 637.

Several regulations have been subjected to criticism regarding the lack of meaningful public participation. For instance, a meeting was conducted with relevant community groups, but they were not given the opportunity to discuss the academic draft and the substantial changes of the Job Creation Law.[56] Academic draft of the Job Creation Law was difficult to access and different and inconsistent versions of the Job Creation Law Bill were published, creating confusion among the public as it did not know which draft it should refer to. The absence of a meaningful public participation has been affirmed by the Constitutional Court, as it subsequently called for amendments to be made within two years or it would be deemed unconstitutional.[57] However, this did not stop the government from tactically enacting the already controversial law by issuing a Governmental Regulation-in-lieu-of Law, that can only be done in times of exigencies by using the Russia-Ukraine conflict as a basis.[58] Through this mechanism, the Job Creation Law was re-enacted without any meaningful participation, illustrating the lack of consideration towards the public's opinions and concerns. As such, the massive protests conducted by the public were insufficient to bring the government to incorporate its interests.

The lack of participation is further demonstrated by the fact that the Job Creation Law only took a year to finish, although it was formulated through the omnibus mechanism, amending vast amounts of statutory laws. On the other hand, a difference in effort is seen in legislations that do not touch upon business interests or that contain provisions that may impede business operations. The Indigenous Peoples Bill is illustrative of this, as it has not been enacted and promulgated to this day. Although the bill was approved at the plenary meeting of the DPR on 4 September 2020, it has never been passed as a law in the plenary session (full assembly meeting) of the DPR.[59] For more than a decade, the academic draft of the bill continues to await its promulgation until today.[60] This delay reflects the lack of political will from the President and the DPR to pass the Indigenous Peoples Bill. Further on this matter, critics have highlighted existing concerns surrounding the provisions within the Indigenous Peoples Bill that are considered to potentially impact investment, especially after the enactment of the Job Creation Law.[61]

A different attitude is projected towards laws that enhance business interests, as illustrated by the enactment of the amended Mineral and Coal Mining Law, which only took three months to discuss.[62] Similar to the Job Creation Law, the Mineral and Coal Mining Law was criticized for the lack of public involvement, including indigenous groups, and its

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56 Constitutional Court Decision No. 91/PUU-XVIII/2020.

57 *Ibid.*

58 'Perang Rusia-Ukraina Jadi Dalih Jokowi Terbitkan Perppu Cipta Kerja' (*CNN Indonesia,* 30 December 2022) <https://www.cnnindonesia.com/nasional/20221230114033-32-894040/perang-rusia-ukraina-jadi-dalih-jokowi-terbitkan-perppu-cipta-kerja> accessed 7 September 2024.

59 Fathiyah Wardah, 'Mengapa RUU Masyarakat Hukum Adat Tak Kunjung Disahkan' (*Voa Indonesia*, 21 November 2011) <https://www.voaindonesia.com/a/mengapa-ruu-masyarakat-hukum-adat-tak-kunjung-disahkan-/6324774.html> accessed 7 September 2024.

60 Dewi Nurita, 'Terusir dari Kampung Sendiri: Perampasan Tanah Ulayat dan Satu Dekade RUU Masyarakat Adat Mangkrak' (*Interaktif Tempo,* 25 February 2022) <https://interaktif.tempo.co/proyek/rencana-undang-undang-masyarakat-adat/> accessed 8 September 2024.

61 Fathiyah Wardah, *Loc. Cit.*

62 Sania Mashabi and Icha Rastika, 'Pengesahan UU Minerba, Untuk Siapa' (*Kompas,* 14 May 2020) <https://nasional.kompas.com/read/2020/05/14/06215741/pengesahan-uu-minerba-untuk-siapa?page=all> accessed 7 September 2024.

provisions that were directed to benefit mining businesses, particularly through the provision of leniency and flexibility for coal companies.[63] In 2019, large protests caused President Joko Widodo to halt the discussion of the Mineral and Coal Mining Bill, but was subsequently resumed in February 2020 and ultimately promulgated on 12 May 2020.[64] The main motivation behind the expeditious process may be due to a coal company's soon-expired Coal Mining Concession Work Agreement (PKP2B).[65] This thus further reaffirms the tendency of the DPR to collectively lean towards business interests, specifically of the oligarchs.

In reality, control over economic and political sources persist after the conclusion of the New Order Regime as oligarchs are described to have the power to be 'immune to change'.[66] The influence of oligarchs until today can be further seen through the 2023 Crony Capitalism Index released by the Economist which holds Indonesia as the 9th country in the world it deems to have policies that are made to benefit businesses.[67] It is therefore not surprising that the Job Creation Law was consistently pushed as its provisions focused on the simplification of business permits to ease investments, concurrently strengthening the influence and power of oligarch groups.[68]

Moreover, Indonesia has witnessed several of its policymakers caught for corruption and conflict of interests when formulating regulations in the natural resources sector. Research conducted by ICW revealed that in five regions, namely North Sumatera, Jakarta, East Java, South Sulawesi, and East Nusa Tenggara, legislative members are known to take advantage of their authority to satisfy their self-interests as well as the interests of specific groups.[69] For instance, one of the members of Commission IV Regional Legislative Council Jakarta was reported to have received bribes from the Director of a residential and property company to facilitate the formulation of Regional Regulation concerning the Kapuk Beach Strategic Area Spatial Plan. There were records of private meetings conducted during the discussion of the regulation.[70]

Private meetings conducted and bribery during the legislation-making demonstrate the fulfilment of self-interests rather than the public's. At all times, lawmakers should be prohibited from arranging private meetings with parties of the regulated industry. If a meeting is to be conducted, it should be known to the public and the matters discussed should also be disclosed. In the stages of planning and discussion, rule-makers should be required to have all their meetings done openly with their agendas disclosed to the public. This way, the public is allowed to verify any information given by the businesses as well as ensure that the rule-making process is still in line with the interests of the public.

While the New Order regime limited itself to three dominating political parties, the current legislative body has increased in diversity, with nine political parties (2019 - 2024) and eight political parties in the upcoming period (2024 - 2029). A variety of political parties seated

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63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 Dini Suryani et al., 'Democracy Setback in Natural Resource Governance: Oligarchic Consolidation and the Declining of Civil Society Participation' (2021) 18 *Jurnal Penelitian Politik* 2, p. 176.

67 The Economist 'The 2023 crony-capitalism index' (*The Economist,* 2 May 2023) <https://www.economist.com/international/2023/05/02/the-2023-crony-capitalism-index> accessed 9 September 2024.

68 Dini Suryani et al., *Op. Cit.*, p. 185.

69 Kurnia Ramadhana, Seira Tamara, Yassar Aulia, and Mitra Antikorupsi, *Laporan Penelitian Studi Konflik Kepentingan Anggota Legislatif Terkait Bisnis Sumber Daya Alam* (ICW 2022), p. 71.

70 *Ibid.,* pp. 12-13.

in the legislative body promotes an image of an 'ideal' democracy, where various voices, including those of the opposition, are represented in the parliament. This could have been a step closer towards a strengthened democracy, but it has instead opened the door for collusion and party cartels that subsequently capture the legislation making process. The swift enactment of the Job Creation Law, for instance, was successful due to the coalition of political parties and was opposed only by two fractions, namely Demokrat and PKS. This coalition of political parties guarantees that those who support the enactment of the law will receive a fraction of its benefits which could be in the form of economic gains and political favors. Thus, diversity in voices does not necessarily reflect democracy, especially when the parliament remains infiltrated with oligarchic influences. To further comprehend the extensive influence of oligarchs, it is subsequently necessary to understand the system of political contribution in Indonesian politics.

5.3. The Impact of Financial Contributions by Private Entities

The capability of businesses in supporting political leaders exacerbates the issue of regulatory capture. Those who wish to represent citizens in parliament cannot do so without the help of fundings and sponsorships, which usually derive from business elites. To return the donors' favor, candidates, once elected, will push the desired business agenda, creating a law that favors the regulated industry. This phenomenon, also referred to as 'money politics', fuels regulatory capture within the lawmaking process, skewing decisions toward private interests instead of public needs.

Providing funding has been implemented since the direct election mechanism in 2004 and was a response to the difficulty expressed by political parties in funding party activities after 1998.[71] Article 34 of Law No. 2 of 2011 on Political Parties secures financial assistance by the State to all political parties, but this is insufficient for them to carry out socialization and political communication in the community.[72] As such, the provision allows political parties to also receive funding from contributions that are deemed 'lawful'.[73] Such contributions can be in the form of money, goods, and/or services. Article 339 (1) of Law No. 7 of 2017 on General Elections further prohibits candidates in a general election to receive fundings from 1) foreign party; 2) donors with unclear identification; 3) a criminal act that has been proven by a court decision that has been deemed as legally enforced and/or funds that are intended to conceal a criminal act; 4) government, regional government, State-owned companies, and regional-owned companies; and 5) village government and village-owned companies.

With such provisions set in place, candidates may receive fundings from business elites. This has caused the emergence of regulatory capture, resulting in elected political leaders that represent those who can support and provide them the opportunity to maintain their position in the parliament, rather than the interests of the public. is necessary to highlight that such contributions are equipped with limitations as the General Elections Law and General Election Commission (hereinafter, 'KPU') Regulation No. 18 of 2023 both regulate the maximum amount that a donor can provide to a political candidate. This provision aims to ensure a fair campaign. In the case of legislators, the maximum amount is set to IDR 2.5 billion for contributions given by individuals. As for other parties, including corporations, the highest limit is set at IDR25 billion. Contributions that are received must be reported to the KPU.

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71 Hargens Bonifasius, *Op. Cit.*, p. 79.

72 *Ibid.*

73 Article 34 of Law No. 2 of 2011 on Political Parties.

KPU Regulation No. 18 of 2023 obliges political candidates to submit several reports, including a report which details the source of financial contributions (LPSDK) and is submitted to the KPU through the political party of the candidate.[74] In detail, Article 49 of KPU Regulation No. 18 of 2023 prescribes that the LPSDK must include information regarding the identity of the donor and the amount donated. These reports play an indispensable role in shedding light to corruption and possible financial contributions that derive from criminal acts, such as money laundering. However, the information disclosed is only available for the KPU as the LPSDK is not published nor accessible by the public.

One report that is publicized through a press release is the Initial Campaign Fund Report (LADK) which only contains the number of receipts and expenses of each political party. This report does not detail the identity of the contributors, lacking transparency and openness to the public. Notification to the KPU on the identity of the contributors is not enough. Reflecting upon the current quality of the policy decisions made by the DPR, the public deserves to know the identities of the contributors and must be given access to such information. Information regarding contributions given to political candidates should be made public. Ensuring public knowledge on the matter will allow additional monitoring of the work of the elected officials and trace any signs of conflict of interest and influence of the oligarchs.

Money politics in Indonesia's general elections is exacerbated due to the transition from a closed-list proportional system to an open-list proportional system. The latter shifts the focus from the political party to the personal candidate.[75] As a result, political candidates are pushed to develop a personal and direct connection with their constituents.[76] Securing a seat in the parliament requires substantial support. In fact, it is noted that a political candidate spends around IDR 750 million to IDR 4 billion for their campaign.[77] This thus encourages political candidates to expand its source of funding and rely on those who wish to support them.

Although this transformation is primarily encouraged by the need to enhance democracy, it has consequently opened the gate for private parties to capture the legislative process and exert their influence under the guise of campaign support. It has not only reshaped Indonesian politics, but also its legislative process, allowing for increased influence exerted by businesses. To repay the support they have received during their campaign, elected members of the parliament subsequently formulate policy decisions that are satisfactory to their contributors, disregarding public interests and participation. Conclusively, Indonesia's democracy does not equate to enhanced public participation in the legislative process but rather confines itself to the election booth – the only place where genuine public participation is valued.

6. Conclusion

In conclusion, democracy does not guarantee increased participation but may be used to obscure oligarchy and private interests. This entails a legislation-making process that is inherently captured by business interests. A lack of public participation does not always indicate the absence of a particular group's involvement but can also denote that no genuine

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[74] Article 48 of KPU Regulation No. 18 of 2023.

[75] Topan Yunarto, 'Menyelisik Dana Kampanye Pemilu' (*Kompaspedia*, 31 January 2024) <https://kompaspedia.kompas.id/baca/paparan-topik/menyelisik-dana-kampanye-pemilu> accessed 7 September 2024.

[76] *Ibid.*

[77] *Ibid.*

consideration is made towards its interests. Loopholes have been found within the system to use democracy as a façade to produce laws that sideline public interests but are favourable to a few. Amendments that have been made to the 1945 Constitution to enhance representative democracy in Indonesia have indeed brought substantial changes to the Indonesian law-making process, but the regulatory capture within the institution will continue to remain entrenched as long as oligarch interests persist.

As a result, the condition of the current legislation-making process shows no significant difference from the New Order Regime. The legislation-making process is only transformed on paper to include public participation and democratic principles but fails to free itself from capture as it remains under oligarchic hegemony. To ensure that it implements the true democratic principle mandated by the 1945 Constitution, Indonesia must review and work its way to fill in the gaps that allow for the legislative process to remain captured under business elites. It shall begin by increasing its transparency, such as the disclosure of conflict of interests, increasing the will to consider public opinion, and publication of the identities of contributors to political campaigns.

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Approaches to Abuse of Dominance in EU Competition Law: Lesson Learned and Consumer Protection

Yorgita Pascallanda [a], **Joy Andrea Sihombing** [b]

[a] Master of Laws Student, University of Liverpool, United Kingdom. Corresponding Author. Email: y.pascallanda@liverpool.ac.uk.
[b] Assistant Researcher, Center for Law and Responsible Business Studies, Indonesia.

ABSTRACT
Competition law has several main objectives, which are: economic welfare, economic efficiency, and free and fair competition. Among such objectives, economic efficiency exists when available resources are allocated to their best use and the goods and services are distributed to individuals who appreciate them the most. For consumers, this leads to lower prices, higher quality of goods and service, and wider choices in the market, and increased innovation. By deterring anti-competitive conduct, competition law helps ensure that consumers are protected from conducts that may harm them. EU competition law has undergone significant changes to maintain competitive markets. The EU's initial approach to abuse of dominant position focused more on the form of the undertakings' conduct (form-based), which only assessed an action based on its form. This form-based approach is risky in producing false positives, that is, the wrong conclusion that an action is considered detrimental, when in practice, it may not actually be detrimental to competition or consumers. in applying Article 102 of the Treaty on the Functioning of the European Union (TFEU). In this regard, the Commission published a Discussion Paper indicating that the Commission planned to update its approach to Article 102 TFEU in 2005. This article will critically analyse the Guidance, its revision, and the changes between them to determine whether these concerns are justified or simply unfounded. It begins with an introduction and explores the prohibition of abuse of dominant position under Article 102 TFEU. It then continues with a discussion of the Guidance and its revisions and continues with key changes in the amending communication. An analysis of the changes will be provided, and followed by lessons, notably for Indonesia on ways to improve its enforcement of abuse of dominance to protect consumers' interest.

KEYWORDS: Abuse of Dominance, Consumer Protection, Competition Law, European Union, Consumer Welfare.

1. Introduction

Globally, more than 130 jurisdictions have implemented competition law systems.[1] These systems are generally made to protect the competitive process and address market imperfections that arises in a free-market economy. [2] According to major textbooks and articles, competition law has several main objectives, which are: economic welfare, economic efficiency, and free and fair competition.[3] Among such objectives, economic efficiency exists when available resources are allocated to their best use and the goods and services are

[1] Wendy Ng, 'Changing Global Dynamics and International Competition Law: Considering China's Potential Impact' (2019) 30 *European Journal of International Law* 1409.
[2] Alison Jones and Albertina Albors-Llorens, 'The Images of the "Consumer" in EU Competition Law' in D Leczykiewicz and S Weatherill (eds), The Image(s) of the 'Consumer' in EU Law: Legislation, Free Movement and Competition Law (Studies of the Oxford Institute of European and Comparative Law, Hart Publishing 2016) 43–92, University of Cambridge Faculty of Law Research Paper No 17/2016 accessed 13 May 2025.
[3] Cassey Lee, 'The Objectives of Competition Law' (2015) ERIA-DP-2015-54.

distributed to individuals who appreciate them the most. [4] For consumers, this leads to lower prices, higher quality of goods and service, and wider choices in the market, and increased innovation.[5] By deterring anti-competitive conduct, competition law helps ensure that consumers are protected from conducts that may harm them. This rationale supported the development and evolution of competition regimes worldwide, including within the European Union.

EU competition law has undergone significant changes to maintain competitive markets. The EU's initial approach to abuse of dominant position focused more on the form of the undertakings' conduct (form-based), which only assessed an action based on its form. This form-based approach is risky in producing false positives, that is, the wrong conclusion that an action is considered detrimental, when in practice, it may not actually be detrimental to competition or consumers.[6]

However, in the late 1990s, the European Commission (hereinafter, 'Commission') began to shift from a form-based approach to an effect-based approach, where the assessment focuses more on the actual impact of the action on market competition.[7] The main reason for this shift was the sharp criticism of the Commission, which implied that the Commission's approach was not economically oriented enough and based its decisions on the form of conduct without conducting an impact-based analysis that focused on the impact of the behaviour on competition and society. In addition, the Commission was more focused on protecting competitors than protecting competition in applying Article 102 of the Treaty on the Functioning of the European Union (hereinafter, 'TFEU').[8]

In this regard, the Commission published a Discussion Paper[9] indicating that the Commission planned to update its approach to Article 102 TFEU in 2005. Then, in 2008, the Commission published Guidance on Enforcement Priorities (hereinafter, 'Guidance')[10] that formally adopted an effects-based approach to assessing the exclusionary conduct of dominant undertaking.

The Guidance provided greater clarity on what constituted an exclusionary practice, shifting attention to the concrete impact of such conduct on the market. However, in 2023, the Commission published the revision of the Guidance: Amending Communication and Annex to the Amending Communication (hereinafter, 'Amending Communication'),[11] which raised new

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4 Adriaan Ten Kate, 'Economic Efficiency as the Ultimate Goal of Competition Policy' [2016] SSRN Electronic Journal.

5 Chibulo Foster Mwachikoka and Parret Muteto, 'Effects of Competition Law on Consumer Welfare-Evidence from Zambia' (2024) 24 *World Journal of Advanced Research and Reviews* 1293.

6 Linsey McCallum, Inge Bernaerts, et al., 'A dynamic and workable effects-based approach to abuse of dominance' (Competition Policy Brief, Issue 1, March 2023).

7 Johan W van de Gronden and Catalin S Rusu, *Competition Law in the EU: Principles, Substance, Enforcement* (2nd edn, Edward Elgar Publishing 2024) 105; Pablo Ibáñez Colomo, *The New EU Competition Law*, (1st edn, Hart Publishing 2023), 46; Fernando Castillo de la Torre, 'Is the Effects-Based Approach Too Cumbersome?: Taking Stock of Recent Practice and Case Law on Article 102 TFEU' in Adina Claici, Assimakis Komninos, and Denis Waelbroeck (eds), *The Transformation of EU Competition Law: Next Generation Issues* (Wolters Kluwer Law International 2023) 197.

8 Pinar Akman, 'The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?' (2010) 73(4) *MLR* 606, 607.

9 Discussion Paper on the Application of Article 82 of the EC Treaty to Exclusionary Abuses [2005] OJ C101/73.

10 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7.

11 Amendments to the Communication from the Commission: Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2023] OJ C116/1.

concerns. These concerns were based on the possibility that considerations beyond the non-competitive aspect could undermine the primary objectives of competition law.

This erticle will critically analyse the Guidance, its revision, and the changes between them to determine whether these concerns are justified or simply unfounded. It begins with an introduction and explores the prohibition of abuse of dominant position under Article 102 TFEU. It then continues with a discussion of the Guidance and its revisions and continues with key changes in the amending communication. An analysis of the changes will be provided, and followed by lessons, notably for Indonesia on ways to improve its enforcement of abuse of dominance, which is then followed with a conclusion.

2. Methodology

This article uses a normative approach by relying on legal sources as the basis for analysis. Primary sources include legal cases and EU documents, while secondary sources consist of books, academic journals, and other legal literature. This article will not refer to empirical data but will focus on normative analysis by comparing the Guidance and the Amending Communication, as well as relevant cases.

3. Prohibition of Abuse of Dominant Position in the European Union

In a market where consumers with limited resources are presented with choices, consumers by their nature will attempt to consume goods or services which they can derive the greatest satisfaction from.[12] When such natural desire to make optimal choices is combined with the ability to switch easily between competing products, consumers effectively encourage businesses to compete more vigorously.[13] From such collective pressure from consumers, firms in the market are pressured to produce good quality, value-for-money products which meet the consumers' needs.[14] It is undoubted that consumers would benefit more when the market is undistorted.

However, markets could be distorted by anti-competitive practices, such as exclusionary and exploitative behaviours. For instance, a dominant firm may set prices below production cost, which forces non-dominant firms that could not compete accordingly, to sustain losses and exit the market.[15] These practices can significantly impact prices, product quality, innovation, and consumer choices.[16]

To address such distortions, competition law is essential in fostering fair, efficient markets and preventing monopolistic practices, anti-competitive mergers, and abuse of market power. By promoting competition, it safeguards consumer welfare through lower prices, higher product quality, increased innovation, and broader variety of goods and services.[17]

Thus, when such laws effectively prohibit anti-competitive behaviour, the market becomes more competitive, benefitting the overall market and especially consumers. *Firstly*, such prohibition maintains price levels in the market. When the market is competitive, firms

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12 Neva Goodwin, Jonathan M. Harris, et al., *Essentials of Economics in Context* (2nd edn, Routledge 2024).

13 Michael Hutchings and Peter Whelan, 'Consumer Interest in Competition Law Cases' (2007) 16 *Consumer Policy Review* 182.

14 *Ibid.*

15 Jasper P Sluijs, 'Predatory Pricing above Average Variable Cost: Case T-671/19 Qualcomm' [2025] Journal of European Competition Law & Practice <https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpaf008/7990607> accessed 16 May 2025.

16 Chibulo Foster Mwachikoka and Parret Muteto (n 5).

17 *Guidance* (n 10), para 5.

tend to decrease its selling prices to match the prices charged by its competitors, unequivocally benefitting the consumer through cost savings.[18] *Secondly*, such prohibition encourages firms to innovate and improve the quality of their products and services to stand out in a sea of products and services available in the market,[19] which ultimately leads to higher quality products. As such, the prohibition of anti-competitive practices, prevents firms to limit the availability of their product.

For such reasons, the European Union prohibits undertakings from engaging in anti-competitive practices, particularly the abuse of a dominant position, as regulated under Article 102 TFEU, which is as quoted below:

> "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*
> *Such abuse may, in particular, consist in:*
> *a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
> *b) limiting production, markets or technical development to the prejudice of consumers;*
> *c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

Article 102 TFEU prohibits abuse by one or more undertakings of a dominant position. The article, however, makes clear that it does not prohibit dominance of an undertaking, but rather the abuse of such dominance. This was reiterated by the Court of Justice of the European Union in the *Michelin* Case, which states that "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that … the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market." [20]

4. European Commission's 2008 Guidance and Its Revision

As mentioned earlier, in 2008, the Commission issued the Guidance, marking a shift from form-based to effect-based. Shifting the formal approach in applying Article 102 TFEU from previously investigating infringements based more on whether the conduct meets certain formal criteria to an in-depth analysis of the impact of the conduct on the market and competition, taking into account market dynamics and using modern economic approaches. However, it should be noted that this Guidance does not change or replace the interpretation of Article 102 TFEU by the Court of Justice but sets out the enforcement priorities of competition law cases by the Commission.[21]

Since the publication of the Guidance, there has been significant development in the jurisprudence of the Court, with the Commission adopting 27 decisions on exclusionary conduct under Article 102 TFEU, and the EU courts issuing 32 judgments.[22] Several important judgments also confirmed the effects-based approach in assessing the exclusionary conduct

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18 Chibulo Foster Mwachikoka and Parret Muteto (n 5).
19 *Ibid.*
20 Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v. Commission* (*Michelin)* EU:C:1983:313.
21 *Guidance* (n 10), para 3.
22 Linsey McCallum, Inge Bernaerts, et al. (n 6).

of dominant undertaking, including Case TeliaSonera,[23] Case Post Danmark I,[24] and Post Danmark II.[25]

As the market continues to change, especially with the emergence of digital technology, the increase in Court decisions and their interpretations, and the Commission's experience in enforcing competition rules, adjustments are needed in the approach to competition law enforcement and the Commission's approach in determining the priority of investigating more relevant violations. Following up on this, in 2023, the Commission issued an Amending Communication to revise parts of the 2008 Guidance that no longer comply with the conditions at that time.

5. Key Changes in the 2023 Amending Communication

The publication of the Amending Communication is evidence of the Commission's continued efforts to refine its enforcement practices and adjust its priorities to promote a dynamic, effects-based approach as the law and markets evolve. This section will discuss the changes made in the revised Guidance.

5.1. Anti-competitive Foreclosure

In the Guidance, "anti-competitive foreclosure" focused on the conduct of a dominant undertaking that hinders competitors' market access, allowing it to raise prices, gain profits and harm consumers. In the Amending Communication, the focus shifts to the broader impact of the dominant undertaking's conduct on the overall competitive structure, allowing it to negatively influence competitive parameters, such as prices, production, innovation or quality, to its own advantage at the expense of consumers.

The Guidance implied that the profitability of the dominant undertaking was an important factor in determining the priority of an investigation. However, the Court of Justice of the European Union did not make profitability a requirement for proving abuse of a dominant position but more focused on the negative impact on the effective competitive structure.[26] The Amending Communication confirm that profitability is no longer the main factor determining the priority of an investigation since a violation of competition rules does not necessarily have to demonstrate a direct benefit to the dominant undertaking.

5.2. As-efficient Competitors

The Guidance tended to focus on actions by dominant undertaking that could inhibit competitors with similar cost efficiency. This could overlook competitors that may not be as efficient as the dominant undertaking, particularly in markets with high barriers to entry, but can still make an important contribution to competition.

The Court of Justice of the European Union recognised that less efficient competitors could also make important contributions to competition, such as by offering different options, better quality or innovation.[27] Taking this further, the Amending Communication broadened its focus, considering the role of less efficient competitors in competition that can potentially make an important contribution to competition.

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[23] Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige (TeliaSonera) AB* EU:C:2011:83.
[24] Case C-209/10 *Post Danmark A/S v. Konkurrencerådet (Post Danmark I)* EU:C:2012:172.
[25] Case C-23/14 *Post Danmark A/S v. Konkurrencerådet (Post Danmark II)* EU:C:2015:651.
[26] Case T-604/18 *Google and Alphabet v. Commission (Google Android)* EU:T:2022:541.
[27] Case C-413/14 P *Intel Corp. v. European Commission* EU:C:2017:632.

5.3. Price-Cost As-Efficient Competitor (AEC) Test

The AEC Test is a quantitative test to assess whether a dominant undertaking's actions can hinder competition by comparing the price set by the dominant undertaking with the production costs of an undertaking that is considered as efficient as it.[28] The main purpose of this test is to determine whether competitors with similar efficiency can compete profitably against the dominant undertaking's pricing strategy. The Guidance mentioned the use of the AEC Test for cases of price abuse, primarily to determine whether efficient competitors could be eliminated due to the actions of the dominant undertaking.

However, the Court of Justice of the European Union stated that the use of this test is not required to prove abuse.[29] The AEC Test is considered more relevant in some instances, such as predatory pricing (selling products at prices below production costs to drive out competitors) and margin squeeze (setting selling prices too high and buying prices too low).[30] So, in the Amending Communication, it is emphasised that the AEC Test is the one that can be used in analysis, which is optional and should not be used as the sole basis for making decisions. In addition, this test must consider various factors, including quantitative and qualitative evidence.

5.4. Constructive Refusals and Unfair Access Conditions

The Guidance stated that constructive refusal to supply could result from unreasonable delays, reductions in the quality of supplies, or the imposition of unreasonable conditions for obtaining supplies. In its analysis, The Guidance treats constructive refusal in the same way as outright refusal to supply, applying the same criteria to both, known as the Bronner criteria.[31]

However, the Court of Justice of the European Union has clarified that constructive refusal differs from outright refusal.[32] In the case of outright refusal, the Court can compel a dominant undertaking to provide access because it considers the conduct to be an infringement of fair competition. Nevertheless, in the case of constructive refusal, the Court will not compel a dominant undertaking to provide better access because access has already been granted, albeit on unfair terms. The Amending Communication emphasises the need to distinguish between outright refusal to supply and constructive refusal to supply, narrowing the application of the Bronner criteria to cases of outright refusal only.

5.5. Margin Squeeze

The Guidance considered margin squeeze as a form of refusal to supply and applied the Bronner criteria as the basis for its analysis. However, the Court of Justice of the European Union confirmed that margin squeeze is a form of infringement in its own right, distinct from refusal to supply. Therefore, the Bronner criteria are not relevant for evaluating margin squeeze.[33] As a follow-up, the Amending Communication separates the discussion of margin

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[28] Linsey McCallum, Inge Bernaerts, et al. (n 6).

[29] Case C-680/20 *Unilever Italia Mkt. Operations Srl v. Autorità Garante della Concorrenza e del Mercato* EU:C:2023:33; Case C-23/14 *Post Danmark II* (n 25); Case T-604/18 *Google Android* (n 26).

[30] Case C-23/14 *Post Danmark II* (n 25); Case T612/17 *Google and Alphabet v Commission (Google Shopping)* EU:T:2021:763.

[31] Case C- 7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint* EU:C:1998:569.

[32] Case C-165/19 P *Slovak Telekom v. Commission* EU:C:2021:239; Case C-42/21 P *Lietuvos geležinkeliai AB v. European Commission* EU:C:2023:12.

[33] Case C-52/09 *TeliaSonera* (n 23); Case C-295/12 P *Telefónica SA and Telefónica de España SAU v. European Commission* EU:C:2014:2062.

squeeze into a new section and emphasises evaluation criteria distinct from refusal to supply and the Bronner criteria.

Previously in the Guidance, the focus was more on a strictly economic approach and prioritising a consistent decision-making process. However, now in the Amending Communication, it is considered more important to ensure that competition law enforcement actions achieve the desired policy objectives, such as protecting consumers and encouraging innovation, rather than focusing only on rigid procedures.

6. Analysis

Based on the changes mentioned above, the Amending Communication aims to adapt the Guidance to the changing market dynamics and the development of the jurisprudence of the Court of Justice of the European Union.

One of the main changes is the expansion of the focus on the impact of the dominant undertaking's actions on the overall competitive structure of the market, including its effects on prices, production, innovation, and product quality, rather than just on its impact on direct competitors. In addition, this revision is also designed to support the creation of a more inclusive competition, where less cost-efficient competitors are still considered to play an important role in maintaining competition through contributions in the form of innovation, quality, or product differentiation.

A flexible and contextual approach is also an important aspect of this revision, as it does not impose the same criteria for different situations but rather adjusts the analysis based on the characteristics and complexity of each case. This allows for a more thorough and in-depth analysis, considering various relevant factors to make fair decisions and support healthy competition.

This revision appears to give the Commission more flexibility in analysing competition cases and allows for a more comprehensive and adaptive approach to the changing market dynamics. This raises concerns about the potential for the scope of the analysis to be expanded to non-competitive factors. However, on closer review, the main objective of the changes is to maintain healthy and effective competition and ensure that consumer interests remain a priority. Thus, the revision shows that the focus remains on competition issues.

7. Lesson for Indonesia

As Indonesia continues to strengthen its competition law regime, valuable comparative insights can be drawn from the European Union’s approach in regulating abuse of dominant position under Article 102 TFEU. Although both the European Union and Indonesia prohibit the abuse of dominant position, there are notable difference in how each jurisdiction defines and approaches this area of competition law. As there are differences in EU’s and Indonesia’s approach on abuse of dominance, Indonesia can take lessons from EU’s approach to enhance its own provision which is regulated under Article 25 of Law Number 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, as amended by Law Number 11 Year 2020 on Job Creation (hereinafter, ‘Law No. 5/1999’).

7.1. Dominant Position: Move Beyond the Market Share Threshold

In the European Union, dominance under Article 102 TFEU is not determined by market share alone but is assessed through a broader, economic analysis. In EU, market share percentage cannot on its own constitute as conclusive evidence of a dominant position.

In assessing whether an undertaking is dominant, the Court of Justice of the European Union and the Commission take into account factors which includes: [34]

(a) the market position of the dominant undertaking and its competitors;
(b) barriers to entry or expansion within the relevant product;
(c) countervailing buyer power.

While a higher market share percentage may indicate dominance, its significance varies from one market to another according to the structure of the markets. In the *United Brands* Case, the Court of Justice opined that a firm can still be considered dominant if the market share is ranging between 40-45%, but other factors affecting competition in the relevant market should still be considered.[35] This was shown in the *British Airways* Case, in which British Airways was found to be dominant with a market share of 39.7% in 1998. The reasoning was because British Airways had multiple times the market shares of each of its five main competitors.[36]

In contrast, Indonesia's assessment of dominant position relies exclusively on market share. Under Article 25 paragraph 2 of Law No. 5/1999, business actors shall be deemed to have a dominant position when:

(a) one business actor or a group of business actors controls over 50% of the market share of a certain type of goods or services; or
(b) two or three business actors or a group of business actors controls over 75% of the market share of a certain type of goods or services.

However, Article 1(4) of the Law No. 5/1999 does offer a broader definition of "dominant position," which refers as a situation in which an undertaking has no meaningful competitors in the relevant market in view of the market share that it holds, or the undertaking holds a higher position among competitors in the relevant market in view of financial capability, the ability to access supplies and sales, and the ability to adjust offer and demand of certain goods and services. However, despite such broad definition, the qualitative elements under Article 1(4) are not implemented in assessing a dominant position.

For example, in the Decision of Case 14/KPPU-L/2015, Indonesia Business Supervisory Commission (hereinafter, 'KPPU') only elaborated the categories of barriers to entry under Article 1(4), without using it as a decisive factor to determine dominance, relying predominantly on market share instead.[37] It was only recently, KPPU in the Google Play Billing System Case, it had relied on Article 1(4) to determine whether an undertaking has a dominant position.[38] However, in majority of its decisions, KPPU have mostly relied Article 25 paragraph 2 in determining whether an undertaking has a dominant position.[39]

Thus, in determining whether a firm has a dominant position, KPPU relies heavily on market share percentage as the sole decisive factor as outlined in Article 25 paragraph 2. While such market share percentage provides a clear benchmark, solely relying on such

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[34] *Guidance* (n 10), para 12.
[35] Case 27/76 *United Brands Company and United Brands Continentaal BV v. Commission* (*United Brands)* EU:C: 1978:22, para 10 ,105.
[36] Case T-219/99 *British Airways v. Commission* [2003] ECR II-5917.
[37] Komisi Pengawas Persaingan Usaha (KPPU). *Salinan Putusan KPPU terhadap PT Forisa Nusapersada, Perkara Nomor: 14/KPPU-L/2015*. (Komisi Pengawas Persaingan Usaha, 2016) 29, 30.
[38] Komisi Pengawas Persaingan Usaha (KPPU). *Salinan Putusan KPPU terhadap Google LLC, Perkara Nomor: 03/KPPU-I/2024*. (Komisi Pengawas Persaingan Usaha, 2025) 591, 592.
[39] Komisi Pengawas Persaingan Usaha (KPPU). *Salinan Putusan KPPU terhadap PT Telekomunasi Indonesia,Tbk., Perkara Nomor: 10/KPPU-I/2016*. (Komisi Pengawas Persaingan Usaha, 2017) 120; Putusan KPPU No 14/KPPU-L/2015 (n 37) 192.

threshold may give rise to limitations, as it does not reflect to the actual competitive reality of the market. For instance, a firm with a market share below the statutory threshold may still possess significant market power due to factors such as barriers to entry or essential facility. Meanwhile, firms which exceed the statutory threshold, may be mistakenly determined as dominant despite the presence of effective competition in the market.

To address the limitations of Indonesia's current dominance assessment, Indonesia can adopt EU's approach, which does not exclusively rely on market share, but also incorporate factors such as barriers to entry and existence of buyer power. By adopting such approach, it would strengthen KPPU's capacity in identifying true instances of market dominance and respond more effectively to evolving anti-competitive practices in Indonesia.

7.2. Broaden the Scope of Abusive Practices

Article 102 TFEU provides a non-exhaustive list of examples of abusive practices, such as imposing unfair purchases, discriminatory treatments and limiting production. Such formulation of provision allows EU to respond to evolving practices of abuse, and does not limit forms of abuse conducted by a dominant firm. This non-exhaustive structure has enabled the Commission and the Court of Justice to develop effects-based approach in abuse of dominance cases. As discussed above, EU has shifted its form-based approach to an effects-based approach. The effects-based approach in applying Article 102 TFEU emphasizes the importance of assessing whether a particular conduct by a dominant undertaking produces, or is at least capable of producing, anticompetitive effects. Notably, in the *TeliaSonera* Case, the Court of Justice of the European Union reaffirmed that the assessment of abuse by a dominant undertaking must demonstrate that the conduct "produces, at least potentially, an anti-competitive effect."[40]

This approach is generally in line with Article 25 paragraph 1 of Law No. 5/1999, which also adopts an effects-based nomenclature by emphasizing conduct that "prevents or hinders" consumer choice, market access and entry, or technological development. Article 25 of Law No. 5/1999 provides that:

> *(1) "Business actors are prohibited from using dominant position either directly or indirectly to:*
> *a. stipulate the conditions of trading with the intention of preventing and or hindering consumers from obtaining competitive goods and or services, both in terms of price and quality; or*
> *b. limit markets and technology development; or*
> c. *hinder other potential business actors from entering the relevant market."*

This provision poses multiple limitations in addressing abuse of dominance. *First*, Article 25 paragraph 1(a) requires that the dominant firm has "intention" to prevent and or hindering consumers from obtaining products. This could then introduce a subjective requirement, which can limit enforcement on abuse of dominance. In some cases, however, the anti-competitive nature of trade conditions is evident even without the need to show explicit intent. For instance, tying arrangements or exclusivity clauses clearly limit consumer choice. Nonetheless, the article requires proof that the dominant firm intends to hinder consumers. In the *Google Billing Play* Case, KPPU decided that Google's alleged abusive conduct under Article 25 paragraph 1(a) did not fulfil the article as there was insufficient evidence that Google had the purpose of hindering the consumers.[41] This differs from the approach taken under

[40] Case C-52/09 *TeliaSonera* (n 23), para 77.
[41] Putusan KPPU No 03/KPPU-I/2024 (n 38) 596.

Article 102 TFEU, which emphasizes the effects of the conduct, regardless of the dominant firm's intention. Such approach ensures that abusive practices are not dismissed simply because an intent is absent.

Second, Article 25 paragraph 1 (b) prohibits conduct "limit markets and technology development". As the article uses the conjunction 'and', it sets a cumulative standard, requiring proof that a conduct simultaneously limits both the market and technological development. As such, when enforced, this article may exclude conducts that harm only one of the two limitations set forth. For instance, conducts such as exclusive agreements may limit the market without hindering technological development.

Third, Article 25 paragraph 1(c) specifically prohibits conduct which hinder potential business actors from entering the relevant market. This wording implies that the Article 25 paragraph 1(c) does not extend to conduct directed at existing competitors already operating within the market. In contrast, Article 102 TFEU expressly prohibits conduct that forecloses or disadvantages both potential and actual competitors. Article 102 TFEU does not confine its application solely to conduct that prevents new firms from entering the market but also conducts that distort the competitive process of the existing firms in the market.

Additionally, as markets rapidly evolves, particularly in the digital economy, new business strategies may emerge which causes anti-competitive effects that harms market competition and consumer welfare. These strategies, however, may not be explicitly addressed under the scope of Article 25 of Law No. 5/1999.

These limitations indicate that Indonesia may benefit from adopting a broader scope of abuse from EU's approach under Article 102 TFEU. Indonesia could consider reforming its competition law to incorporate similar non-exhaustive and effects-based approach as EU, which assesses abusive practices on whether it create anti-competitive effects in the market. By adopting a similar approach, it would allow KPPU to address a wider range of abusive practices beyond those explicitly listed in Article 25 paragraph 1(a) of Law No. 5/1999. This approach would shift the focus of enforcement towards actual anti-competitive effects, rather than its form or the dominant's firm intent. Furthermore, such approach would provide authority to KPPU in addressing practices which produces anti-competitive effects that may not fall within the existing provisions of Article 25 of Law No. 5/1999

8. Conclusion

Transformation is inevitable in competition law, especially regarding abuse of dominance. The reason for this change is that the market continues to develop, so it is necessary to adapt to current practices. The development of competition regulations shows that regulations continue to evolve along with changes in the business landscape. The main goal is to create a competitive, innovative and profitable market for all parties. This evolution can be seen in the transition from form-based to effect-based. The issuance of the 2008 Guidance, followed by the 2023 Amending Communication, and the next step will be issuing new regulations in 2025.

Based on the analysis of the changes in the Amending Communication, it is indeed apparent that there is a more complex approach to dealing with the dynamics of the modern market. Although there are concerns that the Amending Communication may open up space for considerations beyond the competition aspect, the analysis shows that its main focus remains on the competition issue.

Concerns about including non-competition factors in the Amending Communication are valid. However, it is important to recognise that the purpose of competition law goes

beyond economic efficiency alone; other factors are also important regarding economic goals. Quoting Margrethe Vestager, Executive Vice-President in charge of competition policy:

> "*... EU competition policy is able to pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes,* ***consumer welfare****, efficiency and innovation, and ultimately plurality and democracy".*[42]

The challenge is to maintain a balance between protecting the competitive process, maintaining economic efficiency, and pursuing relevant and broader policy goals without sacrificing the focus on competition issues. The Commission will publish guidelines in 2025, which are expected to be key to answering the challenge of whether it is able to balance flexibility and legal certainty in cases of abuse of dominant position. Here, the Commission also asks for a call for papers to understand current market needs and be able to create more relevant rules for the stakeholders. In the future, any changes and drafting of related regulations must be carried out carefully, and all existing factors must be analysed in depth to avoid legal uncertainty and ensure that competition law remains focused on protecting competition and consumers.

[42] Margrethe Vestager, 'Antitrust: Commission announces Guidelines on Exclusionary Abuses and Amends Guidance on Enforcement Priorities', (European Commission, 27 March 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1911> accessed 1 January 2025.

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Komisi Pengawas Persaingan Usaha (KPPU). Salinan Putusan KPPU terhadap Google LLC, Perkara Nomor: 03/KPPU-I/2024. (Komisi Pengawas Persaingan Usaha, 2025) 591, 592. Komisi Pengawas Persaingan Usaha (KPPU), 2025.

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Carbon Tax in Indonesia: Challenges and Opportunities

Fatma Ayu Husnasari

Master of Laws, Queen Mary University of London, United Kingdom.
Email: fatmaayu07@gmail.com

ABSTRACT
In order to control GHG emissions to support NDCs achievement, the government imposes a carbon tax. A carbon tax is an instrument which puts a price on the carbon released from the use of fossil fuels, namely oil, natural gas, and coal. This carbon tax is implemented to change industrial behaviour, as industries are encouraged to avoid this additional charge. Thus, it helps shift industries to green economic activities with low carbon emission. This paper will explore further regarding carbon tax in Indonesia addressing two questions: how is the laws of carbon tax in Indonesia? and what are carbon tax challenges and opportunities in the country? This paper consists of seven sections. The first section will present the background of carbon tax as a part of climate change initiatives in Indonesia. The second section will cover the development of carbon tax law in the country. The third section will present carbon tax in the international aspect. The fourth section will discuss further some challenges and opportunities of carbon tax in Indonesia. The fifth section will provide some highlights as a comparison in implementing carbon tax water in other countries. The final section will review the progress of implementation of carbon tax laws in Indonesia.

KEYWORDS: Carbon Tax, Climate Change, Carbon Emission, Indonesia, Tax Regulation

1. Introduction

It is a common global understanding that climate change is and will remain a prominent topic. The primary drivers of climate change are human-caused carbon dioxide emissions and other greenhouse gases.[1] Consequently, countries around the world are required to take active measures to help prevent climate change from worsening, by reducing carbon emissions. Accordingly, many countries implement policies to prevent climate changes. These policies are not only intended to cover regulations regarding atmospheric pollution due to the release of greenhouse gases from human activities, but also number of other issues, including impacts and adaptation, loss and damage, finance, deforestation and forest degradation (REDD+), carbon markets, and linkages with other fields of international law.[2]

Indonesia is also among the countries concerned with the issue of climate change. This is due to the fact that the issue of climate change does not only affect world climate change, but also all aspects of human life. As an example, in order to bring out people out of poverty, an economic development is being promoted by the Government of Indonesia and it is projected to reach an average of at least 5% annually to reduce the poverty rate to below 4% by 2025, as mandated by the Indonesian Constitution, one of those targets is that "every person shall have the right to enjoy a good and healthy environment."[3] Indonesia must

1 William J Ripple and others, 'The 2024 State of the Climate Report: Perilous Times on Planet Earth' (2024) 74 *BioScience* 812.
2 Philippe Sands and Jacqueline Peel with Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law* (4th edn, Cambridge University Press, 2017) 295.
3 The Government of Republic of Indonesia, 'First Nationally Determined Contribution Republic of Indonesia' (*NDCs Indonesia*, 2016) <https://unfccc.int/sites/default/files/NDC/2022-

proceed to maintain a balance between its current and future development and poverty reduction priorities since climate change becomes a reality.[4]

One of the forms of commitment that Indonesia has authorized is its commitment to keeping global temperatures under 1.5 degrees Celsius which corresponds to the Paris Agreement, which is ratified through Law No. 16 of 2016. The goal of the Paris Agreement itself is to hold the increase of the global average temperature to below 2 degrees Celsius above pre-industrial levels and limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels; increase ability to adapt to climate change; and financial support towards low Green House Gas (hereinafter, 'GHG') emissions and climate resilient development.[5] Indonesia has the commitment in the Paris Agreement produces a Nationally Determined Contributions (hereinafter, 'NDCs') which aims to regulate and reduce GHG emissions. The Indonesian government has targeted to maintain its commitment through its enhanced NDCs' a 31.89% of reduction in GHG emissions, compared to business-as-usual scenarios and a 43.20% of reduction along with global support by 2030.[6]

In order to control GHG emissions to support NDCs achievement, the government imposes a carbon tax. A carbon tax is an instrument which puts a price on the carbon released from the use of fossil fuels,[7] namely oil, natural gas, and coal.[8] The price on carbon is to add additional charge per ton of carbon dioxide ($CO_{2)}$ emitted.[9] This carbon tax is implemented to change industrial behavior, as industries are encouraged to avoid this additional charge. Thus, it helps shift industries to green economic activities with low carbon emission.[10] In 2021, Indonesia already has the laws related to tax (including carbon tax). However, Minister of Finance of Indonesia, Sri Mulyani Indrawati admitted that implementing a carbon tax in the country was not easy.[11] This is the reason behind postponing the implementation of the carbon tax in Indonesia until 2025.[12]

This paper will explore further regarding carbon tax in Indonesia addressing two questions: how is the laws of carbon tax in Indonesia? and what are carbon tax challenges

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06/First%20NDC%20Indonesia_submitted%20to%20UNFCCC%20Set_November%20%202016.pdf> accessed 20 December 2023.

4 *Ibid*.

5 Paris Agreement (adopted 22 April 2016, entered into force 4 November 2016) C.N.92.2016.TREATIES-XXVII.7.d, art 2.

6 Institute for Essential Services Reform IESR, 'Webinar: Sunset of Coal-Fired Power Plants and the Coal Industry – Reviewing Direction and Multisectoral Impacts in a Just Energy Transition' (*IESR, August 2023)* <https://iesr.or.id/en/tag/nationallydeterminedcontribution>ndc#:~:text=The%20Indonesian%20government%20has%20set,with%20international%20assistance%20by%202030> accessed 29 December 2023.

7 Abdullah Gymnastiar, 'Challenges and Prospects of Carbon Tax Implementation in Indonesia: A Systematic Literature Review', *1st International Conference on Public Administration and Social Science (ICoPASS 2024) Universitas Sultan Ageng Tirtayasa* (Faculty of Social and Political Sciences Universitas Sultan Ageng Tirtayasa 2025).

8 Ian Parry, 'Five Things to Know About Carbon Pricing' (*International Monetary Fund IMF*, September 2021) <https://www.imf.org/en/Publications/fandd/issues/2021/09/five-things-to-know-about-carbon-pricing-parry> accessed 29 December 2023.

9 *Ibid.*

10 *Ibid*.

11 Cantika Adinda Putri, 'Pajak Karbon di RI 'Ngaret', Sri Mulyani: Ini Rumit!' (*CNBC Indonesia,* 2 February 2023) <https://www.cnbcindonesia.com/news/20230201192011-4-410188/pajak-karbon-di-ri-ngaret-sri-mulyani-ini-rumit#:~:text=Penetapan%20pajak%20karbon%20di%20Indonesia,harus%20dibayarkan%20setiap%20satuan%20tertentu> accessed 30 December 2023.

12 *Ibid*.

and opportunities in the country? This paper consists of seven sections. The first section will present the background of carbon tax as a part of climate change initiatives in Indonesia. The second section will cover the development of carbon tax law in the country. The third section will present carbon tax in the international aspect. The fourth section will discuss further some challenges and opportunities of carbon tax in Indonesia. The fifth section will provide some highlights as a comparison in implementing carbon tax water in other countries. The final section will review the progress of implementation of carbon tax laws in Indonesia.

2. Methodology Development of Carbon Tax Law in Indonesia

Indonesia puts genuine concern in taking part to tackle climate change. This was reflected on 22 April 2016, when Indonesia became one of the first 55 countries to sign the Paris Agreement.[13] In fulfilling its objectives, the Paris Agreement uses Nationally determined contributions or NDCs as its main technique. NDCs are national climate action plans, which must be submitted by all parties under the Paris Agreement. This is in accordance with articles 3 and 4 of the Paris Agreement which states action that the Parties will take to reduce their greenhouse gas emissions and to build resilience communication to adapt to the impacts of climate change.[14] This should also reflect the highest possible ambition of each country. As stated in Article 4 paragraph (9) of the Paris Agreement, state parties are required to update its NDCs every five years.[15]

Notably, two-thirds of all submitted NDCs under the Paris Agreement, incorporated carbon pricing strategies to meet their emission reduction targets.[16] One of the many carbon pricing efforts to reduce GHG is by implementing a carbon tax.[17] Carbon tax is a tax imposed on the use of fossil fuels that produces gas emissions (CO_2)[18] This tax is directly included in the fuel tax. The ability of carbon taxes to guarantee future emissions pricing is important for encouraging investment in clean technology. Carbon tax revenue might be invested in climate technology or used to reduce onerous taxes on businesses and labour. It can be said that the purpose of imposing a carbon tax is to change the behaviour of economic actors to switch to green, low-carbon economic activities, support emission reduction targets in the medium and long term, and encourage the development of carbon markets, technological innovation and investments that are more efficient, low carbon and environmentally friendly.[19]

In the first Indonesia NDCs report in 2016, the terms “carbon pricing” or “carbon tax” were not found and were not discussed. However, in the 2021 NDCs report, the term carbon pricing was mentioned, namely that Indonesia will prepare carbon pricing to overcome climate change. Meanwhile, in the 2022 NDCs report, carbon pricing including carbon tax has been discussed. The 2022 NDCs report states that in order to meet the Nationally Determined Contribution target and maintain control over GHG emissions in the country's development, the Indonesian government has issued Presidential Regulation Number 98 year 2021 concerning Implementation of the Economic Value of Carbon to Achieve Nationally

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13 Humas KLHK, ‘Siaran Pers Indonesia Signs Paris Agreement on Climate Change’ (*Menlhk*, 23 April 2016) <https://ppid.menlhk.go.id/siaran_pers/browse/299> accessed 29 December 2023.

14 Paris Agreement (n 5), art 3 & art 4.

15 *Ibid*, art 4.

16 United Nations Framework Convention on Climate Change ,’Can countries use carbon pricing for achieving their NDCs’ (UNFCCC) <https://unfccc.int/about-us/regional-collaboration-centres/the-ciaca/about-carbon-pricing> accessed 31 May 2025.

17 Parry (n 8).

18 Kui Qiao and others, ‘The Development and Experience of International Carbon Tax Policy Practice: A Mini Review’ (2024) 19 *International Journal of Low-Carbon Technologies* 2328.

19 *Ibid*.

Determined Contribution Targets and Control of Greenhouse Gas Emissions in National Development (hereinafter, 'Presidential Regulation No. 98/2021') . The Regulation provides a legal framework for putting the NDC's low-carbon and climate resilience goals into practice.[20] It also specifies how much carbon should cost, including how carbon trading, levies, and result-based payments should be done. Based on the report above, Indonesia is committed to immediately implementing a carbon tax by preparing legal instruments.

According to Minister of Finance of Indonesia Sri Mulyani Indrawati, Indonesia is dedicated to addressing the effects of climate change in tandem with all other nations worldwide.[21] The administration included a carbon tax in the Tax Regulation Harmonization Law (HPP) to support this commitment. At the COP26 meeting in Glasgow, the running Indonesian President at that time, Joko Widodo, conveyed Indonesia's commitment to becoming a global citizen to tackle climate change and this commitment has been the responsibility of president to president since the Kyoto Protocol until now.[22] Moreover, the carbon tax will be implemented in stages in accordance with the roadmap by taking into account the development of the carbon market, achievement of NDC targets, as well as sector readiness and economic conditions.

Furthermore, the Minister of Finance also said that the government needs an instrument to implement this commitment through carbon trading, which is regulated in Presidential Regulation No. 98/2021.[23] This policy regulates the implementation of carbon trading, levies on carbon emissions, performance-based payments for reducing carbon emissions. In the cap and trade scheme, entities that emit more than the cap are required to purchase an Emission Permit Certificate (SIE) from the entity that emits below the cap or purchase an Emission Reduction Certificate (SPE) or carbon offset.[24] The Minister said the carbon tax rate was set higher or equal to the carbon price on the carbon market with a minimum rate of IDR 30.00 per kilogram of carbon dioxide equivalent (CO2e).[25] Meanwhile, on the world market the price is already above 40 US dollars and Canada will even increase it to above 125 US dollars until 2030.[26] On the other hand, Indonesia needs to pay attention to carbon prices in the world which are relatively non-uniform. The government of Indonesia shall protect the carbon market, therefore that it is not exploited by developed countries producing carbon emissions.

In Indonesia, carbon tax is regulated under Law No. 7 Year 2021 on Harmonisation of Tax Regulation (hereinafter, 'Law No. 7/2021'). Article 13 paragraph (1) of Law No. 7/2021 provides that, "*a carbon tax shall be imposed on carbon emissions which have a negative impact on the environment.*" The law further specifies in article 13 paragraph (5) that such carbon tax applies to individuals or entities that purchase carbon-containing goods and/or engage in activities that produce carbon emissions. In addition, under article 13 paragraphs (8) and (9) of Law No. 7/2021, the carbon tax rate shall be set at a level equal to or higher

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[20] The Government of Republic of Indonesia, 'Enhanced Nationally Determined Contribution Republic of Indonesia' (*NDCs Indonesia UNFCCC*, 2022) <https://unfccc.int/sites/default/files/NDC/2022-09/23.09.2022_Enhanced%20NDC%20Indonesia.pdf> accessed 29 December 2023.

[21] Humas Sekretariat Kabinet Republik Indonesia, 'Pajak Karbon dalam UU HPP Bentuk Komitmen Indonesia Atasi Perubahan Iklim' (Setkab RI, 22 November 2022) <https://setkab.go.id/pajak-karbon-dalam-uu-hpp-bentuk-komitmen-indonesia-atasi-perubahan-iklim/> accessed 1 January 2024.

[22] *Ibid*.

[23] *Ibid*.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid*.

than the carbon market price per kilogram of carbon dioxide equivalent (CO_2e), with a minimum rate of IDR 30.00 per kilogram of CO_2e if the carbon market price falls below this threshold.[27] Moreover, the explanation of article 13 paragraph (3) Law No. 7/2021, provides that the imposition of carbon tax is to be implemented as follows:

a. In 2021, the carbon trading mechanism will be developed;
b. From 2022 to 2024, a cap and tax mechanism will be implemented for the limited power plant sector at coal-fired power plants (PLTU);
c. In 2025 onwards, the implementation of carbon trading and expansion of taxation sector carbon tax with stages according to the readiness of the relevant sector by taking into account, inter alia, economic conditions, actor readiness, impact, and/or scale.[28]

From this article, it is evident that Indonesia plans to implement both carbon tax and carbon trading starting in 2025, contingent upon the readiness of the country, including its economic conditions to support such implementation. Carbon tax is also regulated in Government Regulation No. 50 Year 2022 concerning Procedures for Implementing Tax Rights and Fulfilling Tax Obligations. As stated in its recital, this government regulation is intended to implement the provisions of article 44E paragraph (1) of Law Number 6 of 1983 on General Provisions and Procedures of Tax as amended several times, most recently by Law No. 7/2021. Thus, it is clear that carbon tax is a tax imposed on carbon emissions that have a negative impact on the environment.[29] In article 69 paragraph (2), carbon tax shall be repaid personally by tax payer or collected by the carbon tax collector.[30] Moreover, further provisions regarding the appointment of the intended carbon tax collector and certain criteria will be regulated further in a ministerial regulation.[31]

3. Global Framework on Carbon Tax

Commitment in cutting back gas emissions in order to counteract the long-term global warming has become a major global priority. The United Nations Framework Convention on Climate Change has played a pivotal role in fostering international cooperation, by establishing mandates to reduce carbon emissions across countries worldwide.[32] In response to growing concerns on climate change, many nations have adopted energy transition policies that prioritize and emphasize the use of cleaner and more abundant energy sources. This transition, including the use of more sustainable fossil fuel energy, has led to a decrease in the amount of greenhouse gas emissions from homes, which has resulted in a change in climate.[33]

One of the main approaches being considered to advance these efforts is the establishment of a global carbon pricing mechanism. Every carbon output that has the potential to harm the environment is subject to a charge known as a carbon tax. Methane,

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[27] *Undang-Undang Nomor 7 Tahun 2021 Tentang Harmonisasi Peraturan Perpajakan* [Law No. 7 of 2021 on Harmonisation of Tax Regulation] art 13.

[28] *Ibid*.

[29] *Peraturan Pemerintah Nomor 50 Tahun 2022 Tentang Tata Cara Pelaksanaan Hak Dan Pemenuhan Kewajiban Perpajakan* [Government Regulation No 50 of 2022 on Procedures for Implementing Tax Rights and Fulfilling Tax Obligations] art 1 (47).

[30] *Ibid*, art 69.

[31] *Ibid*, art 8 (7), art 11(3), art 12 (6).

[32] Aulia Mutiara, 'Bursa Karbon: China Paling Ambisius, Eropa Kenyang Pengalaman' (*CNBC Indonesia*, 25 September 2023) <https://www.cnbcindonesia.com/research/20230922110507-128-474702/bursa-karbon-china-paling-ambisius-eropa-kenyang-pengalaman> accessed 29 December 2023.

[33] *Ibid*.

carbon dioxide, and other greenhouse gases are included in the definition of carbon emissions.[34] Typically, a carbon tax applies to every economic activity that emits carbon dioxide, including both production and consumption processes.[35] For instance, manufacturers which emit carbon emissions throughout their production processes will be subject to a carbon tax, as are consumers who use products or services that emit carbon emissions.[36]

In 1990, Finland became the first country in the world to impose a carbon tax. This was then followed by 16 other European countries.[37] However, Sweden is the country with the highest carbon tax rate in the world. In 1991, Sweden began implementing a carbon tax at a rate of US$ 26 per ton of CO_2.[38] As time goes by, this rate continues to increase. In fact, in 2023, Sweden imposed a carbon tax rate of EUR 122 or US$133 per ton of CO_2.[39]

As of August 2023, there are more than 70 carbon pricing schemes identified worldwide in the emissions trading system (hereinafter, ETS') schemes and carbon taxes implemented.[40] The implementation of these schemes also occurs at various levels, namely at the provincial, national and inter-country levels in the same region.[41]

At the inter-country level, the European Union has implemented the EU Emissions Trading System (hereinafter, EU ETS'). The EU ETS is a cap-and-trade scheme which have been implemented since 2005. The EU ETS applies in all EU Member States, the European Free Trade Association countries, as well as Northern Ireland for electricity generation.[42] It imposes a cap on the total emissions of specific GHG, namely carbon dioxide (CO_2), nitrous oxide (N_2O), and perfluorocarbons (PFCs), from heavy energy-using and electricity-generating installations and aircrafts. [43] Emissions Trading Schemes in the European Union is an example of a carbon trading scheme between countries that are still located in the same region.

Nationally, countries like Indonesia and Japan have adopted ETS schemes to align with its climate objective. In February 2023, Indonesia launched the first phase of the ETS scheme. It covered 99 electrical plans coal-fired power plants connected to the state-owned electricity company, [44] or 80% of the country's production capacity.[45] Meanwhile in Japan, the country launched a voluntary carbon trading scheme, named GX-ETS in April 2023. In 2023, 400 companies have participated in the GX-ETS scheme, and this has accommodated 28%

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34 *Ibid*.
35 *Ibid*.
36 *Ibid*.
37 Government Offices of Sweden, 'Sweden`s Carbon Tax` (*Government of Sweden*, 2023) <https://www.government.se/government-policy/swedens-carbon-tax/swedens-carbon-tax/#:~:text=Swedish%20carbon%20tax%20rates&text=The%20carbon%20tax%20was%20introduced,of%20SEK%2010.87%20per%20EUR)> accessed 29 December 2023.
38 *Ibid*.
39 *Ibid*.
40 Louis Fleurence, Marion Fetet, Sebastien Postic, 'Global Carbon Accounts in 2023' (*Institute For Climate Economics*, 22 November 2023) <https://www.i4ce.org/en/publication/global-carbon-accounts-2023-climate/> accessed 30 December 2023.
41 *Ibid*.
42 Directorate-General for Climate Action, 'Scope of the EU ETS' (Directorate-General for Climate Action,2024) <https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/scope-eu-ets_en> accessed 31 May 2025.
43 Stefano F Verde and Simone Borghesi, 'The International Dimension of the EU Emissions Trading System: Bringing the Pieces Together' (2022) 83 Environmental and Resource Economics 23.
44 Björn Fondén and Hartanto. Edwin, 'Indonesia Emissions Trading Scheme (ETS)' (*Idx,* 2023) <https://www.idx.co.id/en/news/press-release/2016>.
45 Louis Fleurence (n 40).

of Japan's emissions.[46] Starting in 2026, the GX-ETS scheme is set to transition to a mandatory ETS. [47]

Meanwhile, on a provincial scale, several provinces in Mexico have implemented the ETS scheme. Between the year 2017 -2023, states in Mexico such as: Durango, Guanajuato, Queretaro, San Louis Potosi, Tamaulipas, Yucatan, and Zacatecas have implemented ETS scheme.[48] However these ETS schemes vary across states. Which results in different implementation rules and prices.[49] For example, in Queretaro the carbon price is set at about Ps640.50 t/CO2 emitted. Meanwhile in Yucatan, the carbon tax is set at about Ps325.71 t/CO2 emitted.[50]

4. Implementing Carbon Tax in Indonesia

Currently, each country has its own efforts to support various kinds of environmentally friendly developments in combatting global climate change, one of which is a carbon tax. In Indonesia, implementing a carbon tax poses both challenges and opportunities. The first challenge that arises is that of an economic nature. When prices are in an upward position, including energy costs and derivatives, the addition of new tax instruments to existing ones will provide additional burdens which will trigger an increase in the overall cost structure.[51] As an illustration, when the price of gas and oil is already at a high level, the addition of a carbon tax will have an impact on high energy production costs so that the price of energy use will also rise and this will trigger an increase in costs in other sectors.

Additionally, implementation of carbon tax is particularly challenging for the middle- and lower-income classes. Indonesia is dependent on Coal Steam Power Plants; hence electricity prices are closely tied to coal costs and carbon emissions, which can increase with the implementation of a carbon tax.[52] This increase in cost is challenging, as their demand for basic goods, such as electricity, is less elastic, which means they cannot easily reduce consumption even if prices rise. [53] Thus, implementation of carbon tax will then impact the purchasing power of the public, and reduce Indonesia's competitiveness.[54]

The next challenge that arises in relation to the implementation of the carbon tax in Indonesia is that the design of the carbon tax is considered quite complicated in its implementation. The scheme used in this country is cap and tax. This means that every time an industry produces something, it will be immediately taxed while this scheme has several differences between one industry and another.[55] This is what makes the application of the

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46 *Ibid*.
47 International Carbon Action Partnership, "Emissions Trading Worldwide: ICAP Status Report 2025" (2025).
48 Antonio Gozain, 'Mexico's ETS, Carbon Taxes Must Coordinate: Forum' (*Argus Media,* 15 August 2024) <https://www.argusmedia.com/en/news-and-insights/latest-market-news/2598585-mexico-s-ets-carbon-taxes-must-coordinate-forum> accessed 1 June 2025.
49 *Ibid*.
50 *Ibid*.
51 B. Bawono Kristiaji, ' RI Terapkan Pajak Karbon di 2026, Ahli Ungkap "Kerumitanya" (*CNBC Indonesia,* 29 *Setember* 2023) <https://www.cnbcindonesia.com/market/20230929135722-19-476507/ri-terapkan-pajak-karbon-di-2026-ahli-ungkap-kerumitannya> accessed 1 January 2024.
52 *Ibid*
53 Arief Budi Wardana, Mila Indriastuti and Dhian Adhetiya, 'Indonesian Carbon Tax: How Newborn Learn to Jump into The Next Step?' (2022) 24 *Jurnal Akuntansi dan Keuangan* 34.
54 Vissia Dewi Haptari and Budiasih Widiastuti, 'Implementation Of Carbon Tax In Indonesia From A Carbon Tax Design Perspective' (2023) 12 *Jurnal Ekonomi* 2023 <http://ejournal.seaninstitute.or.id/index.php/Ekonomi>.
55 *Ibid*.

carbon tax difficult. Moreover, transparency of policy implementation must be conducted. The challenges that may arise are the weakness of administration system, minimal contribution from revenue-contributing sectors as well as low levels of tax compliance.[56] In addition, Indonesia still lacks the infrastructure for monitoring and reporting emissions, which could affect data accuracy and transparency in implementing carbon tax.[57] For example, industries situated in remote regions often lack access to adequate monitoring devices, leading to inaccurate reporting of their emissions.[58] Consequently with such challenges, the government must ensure transparency in implementing the regulation, in order to achieve the purposes and targets of the carbon tax.

The aim of this carbon tax is not actually to create a means to increase the state's income, but rather to change industrial and societal habits towards a green economy in the future. However, this will be difficult to achieve if a country like Indonesia, which charges relatively small taxes compared to other countries, ends up attracting more industrial or factory relocations to Indonesia in the hopes of gaining cost efficiencies through lower tax burdens. As a result, Indonesia may experience an increase in the number of industries operating within its borders, which could lead to increased gas emissions in the country.[59]

Apart from the various difficulties that Indonesia will face regarding the implementation of a carbon tax in the country, there are various promising opportunities that can help Indonesia gain benefits. The first opportunity is by maximizing Carbon Capture Utilization technology, the problem of emissions from energy use in Indonesia will become lighter.[60] Moreover, there was a study conducted by Rystad Energy which concluded that Indonesia has a storage capacity or reservoir to store CO2 reaching 400 Gigatons of CO2, as stated by the Minister of Energy and Mineral Resources, Arifin Tasrif, in the Ministry's press release number 293 dated July 12, 2023.[61]

This opportunity was reiterated by the newly elected Indonesia's President, Prabowo Subianto, at the G20 Summit in Brazil, where he reaffirmed Indonesia's commitment to optimizing its vast carbon storage capacity. He announced that Indonesia is offering up to 557 million tons of carbon credits to the international market, highlighting the country's role in global climate change mitigation efforts.[62] These carbon reserves will provide substantial benefits for Indonesia, as it becomes tradeable in the future.

Another opportunity from the implementation of carbon tax is that on Tuesday, 26 September 2023, the government formally inaugurated the Indonesian Carbon Exchange (IDX

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56 *Ibid*.

57 Abdullah Gymnastiar (n 7).

58 *Ibid*.

59 B. Bawono Kristiaji, 'RI Tarik Pajak Karbon, Ekosistem & Industri Siap Laksanakan?" (*CNBC Indonesia,* 29 *September* 2023) <https://www.cnbcindonesia.com/market/20230929143630-19-476522/ri-tarik-pajak-karbon-ekosistem-industri-siap-laksanakan> accessed 1 January 2024.

60 *Ibid*.

61 Kementerian Energi dan Sumber Daya Mineral, 'Indonesia Berpeluang Raup Keuntungan dari Penerapan Pajak Karbon' (*KESDM*, 12 Juli 2023) <https://www.esdm.go.id/id/media-center/arsip-berita/indonesia-berpeluang-raup-keuntungan-dari-penerapan-pajak-karbon> accessed 1 January 2024.

62 Humas Sekretariat Kabinet Republik Indonesia, 'G20 Summit: President Prabowo Subianto Highlights Indonesia's Green Energy Vision, Global Climate Role - Sekretariat Kabinet Republik Indonesia' (*Setkab RI,* 20 November 2024) <https://setkab.go.id/en/g20-summit-president-prabowo-subianto-highlights-indonesias-green-energy-vision-global-climate-role/> accessed 29 May 2025.

Carbon).[63] Consequently, the official opening of carbon credit market activities took place. The amount of work done to absorb potential carbon emissions while lessening the effects of climate change is measured in carbon credits. [64] In order to balance the emission restrictions in compliance with government rules, parties that produce large emissions as buyers will join the party that creates these carbon credits, which they may then sell on the carbon exchange for a profit.[65] From this point on, the price of carbon credits can change, much like the price of shares, due to supply and demand.[66] Many issuers with businesses involving the absorption of carbon emissions that qualify as carbon credits will benefit from these criteria.

5. Carbon Tax in other Countries

The regional, national, and subnational governments around the world have implemented more than sixty carbon tax and emissions trading schemes to address climate change.[67] Notably, significant pricing schemes were introduced in 2021 in China and Germany, the European Union's emissions price has surpassed €50 per tonne that same year, and Canada declared that its carbon price will increase to CAN$170 per tonne by 2030.[68]

In the early 1990s, only a few countries in the Scandinavian region began to adopt a carbon tax, one of which was Finland.[69] After around 30 years, 27 countries around the world have implemented a carbon tax.[70] In these countries there is starting to be a carbon value and the figure varies from one country to another. According to data reported by Dolphin and Xiahou in 2021, the carbon value in Canada reached $11.49, while the carbon value in Sweden decreased to $55.02 after briefly reaching a high of around $75.[71] However, the value of carbon in Brazil is always undervalued at less than $2.[72]

In the Southeast Asia region, Singapore became the first country in the zone to implement a carbon tax and this started in 2019.[73] At that time the Singapore government set the carbon value at S$5/tCO2.[74] This is considered still lower than other countries in Europe which have set much higher carbon tax values.

However, Singapore seems to be serious about bringing more changes to the green economy by implementing a carbon tax in the country. In fact, the minister of sustainability and environment, Grace Fu, indicated in parliament during the discussion of the draft carbon pricing law, that there would be an increase in carbon tax every year.[75] In 2024, the tax value

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63 Tasya Natalia, 'Bursa Karbon Resmi Dibuka, Emiten Ini Bisa Cuan Banyak' (*CNBC Indonesia*, 27 September 2023) <https://www.cnbcindonesia.com/research/20230927100559-128-475886/bursa-karbon-resmi-dibuka-emiten-ini-bisa-cuan-banyak> accessed 1 January 2024.
64 *Ibid*.
65 *Ibid*.
66 *Ibid*.
67 Parry (n 8).
68 *Ibid*.
69 Hannah Ritchie, Pablo Rosado, 'Which Countries have Put A Price on Carbon?' (*Our World in Data*, 14 October 2022) <https://ourworldindata.org/carbon-pricing> accessed 1 January 2024.
70 *Ibid*.
71 *Ibid*.
72 *Ibid*.
73 Dian Kurniati, 'Mulai 2024, Singapura Naikkan Tarif Pajak Karbon Hingga 5 Kali Lipat' (*DTC News*, 8 December 2022) <https://news.ddtc.co.id/mulai-2024-singapura-naikkan-tarif-pajak-karbon-hingga-5-kali-lipat-43283> 1 January 2024.
74 *Ibid*.
75 *Ibid*.

was then raised, which reached to S$25 per ton.[76] This price will then be raised to S$45 per ton in 2026 and 2027, with a view to reaching S$50 to S$80 per ton by 2030.[77] This increase plan was presented at the beginning with the aim of so that business actors can prepare themselves for the transition to a more environmentally friendly production process in the future.

6. Conclusion

In general, climate change and its consequences cannot be avoided by any country. However, it has become a common consensus that countries will become more responsible for climate change, such as by implementing a carbon tax in their country. Although the carbon tax values differ in each country, one thing that is certain is that there is a burden that must be borne by producers to change their production to be more environmentally friendly and in line with world targets for more emission reductions in the future. The implementation of this carbon tax cannot be done in a short time, reaching all lines and applying international standard rates. However, several countries have implemented a gradual increase in the value of the carbon tax in the hope that businesses and producers will have sufficient time to make improvements to production lines so that the use of fossil-based energy can be further reduced and start maximizing the use of renewable energy so that a green economy can be achieved faster.

[76] National Climate Change Secretariat Singapore, 'Carbon Tax' (*NCCS,* 2025) <https://www.nccs.gov.sg/singapores-climate-action/mitigation-efforts/carbontax/> accessed 1 June 2025.

[77] *Ibid.*

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Navigating Reputation and Surviving Online Defamation

Putri Riska Answendy

Department of Criminal Law, Faculty of Law, Universitas Airlangga, Indonesia.
Email: putririska@fh.unair.ac.id

ABSTRACT
In the digital age, reputation is more vulnerable than ever due to the rapid dissemination of information across online platforms. With the exponential growth of data flows globally, a single negative online review can significantly damage the credibility and success of professional service providers, such as lawyers and doctors. This essay explores the complex intersection between online reviews, reputation, and defamation. It questions whether businesses, particularly professional service providers, should be allowed to sue for defamation in response to harmful online reviews. Drawing on both normative theories and real-world examples, this article examines the evolving definition of reputation, the legal standards of defamation, and how digital platforms complicate traditional legal frameworks. The analysis is supported by statistical evidence from Australia, which shows a substantial increase in digital defamation cases over the past decade. Additionally, this article delves into the motivations behind online reviews and their growing influence on consumer behaviour. Anonymity in online reviews, while protecting users, also raises concerns over accountability. This article argues for a balanced approach that upholds freedom of expression while protecting professional reputations from unjustified harm. Ultimately, it advocates for clearer legal standards and improved digital literacy to navigate defamation in the online era.

KEYWORDS: Defamation, Online Reviews, Reputation, Digital Platforms, Professional Service Providers

1. Introduction

Based on an article written by Lund et al. titled The Global Economy's Next Winners, it states that "from 2005 to 2017, the amount of data flowing across borders every second grew by a factor of 148.".[1] Using the same equation, it means that there would be 21.904 units of data flowing across borders every second in 2023. This highlights the rapid expansion of global data flows over time. Which led us to notice how fast and how much an information can travel right now. That is the main reason why a negative review on an online platform could be bad news for a business entity. As it is easier and faster to spread the information, it resulted in a quicker down fall of a business with negative reviews.

The digital economy has ushered in a new era of business-consumer interactions, reshaping how products and services are exchanged, evaluated, and discussed. Online platforms, social media, and review websites have become integral to this paradigm shift, offering consumers unprecedented avenues to voice their opinions and share experiences. As mentioned previously, a negative review could be the end game for a business. For example, the recent case occurred to a dentist in Melbourne.[2] The dentist claimed that a review written under the pseudonym "CBsm 23," contained only negative review on Dr.

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1 Susan Lund, James Manyika and Michael Spence, 'The Global Economy's Next Winners: What It Takes to Thrive in the Automation Age' (2019) 98(4) *Foreign Affairs* 121, p. 124.

2 *ABC NEWS*, 'Google, Facebook users face lawsuits over defamatory reviews', <https://www.abc.net.au/news/2020-02-18/facebook-google-defamatory-posts-legal-action-freedom-of-speech/11973040>, accessed 02 February 2020.

Kabbabe's business page. This made him lose thousands and thousands of dollars.[3] Another example took place to an Adelaide lawyer who lost 80 per cent of his clients between a time when the negative review was first posted and when a former client made him aware of it in February 2019.[4] From those example, it would be easy to come to a conclusion that it is indeed true that a negative review could make professional services entity to end their business. It lies the contentious issue of whether businesses should possess the right to sue for defamation as a response to negative online reviews.

As businesses confront negative feedback that can potentially tarnish their reputation, a pivotal question arises: should businesses be granted the right to sue for defamation in response to negative online reviews? To limit the scope of this article, the type of business that will be discussed here is professional service providers such as lawyers and doctors. This article will be divided into four sections, as follows: Reputation and Defamation, Online Review, Anonymity, and Restoring the Reputation. Each section will discuss the normative theory and then being combine with the current factual condition that took place. Finally, this article will be closed by a conclusion by summarizing discussion in all sections and in answering the issues raised.

2. Methodology

This research employs a normative legal research methodology to examine how defamation law responds to anonymous online reviews in the digital age. It focuses on analyzing legal principles, doctrines, and judicial interpretations to evaluate the protection of reputation in the context of freedom of expression and anonymity on digital platforms. Through a doctrinal approach, the study interprets and systematizes relevant legal concepts by reviewing court decisions, scholarly literature, and theoretical frameworks. The aim is to critically assess the adequacy of existing legal norms in addressing the challenges posed by anonymity in online defamation and to provide recommendations for a more coherent and balanced legal response.

3. Reputation and Defamation

The advent of the digital economy has heralded a transformative era in business-consumer interactions, fundamentally altering how services are transacted, assessed, and debated. Online platforms, social media networks, and review websites have risen as potent forums, enabling consumers to articulate their viewpoints and exchange experiences. Yet, this newfound avenue for expression has also unmasked intricate challenges, particularly concerning reputation and defamation within online reviews. The content of these reviews now wields a significant impact, rendering them indispensable elements in upholding a business's standing.

It all begins with a reputation, which, even in the middle of chaos, is overlooked by the common law. Common law does not even bother to define it.[5] Therefore, this analysis will

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3 *ABC NEWS*, 'Judge allows Melbourne dentist to try new tactic to more quickly unmask negative online reviewer', <https://www.abc.net.au/news/2020-02-14/small-business-launches-anonymous-google-review-defamation-case/11963250>, accessed 14 February 2020.

4 *ABC NEWS*, 'Adelaide lawyer Gordon Cheng wins $750,000 defamation judgment over bad Google review', <https://www.abc.net.au/news/2020-02-07/adelaide-lawyer-wins-defamation-payout-over-bad-google-review/11942064>, accessed 07 February 2020.

5 Robert C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(3) *California Law Review* 691, p. 692.

begin by examining the definition of reputation in the Oxford Dictionary, which states that reputation is "The condition, quality, or fact of being highly regarded or esteemed."[6] It focuses more on the positive aspects of reputation, such as being highly regarded or esteemed. The analysis then compares this with the scholarly definition from Cheung, a Professor of Law at the University of Hong Kong, who describes reputation as "an inherently social and relational concept that 'serves an important signalling function' about an individual's place within society".[7] It emphasizes the social and relational aspects of reputation. Anne argues that reputation is not just about how an individual is perceived by others but also about how they relate to others.

Based on these two definitions, reputation can be viewed as a social construct built upon the opinions of others. It is not something that is inherent to an individual but rather something that is earned and maintained through interactions with others. It is also important to highlight the fact that reputation is not something that is static, it can change over time, depending on the interactions that an individual has with others. For example, if a lawyer has successfully provided the best service that its client has requested, therefore the said law firm would be regarded as to have a good reputation. However, if one of the lawyers from that firm starts to behave in an improper way or is incompetent and unprofessional, then the firm will likely to suffer from loss of reputation. However, it will be a different case when the lawyer has done their very best professional performance but somehow is still being labelled as incompetent. This is where the reputation of a firm could lead to tarnished and may further be damaged if it is not being resolved as soon as possible. To make it worse, it could lead to a defamatory case if what the customer said turn out to be untruthful.

The emergence of defamation becomes particularly relevant in the context of the contemporary digital age. Traditional defamation laws were established in a time vastly different from today's interconnected cyberspace. Defamation, in itself, has historical roots in English common law.[8] In its early form, the plaintiff was required to demonstrate that a statement made by the defendant was both false and defamatory, pertaining to the plaintiff, and resulted in actual or "actionable" damages.[9] Fulfilling these conditions could lead to a finding of defamation on a person. This foundational concept of defamation aligns closely with the definition provided by Australian law. Australian law stipulates that defamation occurs when a person publishes defamatory content about another individual with the intent to cause serious harm or where there is a high probability that the publication of such content will result in serious harm to any person who is aware of that probability.[10]

What is worth noting is that these historical and legal definitions of defamation were formulated without anticipation of the digital landscape that exists today. This shift has brought forth significant challenges in the application of traditional defamation laws to the digital era. The criteria set forth by historic common law and even modern legal definitions are being tested and adapted in the face of rapidly evolving communication technologies. The implications of this interplay are far-reaching, affecting how individuals interact online, how

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6 'Reputation meaning and use', *Oxford Dictionary*, <https://www.oed.com/dictionary/reputation_n?tab=meaning_and_use>, accessed 21 August 2023.

7 Anne SY Cheung and Wolfgang Schulz, 'Reputation Protection on Online Rating Sites' (2018) 21(2) *Stanford Technology Law Review* 310, p. 312.

8 Michael Hadley, 'The Gertz Doctrine and Internet Defamation' (1998) 84 (3) *Virginia Law Review* 477, p. 480.

9 *Ibid*.

10 *Defamation Act 1974* (NSW) s. 50.

businesses manage their online presence, and how legal systems adapt to ensure justice and fairness in an increasingly interconnected world.

To draw a further correlation using the statistical data presented by the University of Technology Sydney which were being written in March 2018. The statistical data use is based on a ten-year period, spanning from 2007 to 2017. This study found that there is a significant shift in the proportion of digital defamation cases every year. Specifically, the data reveals a substantial increase in the prevalence of digital defamation cases over this time frame. In 2007, the proportion of digital defamation cases stood at 17.2%.[11] It is indicating that back in 2007 there relatively small portion of defamation cases were related to digital platforms or online communication channels. However, a noticeable transformation occurred over the course of a decade. By 2017, the proportion of digital defamation cases had surged to 53.3%,[12] representing a dramatic threefold increase from the initial figures in 2007. This data demonstrates a clear trend towards a higher incidence of digital defamation cases in recent years. The substantial rise in the proportion of these cases highlights the growing impact of digital communication and online platforms in shaping contemporary defamation dynamics. Public now adays must face the challenge to address the nuances of digital communication and online platforms, which, in this case, online reviews.

In this digital era, online interactions between users contain both the importance of reputations and defamation. As supported by the data from the University of Technology Sydney that highlighting the present of shifting case into a digital defamation case it is clear that reputation today is often challenged by defamation in cyberspace. Hence, finding equilibrium is vital to upholding reputation in order to survive the digital era.

4. Online Review

Based on the example in the introduction that a single negative online review can harm a business's image and influence customer perception. But what is the actual meaning of online review? Online review is a platform where both businesses and consumers share their feedback on a certain product or service that they have acquired; it includes reviews in the form of written text (for example, Q&A forums), a numerical rating (for example, from 1–5 star), a video or photo (for example, short videos posted on social media platforms), or visual elements (for example, emojis)[13] in the cyberspace. The function of the online review itself serves as a way to signalling trust (or build reputation) among business and consumers as well as providing the users with pre-contractual information.[14]

In 2019, ABC NEWS released a news article that revolved around the findings of a survey. This survey involved the collection and analysis of data from 1.400 participants, with a focus on their trust in online reviews and their ability to distinguish between authentic and fabricated content. The outcome of this survey revealed a noteworthy pattern. Specifically, approximately 73% of the participants expressed their trust in online reviews.[15] The survey's

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[11] Centre for Media Transition UTS, *Trends in Digital Defamation: Defendants, Plaintiffs, Platforms* (Research Report, March 2018), p. 80.

[12] Ibid.

[13] M. Narciso, 'The Unreliability of Online Review Mechanisms' (2022) 45 *Journal of Consumer Policy* 349, p. 349.

[14] *Ibid*, p. 350.

[15] *ABC NEWS*, 'How to spot a fake review: You're probably worse at it than you realise', <https://www.abc.net.au/news/2019-08-12/how-to-spot-a-fake-review-online/11406160>, accessed 12 August 2019.

implications underscore the growing significance of online reviews in the digital age. Observing the before-mentioned survey results, where the majority of respondents expressed trust in online reviews, it becomes evident that online platforms wield substantial influence over consumer decisions and behaviours. However, an essential query arises: Who are the actual authors of these trusted online reviews?

Delving into this matter requires tracing the evolution of online reviews within Internet based commerce, which in a way facilitated the rise of online consumer reviews. For instance, Amazon.com was one of the first merchants to allow customers to review the products they bought.[16] Utilizing a familiar five-star system, customers could provide ratings along with detailed explanations. Online reviews quickly gained prominence in the travel field.[17] It found its value in facilitating comparisons among hotels and service providers, given the relative expense of travel. Consumer reviews of professionals are not as common but are quickly increasing in popularity. For example, patient reviews on doctors, in particular, have received recent attention. Client reviews on lawyers are less common than doctor reviews, in part because of their different practices. Doctors may see up to 3.000 patients in a single year, whereas even lawyers with the largest caseloads typically have far fewer.[18] Lawyer reviews are still relatively rare, but they are growing rapidly. This is because more and more people are using online platforms to find reliable legal services. As a result, lawyers are becoming increasingly aware of the importance of online reviews and are taking steps to improve their ratings. Online reviews are becoming increasingly important in shaping consumer behaviour. Consequently, it can be established that the individuals who write online reviews are customers of the business.

The second important question is why do customers write online reviews? A study of consumers who write travel reviews found that venting negative feelings is not a major motivator. Instead, online travel review writers are mostly motivated by wanting to help a travel service provider, help other consumers, and feel good about themselves.[19] Another study found that discussing one's vulnerability as a consumer can be a motivating factor for participating in online forums.[20]

Online reviews wield remarkable influence over consumer behaviour, serving as a potent tool. They hold the potential to not only bolster businesses' trust and reputation but also aid consumers in making well-informed choices. Typically authored by customers who have engaged with the business under review, these reviews serve various purposes. Authors may craft reviews to assist fellow consumers in their decision-making process, aid businesses in refining their offerings, or merely share personal experiences. This intricate interplay between consumers and businesses underscores the multifaceted impact of online reviews in shaping the contemporary marketplace.

5. Anonymity

What to seriously considered is that if one is being sued for defamation, this could lead to paying tens of thousands of dollars in legal fees, regardless of the result. It also will become a serious problem when one is losing the case, since one could face a massive payout on top

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16 Cassandra Burke Robertson, 'Online Reputation Management in Attorney Regulation' (2016) 29(1) *Georgetown Journal of Legal Ethics* 97, pp. 103-104.

17 *Ibid*, p. 104.

18 *Ibid*.

19 *Ibid*.

20 *Ibid*, p. 105.

of the fees.[21] Hence, people tend to avoid being associated and dealing with defamation issues. The emerging digital era makes it easier for a person to spread information, and people seems to like it. Eventually, people will try their best to convince other people what they believe, even if it may damage other persons' reputations. This is exactly what usually occurs in an online review. One way to avoid defamation is as mentioned by Martin in his book. Although what he mentions is not for online review, it can still be applied in defamation issues. He said that a person could avoid it by producing and distributing the material anonymously.[22] He added that even though it does not really get you out of trouble, in cases where anonymous defamatory content is found, addressing any discrepancies becomes challenging, as direct communication with the originator is unfeasible.[23]

The anonymity itself means that no one could trace the source of a massage[24] To be considered anonymous, Post explains a few variables as to how to identify anonymity works in cyberspace. First, namelessness, containing no information about the identity of the message originator, is considered as anonymous.[25.] Second, traceability, its additional information is unable to be obtained.[26] Third, pseudonymity is associated with specific characteristics that are associated with the identifier, for example, username.[27] This is what happened with the example case that was emphasized at the beginning of this article. The case was related to a dentist in Melbourne[28] regarding to a negative online reviews on Dr. Kabbabe's business page, which was written by the pseudonym "CBsm 23", that led him to lose significant amount of income.[29] The damage suffered by the dentist was not a surprising result since it has been established that online reputation can be a very important currency for professional service providers. When other customers read the review from "CBsm 23" they may decide not to come to the dentist clinic in order to avoid having the same experience as "CBsm 23".

6. Measures to Restore Reputation

As evident from the aforementioned case, the damage has already been inflicted. The dentist has suffered substantial financial losses, yet his hands are tied due to the lack of information about the source of the negative review. The review was penned under the pseudonym "CBsm 23," rendering the user effectively anonymous and untraceable. In the face of a similar predicament, what options are available for businesses to address this issue effectively? A number of measures could be taken. One option is to follow the actions of the

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21 Brian Martin, *Information Liberation Challenging the corruptions of information power* (Freedom Press, 1998), p. 105.

22 *Ibid*, p. 117.

23 *Ibid*, p. 118.

24 Anne Wells Branscomb, 'Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces' (1995) 104(7) *Yale Law Journal* 1639, p. 1641.

25 David G. Post, 'Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace' (1996) 1(5) *University of Chicago Legal Forum* 139, p. 149.

26 *Ibid*, p. 150.

27 *Ibid*, p. 151.

28 *ABC NEWS*, 'Google, Facebook users face lawsuits over defamatory reviews', <https://www.abc.net.au/news/2020-02-18/facebook-google-defamatory-posts-legal-action-freedom-of-speech/11973040>, accessed 02 February 2020.

29 *ABC NEWS*, 'Judge allows Melbourne dentist to try new tactic to more quickly unmask negative online reviewer', **<**https://www.abc.net.au/news/2020-02-14/small-business-launches-anonymous-google-review-defamation-case/11963250>, accessed 14 February 2020.

Melbourne dentist. The dentist's first step was to ask the online review platform, Google, to remove the negative review. Unfortunately, this attempt was unsuccessful. Google declined the request, stating that the dentist "not having any means to investigate where and when the ID was created".[30]

It then led the dentist to take a second measurement, which was taking legal action against the platform since Google is responsible for the content that is posted on its site. The dentist would need to prove that the review was defamatory, and that it caused him a damage. He would also need to prove that the website or platform was negligent in allowing the review to be posted. Thankfully, the legal action ended up in a good result for him. The Australian court, specifically the Federal Court, ordered Google to identify the person behind the pseudonym "CBsm 23".[31] The order required Google to pass any personal details such as names, phone numbers, location metadata and IP addresses that were linked to that username.[32] Using an International treaty, the Hague Service Convention, the document will be possible to acquire.[33] After winning the case and obtaining the data, *Kabbabe v. Google LLC*, the dentist could take the case to the next legal action. Which is to sue the owner of the username over the damage as the result of negative reviews that were posted in Google Reviews. This legal action has been done in 2021 by another dentist, which led to the Victorian court ordering a penalty of AUD170.000, -.[34]

The judge reasoning on ordering the penalty were the result of a series of defamatory Google reviews published by Ms. Puleio, which seriously harmed Dr. Dean's professional reputation and caused significant emotional and physical distress.[35]The court found that the reviews carried false and defamatory imputations, including allegations of negligence, bullying, and unethical conduct, which undermined Dr. Dean's standing as a healthcare professional. These reviews were widely viewed by approximately 100.000 people and were part of a sustained campaign that the court characterized as having the flavour of a vendetta. Aggravated damages were deemed appropriate due to Ms Puleio's conduct, which included refusing to apologize or take down the reviews, refusing to attend court-ordered mediation, and attempting to extract additional money from Dr. Dean in exchange for removing the posts.

She also engaged in threatening and accusatory correspondence, accused Dr. Dean of blackmail, and misrepresented the nature of their communications in revised reviews. Although the imputations did not involve criminal conduct, the damage to Dr. Dean's reputation, mental health, and business was profound. In determining the amount, the court considered similar defamation cases involving professional reputations damaged through online platforms, with awards ranging between AUD160.000,- and AUD350.000,- Concluding that the harm was serious, sustained, and aggravated by the defendant's malicious and

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30 The Guardian, 'Court says Melbourne dentist can seek user details from Google over bad review', <https://www.theguardian.com/technology/2020/feb/14/court-says-melbourne-dentist-can-serve-google-for-user-details-over-bad-review>, accessed 14 February 2020.

31 *ABC NEWS*, 'Judge allows Melbourne dentist to try new tactic to more quickly unmask negative online reviewer', **<**https://www.abc.net.au/news/2020-02-14/small-business-launches-anonymous-google-review-defamation-case/11963250>, accessed 14 February 2020.

32 *BBC NEWS*, 'Google ordered to reveal the author of Australian dentist's bad review', <https://www.bbc.com/news/world-australia-51498190>, accessed 14 February 2020.

33 *Ibid*.

34 The Epoch Time, 'Judge Slaps $170,000 Penalty on Former Patient Who Defamed Dentist With Google Review', < https://www.theepochtimes.com/world/judge-slaps-170000-penalty-on-former-patient-who-defamed-dentist-with-google-review-3909370>, accessed 20 July 2021.

35 *Dean v. Puleio* (2021) VCC 848.

uncooperative behaviour, the court determined that a total sum of AUD170.000,- was appropriate to compensate the doctor and to vindicate her reputation.

The third measure is beyond legal actions. There are two primary options for businesses to address negative online reviews. The first is a mandatory pre-litigation step known as the Concerns Notice, as outlined in Section 12A of the *Defamation Act 2005*. This written notice serves as a crucial, formal alert to the review's publisher, informing them of the allegedly defamatory content and offering an opportunity to resolve the issue amicably before a lawsuit can be filed. For the notice to be legally valid, it must meet several strict requirements: it must clearly specify where the content is located (such as a URL), precisely define the defamatory claims or meanings it conveys, and detail the serious harm or financial loss caused to the business's reputation. This statutory requirement is an essential component of the legal framework, designed to encourage out-of-court resolutions and prevent unnecessary litigation.

The second option is through Mediation, a form of Alternative Dispute Resolution (ADR) that offers a private and less adversarial alternative to traditional court proceedings. In mediation, a neutral third party facilitates communication between the business owner and the reviewer, guiding them toward a mutually agreeable solution. This process can be initiated privately or through recognized services like the Community Justice Centres in New South Wales, the Dispute Settlement Centres in Victoria, or various state-level law societies. The benefits of mediation are substantial. It's not only confidential, which helps protect both parties, but it also allows for a broader range of creative solutions beyond what a court might order. These solutions can include a public apology, a formal retraction of the review, the removal of the content, or even financial compensation. Despite these significant advantages, mediation has not yet been widely adopted as a primary method for resolving disputes over negative online reviews, suggesting a gap between the availability of this tool and its practical application.

Businesses also have an array of strategies to restore their reputation in the face of negative online reviews. These proactive measures focus on transparency, communication, and fostering positive customer experiences. Acknowledging negative feedback openly and responding with empathy can show a commitment to addressing concerns. Creating and promoting positive content, such as success stories and informative articles, can overshadow the impact of negative reviews. Highlighting improvements made based on feedback and encouraging satisfied customers to share their positive experiences can enhance the business's image. Engaging with negative reviewers privately, monitoring online platforms for timely responses, and collaborating with influencers can help counterbalance negativity. Prioritizing quality, training employees in customer service, and engaging in community initiatives showcase a dedication to excellence. Leveraging social media, encouraging constructive feedback, and utilizing reputation management tools are valuable steps in managing online reputation. These non-legal approaches seem like to be a baby step in the face of legal action, but if being demonstrate collectively with a commitment to the customer it will enabling businesses to rebuild trust and restore their reputation over time.

7. Conclusion

After thoroughly discussing the current situation and relevant facts, the answer to the question posed in the introduction becomes clear: businesses should indeed be granted the right to sue for defamation in response to negative online reviews. The rapid expansion of global data flow has amplified the impact of online interactions, making negative reviews a potent threat to a business's reputation, particularly professional service providers. The digital

era has reshaped the dynamics between businesses and consumers, with online platforms and review websites playing a central role in shaping consumer decisions. This prompts the question of whether businesses should be empowered to pursue defamation lawsuits as a countermeasure to detrimental online reviews, highlighting the intricate balance between freedom of expression and safeguarding reputation.

Upon delving into the dynamics of reputation and defamation, it becomes apparent that reputation is a socially constructed concept moulded by public perception, while defamation laws struggle to adapt to the digital landscape. The surge in digital defamation cases, as indicated by statistical data, further emphasizes the challenges posed by online communication. Online reviews, crafted by customers themselves, hold a pivotal role in influencing consumer behaviour, with the majority placing substantial trust in them. The complication of anonymity adds a layer of complexity, allowing defamatory content to circulate unchecked. Businesses confronted with such challenges have the option of pursuing legal action, as demonstrated by the dentist's case, resulting in successful identification and reparation. However, alternative strategies are also available, encompassing transparent communication, addressing concerns, fostering positive content, and utilizing social media to regain trust and rebuild reputation.

In the digital age, businesses must adeptly navigate the equilibrium between preserving their reputation and permitting freedom of expression. The prevalence of online reviews and their profound influence on consumer decisions underlines the urgency of proactive approaches to sustain and restore reputation, ultimately ensuring the protection of both the customer and the businesses to thrive in the ever-evolving digital landscape.

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